
Appendix B

Exhibit 1

To: Kozora, Matthew [REDACTED]@SEC.GOV]
From: Bergstresser, Keith - EBSA
Sent: Thur 8/2/2012 2:00:36 PM
Importance: Normal
Subject: RE: question

Dear Matt,

I don't have time to discuss these issues right now, but I do think that we should have further discussions before the proposal is published. I can't say whether we will close the gap on our opposing viewpoints, but I think it is vital that I have a better understanding of your position.

Keith

From: Kozora, Matthew [REDACTED]@SEC.GOV]
Sent: Thursday, August 02, 2012 11:57 AM
To: Bergstresser, Keith - EBSA
Subject: RE: question

Dear Keith,

There is a fundamental difference between price variation and the risk investors bear. For instance, prices may not change over a given period of time but yet investors might still bear much risk. There will also be problems with respect to measuring price variation with respect to illiquid securities or securities that are not traded very often (muni bonds, structured products, real estate). You are also treating systematic risk with idiosyncratic risk equally. Literature tells us (Sharpe (1964), Lintner (1965)) that such risks are not the same and should be treated much differently.

I understand you want to measure returns due to the psychology literature, however, I am quite concerned your benchmarks based on ex-post price variation will make such comparisons have very little economic meaning and thus no value to consumers. I am also concerned as to the intent of the measure itself. Do you want to "weed out" bad providers of advice by reporting performance measures? Or do you want to "protect

participants from conflicts of interest” as proposed rule suggests? Those are two separate and different intents.

If/when you have a formal rule proposal that you want comments on, I will be more than happy to share my thoughts and views. Otherwise, I think we just have two opposing viewpoints on the matter.

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov]
Sent: Tuesday, July 31, 2012 4:15 PM
To: Kozora, Matthew
Subject: RE: question

I would be happy to have a phone conversation to discuss the purpose of the rule, the purpose of the exemption conditions and distinctions between the two. I don't think I want to try to have that conversation via email. I might have some time tomorrow, but I'm at a conference Thursday and Friday and then on vacation next week.

From: Kozora, Matthew [REDACTED]@SEC.GOV]
Sent: Tuesday, July 31, 2012 3:43 PM
To: Bergstresser, Keith - EBSA
Subject: RE: question

I apologize if I have overstepped my boundaries. This is a difficult topic for sure, and I was under the impression that my opinion was a. helpful and b. wanted.

I am also now utterly confused as to what the purpose of the proposed DOL rule is then, if not to limit advisor conflicts when providing retirement advice? Considering that my prior is that the DOL wants to reduce advisor conflicts, it just seems logical to me that the end result should measure advisory conflicts.

Good luck with your rulemaking.

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov]
Sent: Tuesday, July 31, 2012 3:23 PM
To: Kozora, Matthew
Subject: RE: question

See my responses below. We have now gone far beyond the point where your input was helpful to me. You keep circling back to the same statements, many of which are unsupported conjectures on your part, and most of which I have addressed even before you brought them up. Yet, your statements do not seem to even acknowledge the points that I already made (with supporting evidence) in the document we sent. If you have nothing new to bring up, please stop emailing me about this topic.

From: Kozora, Matthew [REDACTED]@SEC.GOV]
Sent: Tuesday, July 31, 2012 2:14 PM
To: Bergstresser, Keith - EBSA
Subject: RE: question

It is easier to determine if your advisor is working in your best interest with just (*Cost*) than with (*Return – Cost*). I'm not trying to ask anyone to determine if their advisor is working in their best interest. One measure is dependent solely on the products sold, whereas the other is dependent on market conditions, differences between industries, etc.

Also, one has to ask what *returns* investors are chasing. Would it not be in the best interests of advisers to take on excessive risk one period to reap the rewards from of high returns the following period? No, because then they would be bumped into a different return volatility category and compared to other advisors who took similar risk. That is one of the key components of the proposal. You might then say that the returns will be benchmarked or categorized to some extent. That is fine, but using my experience working on advertising issues, properly benchmarking or categorizing returns is almost an impossible task. I completely agree with this sentiment. That is why we want to have a public disclosure. So that an average of other peoples' returns (with similar risk) is the benchmark. Using variance of returns also goes against about 50 years of academic and practitioner thought and likely to be gamed just as easily. This appears to be your main issue with my proposal, yet you have not presented a case for how this measure would be gamed.

I also have to wonder whether a retail investor observing their own cost is one thing, but then being able to compare costs across advisors is another. This seems to be an argument against what you have proposed.

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov]
Sent: Tuesday, July 31, 2012 1:50 PM
To: Kozora, Matthew
Subject: RE: question

Well, I hate to break it to you, but you're wrong. People do not respond to fees or any other costs, but they do chase returns. This and our other reasons for choosing the disclosure that we have developed are laid out in the document that we've already sent over to you (attached). You might try reading the paragraph labeled "Portfolio Returns" on page 4. And do look into the references. They are very convincing.

From: Kozora, Matthew [REDACTED]@SEC.GOV]

Sent: Tuesday, July 31, 2012 1:38 PM

To: Bergstresser, Keith - EBSA

Subject: RE: question

I would think retail investors would respond more greatly to costs. People might have difficulty understanding the magnitude of returns but less problem understanding how much they are paying someone.

An adviser can argue that they cost more because they provide better advice. That is why the measure has to relate to kickbacks for selling a security, and not what an advisor charges directly to the consumer.

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov]

Sent: Tuesday, July 31, 2012 1:19 PM

To: Kozora, Matthew

Subject: RE: question

But would IRA holders and plan participants respond to information on conflicts of interest? Couldn't an advisor argue that they take more kickbacks (charge higher prices) because they provide better advice?

From: Kozora, Matthew [REDACTED]@SEC.GOV]
Sent: Tuesday, July 31, 2012 1:08 PM
To: Bergstresser, Keith - EBSA
Subject: RE: question

But returns are based on MUCH more than just conflicts...why not try to measure (as close as you can) just the level of conflicts?

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov]
Sent: Tuesday, July 31, 2012 12:55 PM
To: Kozora, Matthew
Subject: RE: question

Another way to state that is that we are worried about diminished returns that result from conflicted advisory relationships. Therefore, we need to measure advisors based on returns.

From: Kozora, Matthew [REDACTED]@SEC.GOV]
Sent: Tuesday, July 31, 2012 12:46 PM
To: Bergstresser, Keith - EBSA
Subject: RE: question

Okay, how about then the weighted average of all kickbacks for all assets (not just new) managed by an advisor where recurring loads will be measured each year, and the front-end loads plus back-end loads of all new asset sales (in other

words back-end loads will be “expensed” in the year of the asset sale)?

From what I understand, y'all are worried about advisory conflicts of interest (wrong/right ???). You therefore need to measure advisors based on the amount of conflicts of interest they might have.

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov
Sent: Tuesday, July 31, 2012 12:22 PM
To: Kozora, Matthew
Subject: RE: question

Then front-end and back-end loads would look bad and recurring loads would look good. Unless you included multiple years worth of the loads into the calculations, but how many years would you include?

From: Kozora, Matthew [REDACTED]@SEC.GOV
Sent: Tuesday, July 31, 2012 12:15 PM
To: Bergstresser, Keith - EBSA
Subject: RE: question

What happens if the measure takes into consideration back-end loads?

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov]
Sent: Tuesday, July 31, 2012 11:52 AM
To: Kozora, Matthew
Subject: RE: question

In that case, I could see a lot of new products developing that would not have any kickbacks in the year they are sold, but then high kickbacks in subsequent years. Back-end load products would immediately become popular. Front-end load products would look really bad by this measure.

From: Kozora, Matthew [REDACTED]@SEC.GOV]
Sent: Tuesday, July 31, 2012 11:45 AM
To: Bergstresser, Keith - EBSA
Subject: RE: question

I am assuming the income from kickbacks/front-end loads would relate only to the new sales.

Ex.

In year 1, I sell two products (of equal amount) with 1% kickbacks...my measure of Col is 1%

The following year I sell two products (again of equal amount) with one product having 1% kickback and the second with 0% kickback. My measure for year 2 is 0.5%.

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov
Sent: Tuesday, July 31, 2012 11:40 AM
To: Kozora, Matthew
Subject: RE: question

The denominator seems problematic. The advisor is rewarded handsomely by this measure for new sales and penalized severely for old sales. If sales were constant over time, this wouldn't be a big deal, but sales are not constant. Let's say a new entrant has a good sales year selling securities that give him 1% kickbacks every year. His ratio will be about 1%. Compare that to an advisor who gets 0.5% per year kickbacks, but has had constant sales for the last 20 years. His ratio would be about 10% ($0.5\% \times 20$). Now the new guy looks REALLY, REALLY good! So he has the endorsement of a government generated statistic and using that selling point he quadruples his sales the next year. His statistic rises to only 1.2%. He still has amazingly low income by this statistic and has proven to be a major up-and-comer in the market. Sales quadruple every year and his statistic continues to remain incredibly low. Whereas, the advisor who actually had the better rates (0.5%) starts losing business because his statistic is high. But because he loses business his statistic keeps getting worse and worse until he's forced to find another line of business. Unless of course everyone just ignores the statistic, which may be the best case scenario for the common investor.

Am I missing something here?

From: Kozora, Matthew [REDACTED]@SEC.GOV
Sent: Tuesday, July 31, 2012 11:02 AM
To: Bergstresser, Keith - EBSA
Subject: RE: question

No...the measure would be

(Income from Kickbacks/front-end loads) / (Total Value New Security Purchases)

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov]
Sent: Tuesday, July 31, 2012 10:59 AM
To: Kozora, Matthew
Subject: RE: question

I'm still having a hard time understanding exactly what your measure is and how it would be calculated. From your discussion immediately below, it sounds like you would just take the total income of an advisor for the year and divide by the total amount of assets they directed to particular investments. Is that how you would calculate it?

From: Kozora, Matthew [REDACTED]@SEC.GOV]
Sent: Tuesday, July 31, 2012 10:48 AM
To: Bergstresser, Keith - EBSA
Subject: RE: question

The measure would be at the adviser level. Therefore, a one-time kickback may be washed out among all client assets. Furthermore, as more information becomes available over time, that one-time kickback will become less and less significant.

Performance measures have the same drawback. Consider the case of fund manager Bill Miller of Legg Mason. He beat the S&P 500 for 13 straight years (or so) but then decided to invest in financials prior to the financial crisis. His performance for 2008 was not very good.

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov]
Sent: Tuesday, July 31, 2012 10:44 AM
To: Kozora, Matthew
Subject: RE: question

So how would the measure compare for an advisor who receives a one-time 5% commission through a front-end load versus an advisor who gets a 1% per year kickback?

From: Kozora, Matthew [REDACTED]@SEC.GOV]
Sent: Monday, July 30, 2012 3:21 PM
To: Bergstresser, Keith - EBSA
Subject: RE: question

I don't take days off.

My measure of conflicts of interest would be the reciprocal of your performance measure, publicly disclosed and comparable across advisors. The measure would be equal to the amount of kickback for each dollar of assets under management.

The measure would

- a. Not be dependent on a measure of risk
- b. Applicable to all asset classes
- c. An important indicator as to whether the advisor is working in the best interests of the client

As an investor I might not quite understand why my portfolio performed the way it did (asset selection, exogenous events, etc.), but I can see how much I am paying my advisor and how much of that pay might have led to portfolio composition. Public disclosure would require advisors to justify how much kickbacks they receive especially in the face of potentially low returns.

Matt

From: Bergstresser, Keith - EBSA [REDACTED]@dol.gov]
Sent: Monday, July 30, 2012 3:03 PM
To: Kozora, Matthew
Subject: RE: question

Matt,

I wouldn't characterize returns as a measure of advisor ability. To be sure, advisor ability may be one component of returns, but there are many other factors that affect returns, e.g. the degree of conflicts of interest. I think of returns much more literally as an outcome measure associated with receiving advice from the advisor. I don't see how a measure of conflicts of interest would be a substitute for this. How would the measure be used? Would it be disclosed

to plan participants and IRA holders? Disclosed publicly? I think that ultimately, investors are more concerned about maximizing their returns (for a given risk level) than about whether there is a conflict of interest. Disclosing conflicts of interest may not help investors make better decisions and in fact may make matters worse (see attached paper). This all assumes that it would be possible to measure degrees of conflicts of interest. There are many different ways in which advisors are conflicted. How would you construct the measure?

Keith

P.S. When did you send me this email? I have a time-stamp that says I got it at 8:46 AM on a Saturday.

From: Kozora, Matthew [REDACTED]@SEC.GOV
Sent: Saturday, July 28, 2012 8:46 AM
To: Bergstresser, Keith - EBSA
Subject: question

Dear Keith,

Instead about trying to measure returns as a measure of advisor ability, may it not be better to develop a measure of conflicts-of-interest? That is, some measure that relates to how much a particular "advisor" gets paid for the products and investments they recommend?

Just a thought.

Matt

Exhibit 2

To: Nallengara, Lona [REDACTED]@SEC.GOV]
Cc: Hauser, Timothy - EBSA [REDACTED]@dol.gov]
From: Block, Sharon I - OSEC
Sent: Fri 1/9/2015 4:18:36 PM
Importance: Normal
Subject: EBSA responses to SEC comments

Lona – It was great to finally meet you in person this week. Following up on our bosses' conversation, attached please find a chart that details the most recent comments on the draft that we've received from Jen Porter and her team and our responses. I've copied Tim Hauser, who leads our reg drafting team and who has been working with Jen, in case Jen has any follow up questions. Thanks, Sharon

Sharon Block

Senior Counselor to the Secretary

U.S. Department of Labor

[REDACTED]@dol.gov

[REDACTED]

Document Title: EBSA Responses to Recent SEC Comments 1-9-15.docx

EBSA Responses to SEC Comments -- January 8, 2015

SEC comment	EBSA response
<u>Clarification and coordination.</u> (Item 1) Make sure the SEC is comfortable with all references to their views and the coordination process.	We have edited the language based on our conversations with SEC staff.
<u>Ongoing obligation.</u> (Item 2) Consider clarifying the extent to which fiduciary duties and impartial conduct standards apply at transactional level or on ongoing basis.	Draft language in preambles for contract and principal transaction exemption clarify that the parties are free to determine the long-term or transactional nature of their relationship based on the terms of the contract and their course of conduct.
<u>Breadth of exemption – assets.</u> (Item 3) Consider clarifying the breadth of application of the contract exemption (e.g., all client assets? Just IRA assets?)	As drafted, we have not imposed a requirement that the contract broadly cover advice to the client that doesn't relate to retirement assets.
<u>Meaning of "Recommendation".</u> (Item 4) Consider clarifying what counts as a "recommendation" in fiduciary definition and exemptions.	The preambles to the regulation and contract exemption now reference FINRA guidance in Policy Statement 01-23 and Regulatory Notice 11-02. (The preamble discussion mirrors a similar discussion in the draft proposed regulation).
<u>Meaning of "Best Interest".</u> (item 5) Consider adding more about what "best interest" means.	Our preamble discussion focuses on ERISA/trust background, and best interest is expressly defined in the regulatory and exemption text. We would prefer to see what commenters say before adding any additional explanatory language.
<u>Material Conflicts of Interest.</u> (Item 6) Consider limiting the contract exemption's disclosure requirements with respect to "conflicts" to "material" conflicts? Alternatively should we solicit comments on that point?	Our intent had been to capture only material conflicts in our definition. We've clarified this by adding "Material" to the defined term throughout the document.
<u>Breadth of exemption – fee practices.</u> (Item 7) Consider clarifying what fee practices are addressed by what exemption.	We have added additional language clarifying the broad scope of the relief for fiduciaries receiving a wide range of compensation and also noting that more specific class exemptions, apart from the contract exemption, also remain available.
<u>Compliance with law.</u> (Item 8) The contract exemption requirement of compliance with all fed/state laws could result in loss of exemption for trivial breaches. Consider continuing to impose the condition as a feature of the contract, but make it clear that the exemption isn't blown for de minimis breaches?	In the contract and principal transaction exemptions, we have moved the provision about complying with applicable law from the Impartial Conduct Standards to the Warranties; as a result, failure to comply with law will not disallow the exemption, but contractholders may bring suit under the contract when a violation of law is sufficiently significant to make recovery likely. We have also noted that a significant legal violation could rise to the level of a violation of the best interest standards.

SEC comment	EBSA response
<p><u>Limited Menus.</u> (Item 9) Consider more specificity about what is meant by “sufficiently broad range of products” Also, consider companies that restrict menus based on considerations other than third party payments/proprietary products.</p>	<p>The preamble and operative text now clarify that all companies that restrict menus so that the adviser cannot recommend a sufficiently broad range of investments to meet the plan or IRA’s needs (regardless of reason for restriction) must notify retirement investors and describe the asset classes that are offered. Additional conditions also remain applicable to companies that restrict menus based on third party payments, proprietary status, or otherwise, including: i) making a finding that the limitations do not prevent advisers from giving advice that is in the investor’s best interest or otherwise adhering to the impartial conduct standards, and ii) notifying the investors of the specific limitations placed on the investments available for recommendation.</p>
<p><u>Disclosure - reliance on third parties.</u> (Item 10) Where accuracy of disclosure hinges on statements from third parties, consider including good faith reliance provision.</p>	<p>The preamble now explains that in providing disclosures, advisers and financial institutions may rely in good faith on information from third parties, as long as those parties are not close affiliates (i.e., entities in control relationships with the adviser/financial institution, or employees, officers or directors of the adviser/financial institution).</p>
<p><u>Definitions for disclosure and document retention.</u> (Item 11) To the extent the definitions in the disclosure and document retention provisions are unclear, data received may be incomplete or insufficiently comparable from company to company. Consider express references to SEC/FINRA definitions.</p>	<p>The preamble now requests comment as to whether the terms used and definitions are sufficient so that the information received will be reasonably comparable across different financial institutions.</p>
<p><u>Document Retention.</u> (Item 12) How long do the firms have to keep the data under the document retention provisions? Does the period of time match SEC retention periods?</p>	<p>The data must be retained for 6 years, which lines up with ERISA’s statute of limitations, but is slightly longer than some SEC timelines.</p>
<p><u>Large plan exclusion.</u> (Item 13) Considering adding explanatory material in the contract exemption preamble on why we are excluding large plans.</p>	<p>We have added preamble language making it clear that the exemption is aimed at retail investors, such as plan participants and small plan sponsors, who currently receive too little impartial and unconflicted fiduciary advice. The preamble now also explains that we do not believe similar relief is necessary for larger institutional investors, which are already accustomed to operating in a fiduciary environment and within the framework of existing exemptions and that, for such investors, the contract exemption could have the undesirable consequence of reducing protections provided under existing law, without offsetting benefits. It also notes that the seller’s exception is available for arm’s length non-fiduciary transactions involving such investors.</p>

<p><u>Former underwriters.</u> (Item 14) Consider whether the principal transaction’s exemption should be available to Financial Institutions (and Affiliates) who are no longer doing the underwriting even if they formerly did.</p>	<p>The preamble and operative text now clarify that the exemption is not available for a principal transaction involving a debt security that, <i>at the time of the transaction</i>, is underwritten by the Financial Institution or an Affiliate.</p>
<p><u>Limitations on eligible debt securities.</u> (Item 15) Consider specifying what is meant by the general conditions for eligible debt securities (e.g. "reasonably short period of time," "no greater than moderate credit risk", etc.) in the principal transactions exemption.</p>	<p>We have included these standards of creditworthiness as alternatives to minimum credit ratings requirements, as required by the Dodd-Frank Act. The same standards have been used in SEC regulatory pronouncements as well – so, although they are not as objective as a credit rating, we think they will be familiar to the industry. We footnoted an example of an SEC regulation with the same standards.</p>
<p><u>Execution Price.</u> (Item 16) Clarify price permitted in principal transaction in relation to agency transactions.</p>	<p>The preamble and operative text now clarify that the principal transaction must be executed at a price that the Adviser and Financial Institution believe is <u>at least as favorable to the Plan or IRA</u> as would be available in a transaction that is not a principal transaction.</p>
<p><u>Inter-dealer market.</u> (Item 17) Consider clarifying what is meant by inter-dealer market in the principal transaction exemption.</p>	<p>We have deleted references to the inter-dealer market throughout.</p>
<p><u>Meaning of “mark-up”.</u> (Item 18) Consider clarifying what is mean by mark-up and mark-down?</p>	<p>The preamble now clarifies the terms mark-up and mark-down, referencing FINRA Regulatory Notice 14-52.</p>
<p><u>Add “mark-up” or “mark-down” to price comparison requirement in Section III(d) of principal transaction exemption</u> (Email comment). The suggested language would read: “When evaluating the price offered by the counterparties referred to in (2), the Adviser and Financial Institution may take into account the resulting price to the Plan or IRA, including commission <u>or markups or markdowns.</u>”</p>	<p>In further discussions, the SEC clarified that this additional language would be necessary if the adviser could rely on a riskless principal transaction for the price comparison. Our intent had been to have the price comparison involve agency transactions only, so that added language was not necessary. We clarified in the document that the comparison could involve agency transactions only.</p>
<p><u>Double check with SEC on coordinating swap language</u> (Item 19)</p>	<p>We are confident that the language in the regulation lines up with the SEC and CFTC language, but are reaching out to the SEC regulatory team responsible for their swap regulation to make sure.</p>
<p><u>Discuss possible costs/risks of adverse impact on amount of advice and of firms choosing to switch to registered investment adviser, rather than broker, model</u> (Item 21)</p>	<p>These issues are addressed in RIA, but we are reviewing to see if there is anything more we need to say on the topic. In addition, we have added some additional discussion on mutual funds to the affected entities and benefits sections. We may make additional edits after getting feedback from OMB.</p>

<p><u>Better explain logic behind \$30 billion estimate based on front end load mutual funds (in particular, what we are assuming about the rule's efficacy) (Item 22)</u></p>	<p>We have made clear that the quantitative analysis behind the \$30 billion estimate assumes that the rule will be fully effective in eliminating the harms caused by this one category of conflict of interest, and we will acknowledge the possibility of imperfect compliance. At the same time, we stress that the \$30B estimate remains conservative because it reflects just one category of conflict in one small part of the market; accordingly, this remains a very low-end estimate.</p>
<p><u>Consider quantifying the costs and benefits of all the alternative approaches we considered and rejected (Item 23)</u></p>	<p>We think this would be extraordinarily difficult and would appreciably delay the project for very little return. The extensive qualitative descriptions of the bases for rejecting the alternatives included in the current RIA effectively explain the bases for rejecting the alternative approaches. We would prefer to get feedback from OMB before undertaking any additional quantitative analyses.</p>
<p><u>Meaning of "Investment Adviser". (Item 24) Consider replacing term "investment adviser" with "investment advice fiduciary" so that readers will not mistakenly read the term as limited to "registered investment adviser."</u></p>	<p>In describing the term "Adviser," the preamble now specifies that this term is not limited to registered investment advisers, but may include representatives of banks, insurance companies and broker-dealers.</p>
<p><u>Cite the relevant literature or drop discussion of how disclosure can exacerbate conflicts in the preamble to the regulation; also moderate discussion on lack of protections in absence of ERISA fiduciary status (Item 25).</u></p>	<p>We have added cites, which were taken directly from the RIA. We will also make clear that lack of fiduciary status means no accountability <i>under ERISA or the Code</i>, so that there is no inference that we are suggesting that the securities laws don't include protections.</p>
<p><u>Disclosure. (Item 26) Consider incorporating requirements of SEC Rule 10b-16 for disclosure requirements in the credit exemption.</u></p>	<p>The operative text now clarifies that providing the disclosure described SEC Rule 10b-16 would satisfy the written disclosure requirements of the exemption. (This had been in the preamble but we put it in the operative text for ease of use.)</p>
<p><u>Fee disclosures. (Item 27) Consider making fee disclosures in the contract exemption a little easier for the industry by expressly permitting narrative statements.</u></p>	<p>The preamble now requests comment on whether it would be more feasible or less costly to provide some of the disclosures in a narrative statement.</p>

Exhibit 3

To: Nallengara, Lona [REDACTED]@SEC.GOV]
Cc: Hauser, Timothy - EBSA [REDACTED]@dol.gov]; Porter, Jennifer R. [REDACTED]@SEC.GOV]
From: Block, Sharon I - OSEC
Sent: Mon 1/26/2015 7:40:58 PM
Importance: Normal
Subject: RE: EBSA responses to SEC comments

Thanks Lona. We appreciate all the time your team has put in and their thoughtful comments.

From: Nallengara, Lona [REDACTED]@SEC.GOV]
Sent: Monday, January 26, 2015 7:37 PM
To: Block, Sharon I - OSEC
Cc: Hauser, Timothy - EBSA; Porter, Jennifer R.
Subject: RE: EBSA responses to SEC comments

Sharon,

Thank you for sending the chart showing your responses to SEC staff comments on the rule package that we discussed with you in December.

We asked the staff to review the chart and below are a few additional thoughts from the staff on several of the items that you can consider as you prepare your proposal (the staff has identified their comments using the item numbers in your chart).

I would also like to note that although the chart shows that several changes were made to the proposal to address the potential concerns that we have discussed regarding the complexity of the proposal, we continue to believe that commenters are likely to raise concerns that the proposal may result in reduced pricing options, rising costs and limited access to retirement advice, particularly for retail investors. Commenters also may express concerns that broker-dealers, as a practical matter, may be unlikely to use the exemptions provided and may stop providing services because of the number of conditions imposed, likely compliance costs, and lack of clarity around several provisions.

We hope these comments will continue to be helpful to you as you finalize the proposed

rules.

- Lona

Comments on the Chart

Item 3: Based on the draft that we reviewed, some conditions appear to be written to apply to ANY retirement assets, while others apply specifically to the "Assets" defined (funds, etc). If that distinction is intended, it may be useful to add clarifying language or some discussion where this distinction is made to make the intent clear.

Item 4: Consider referencing FINRA Regulatory Notices 12-25 and 12-55. Notably, FAQ No. 2 in FINRA Reg. Notice 12-25 discusses the term "recommendation" and cites various resources that explain FINRA's guiding principles for analyzing whether a communication constitutes a recommendation. Also we would refer to what you called "Policy Statement 01-23" as "NASD Notice to Members 01-23."

Item 8:

- The chart stated failure to comply with law will not disallow the exemption because the provision about complying with applicable law was moved from the Impartial Conduct Standards to the Warranties. Section II(a) in the last draft of rule text we reviewed said advisers and financial institutions have to comply with the "terms required by Section II(b)-(e)," which included the contract warranties. Consider changing this section as well if that is the intended result.

- We note that the liability standards under the federal securities laws for a private right of action by an investor differ from what is described in the chart. As a general matter, if customers of broker-dealers bring claims in FINRA arbitration, they are not limited by substantive law (federal or state) as to the type of claims that they can bring against brokers (i.e., FINRA arbitrations are decisions in equity and arbitrators are not bound by the substantive law that governs litigation in court). However, the chart stated "contractholders may bring suit under the

contract when a violation of law is sufficiently significant to make recovery likely.” Please consider whether you intend to limit customers’ claims against brokers in connection with FINRA arbitration (which may result in a conflict between DOL rules and federal securities laws, including SRO rules), and the interplay of this above-quoted requirement and state law for alleging breach of contract claims.

Item 18: FINRA Reg. Notice 14-52 is a request for comment. Consider referencing FINRA Rule 2232, the rule that the request for comment would ultimately amend, and recognizing that 14-52 is a request for comment.

From: Block, Sharon I - OSEC [REDACTED]@dol.gov]
Sent: Friday, January 09, 2015 4:19 PM
To: Nallengara, Lona
Cc: Hauser, Timothy - EBSA
Subject: EBSA responses to SEC comments

Lona – It was great to finally meet you in person this week. Following up on our bosses’ conversation, attached please find a chart that details the most recent comments on the draft that we’ve received from Jen Porter and her team and our responses. I’ve copied Tim Hauser, who leads our reg drafting team and who has been working with Jen, in case Jen has any follow up questions. Thanks,
Sharon

Sharon Block

Senior Counselor to the Secretary

U.S. Department of Labor

[REDACTED]@dol.gov

[REDACTED]

Exhibit 4

To: 'Hauser, Timothy - EBSA [REDACTED]@dol.gov' [REDACTED]@dol.gov]
From: Porter, Jennifer R.
Sent: Thur 9/4/2014 3:55:55 PM
Importance: Normal
Subject: Disclosure and Audit Cites

Tim,

Below is a list of provisions and rules under the federal securities laws that we discussed on our call on Tuesday. Please note that this list reflects those rules that the staff believes to be most relevant, based on the staff's understanding of DOL staff's current approach with respect to the General Exemption, including the types of assets that would be covered. Additional provisions or rules may be relevant, should the DOL staff change its approach.

Generally

See the SEC Staff Section 913 Study ("Study") for an overview of disclosure, supervision and other broker-dealer and investment adviser obligations, available at: <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>. Note that some of the FINRA/NASD rules cited in the study have been amended or replaced with FINRA rules since publication, including the rules relating to supervision/audit. Where relevant, the new rules are cited below. The FINRA/NASD rules cited in the Study, and links to new rules, are available through FINRA's manual at: <http://finra.complinet.com>.

Disclosure and Data Retention Provisions and Rules

Form ADV, part 2A (particularly items 4-6, 8, 10-12, 14, 16, 17), available at: <http://www.sec.gov/about/forms/formadv-part2.pdf>

Form N-1A (registration form used by registered open-end investment companies, including mutual funds), available at: <http://www.sec.gov/about/forms/formn-1a.pdf>

Advisers Act Rule 204-2 (books and records rule)

Securities Act Rule 421 (regarding the use of plain English)

Exchange Act Rule 10b-5

Exchange Act Rule 10b-10

Exchange Act Rule 10b-16

Exchange Act Rules 15c1-5 and 15c1-6

Exchange Act Rules 15g-1 through 15g-6, 15g-9

Exchange Act Rule 17a-3(a)(1)-(3), (5)

Exchange Act Rule 17a-4

FINRA Rule 2124

FINRA Rule 2232

FINRA Rule 2262

FINRA Rule 2269

FINRA Rule 2310

FINRA Rule 2360(b)(12)

FINRA Rule 4524

FINRA Rule 5110(c)(2)

FINRA Rule 5121

FINRA Rule 5122

NASD Rule 2340

NASD Rule 2830

Form SSOI, available at:

<http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/industry/p125702.pdf>

MSRB Rule G-15

MSRB Rule G-22

Audit (Supervision) Provisions and Rules

Advisers Act Sec. 203(e)(6)

Exchange Act Section 15(b)(4)(E) and 15(b)(6)

Exchange Act Section 17(b)

Exchange Act Rule 17a-4 (in particular paragraph (e)(7))

FINRA Rule 1250

FINRA Rule 3110 (generally, and in particular paragraphs (a), (b)(6), (c)(1), (c)(2), and (c)(3)(A))

FINRA Rule 3120

FINRA Rule 3130

FINRA Rule 4511

FINRA Rule 8210

FINRA Regulatory Notice 14-10 (discussing FINRA's new consolidated supervision Rules 3110, 3120, 3150 and 3170), available at:
<http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p465940.pdf>

Please let me know if you have any questions or need anything else on this.

Regards,

Jen

JENNIFER R. PORTER

Senior Advisor to the Chair

U.S. Securities and Exchange Commission

100 F Street NE
Washington DC 20549
Phone | [REDACTED]

[REDACTED][sec.gov](#)

Exhibit 5

To: 'Hauser, Timothy - EBSA [REDACTED]@dol.gov]
From: Porter, Jennifer R.
Sent: Wed 10/8/2014 10:34:40 AM
Importance: Normal
Subject: RE: Follow-up from 9/26 call with SEC/DOL/Treasury

Tim,

Here are some additional links to certain NASD/FINRA materials we have mentioned during our recent calls. We thought these might be helpful in case you have not seen some of these items.

· Certain FINRA rules pertaining to arbitration and class actions, as well as a related FINRA decision:

- o [FINRA Rule 12200 \(Arbitration Under an Arbitration Agreement or the Rules of FINRA\)](#)
- o [FINRA Rule 12204 \(Class Action Claims\)](#)
- o [FINRA Rule 2268\(f\) \(Requirements When Using Pre-dispute Arbitration Agreements for Customer Accounts\)](#)
- o FINRA's Board of Governors' decision from April 24, 2014 concerning FINRA's rules related to class actions: [FINRA's Board of Governors' Decision](#)

· Certain materials discussing, among other things, the interplay between FINRA's suitability rule and FINRA's exemption for certain categories of educational material:

§ [FINRA Rule 2111, Supplementary Material .03](#)

§ [NASD Notice to Members 01-23](#)

§ FINRA Regulatory Notices:

- o [12-55 Guidance on FINRA's Suitability Rule](#)
- o [12-25 Additional Guidance on FINRA's New Suitability Rule; Implementation Date: July 9, 2012](#)
- o [11-25 New Implementation Date for and Additional Guidance on the Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations; Implementation Date: July 9, 2012](#)
- o [11-02 SEC Approves Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations; Effective Date: October 7, 2011](#)

Again, please let us know how we can provide further assistance to you.

Regards,

Jen

JENNIFER R. PORTER

Senior Advisor to the Chair

U.S. Securities and Exchange Commission

100 F Street NE
Washington DC 20549
Phone | [REDACTED]

[REDACTED]@sec.gov

From: Hauser, Timothy - EBSA [REDACTED]@dol.gov]

Sent: Tuesday, September 30, 2014 12:41 PM

To: Porter, Jennifer R.

Cc: Hauser, Timothy - EBSA

Subject: RE: Follow-up from 9/26 call with SEC/DOL/Treasury

Thanks. That's terrific. I'll pass your email along to everybody on the meeting list.

Tim

Exhibit 6

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2509 and 2510

RIN 1210-AB32

Definition of the Term “Fiduciary”

Conflict of Interest Rule – Retirement Investment Advice

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed rulemaking and withdrawal of previous proposed rule.

SUMMARY: This document contains a proposed regulation defining who is a “fiduciary” of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) as a result of giving investment advice to a plan or its participants or beneficiaries. The proposal also applies to the definition of a “fiduciary” of a plan (including an individual retirement account (IRA)) under section 4975 of the Internal Revenue Code of 1986 (Code). If adopted, the proposal would treat persons who provide investment advice or recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner as fiduciaries under ERISA and the Code in a wider array of advice relationships than the existing ERISA and Code regulations, which would be replaced. The proposed rule, and related exemptions, would increase consumer protection for plan sponsors, fiduciaries, participants, beneficiaries and IRA owners. This document also withdraws a prior proposed regulation published in 2010 (2010 Proposal) concerning this same subject matter. In connection with this proposal, elsewhere in this issue of the Federal Register, the Department is proposing new exemptions and amendments to existing exemptions from the prohibited transaction rules applicable to fiduciaries under ERISA and the Code that would allow certain broker-dealers, insurance agents and others that act as investment advice fiduciaries to continue to receive a variety of common forms of compensation that would otherwise would be prohibited as conflicts of interest.

DATES: The proposed rule published October 22, 2010 (75 FR 65263) is withdrawn as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Submit written comments on the proposed regulation on or before [INSERT DATE THAT IS 75 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To facilitate the receipt and processing of written comment letters on the proposed regulation, EBSA encourages interested persons to submit their comments electronically. You may submit comments, identified by RIN 1210-AB32, by any of the following methods:

{ PAGE * MERGEFORMAT }

Deleted: affect

Comment [A1]:

EBSA: We disagree with this edit. We believe the emphasis should be placed on the positive effect the rule will have on plans, participants and beneficiaries and IRA owners so they should remain in the first part of the sentence.

Comment [A2]: Okay, but affect makes it sound like you are regulating them rather than protecting/helping them.
EBSA Response: A statement of who is “affected” by the rule is pretty standard summary text for a Federal Register notice, but we revised to address this comment. Federal Register may reject because it prohibits using the summary “to prove a point or argue a case.”

Deleted: as well as providers of investment and investment advice related services to such plans and IRAs

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DRAFT – 4/08/2015

Federal eRulemaking Portal: { HYPERLINK "http://www.regulations.gov" }. Follow instructions for submitting comments.

E-mail: { HYPERLINK "mailto:e-ORI@dol.gov" }. Include RIN 1210-AB32 in the subject line of the message.

Mail: Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: Definition of Fiduciary, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

Hand Delivery/ Courier: Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: Definition of Fiduciary, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

Instructions: All comments received must include the agency name and Regulatory Identifier Number (RIN) for this rulemaking (RIN 1210-AB32). Persons submitting comments electronically are encouraged not to submit paper copies. All comments received will be made available to the public, posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and made available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

For Questions Regarding the Proposed Rule: Contact Luisa Grillo-Chope or Fred Wong, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), (202) 693-8500.

For Questions Regarding the Proposed Prohibited Transaction Exemptions: Contact Karen Lloyd, Office of Exemption Determinations, EBSA, 202-693-8554.

For Questions Regarding the Regulatory Impact Analysis: Contact G. Christopher Cosby, Office of Policy and Research, EBSA, 202-693-8425. (These are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. EXECUTIVE SUMMARY

A. Purpose of the Regulatory Action

Under ERISA and the Code, a person is a fiduciary to a plan or IRA to the extent that he or she engages in specified plan activities, including rendering “investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan” ERISA safeguards plan participants by imposing trust law standards of care and undivided loyalty on plan fiduciaries, and by holding fiduciaries accountable when they breach those

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COI EBSA PASS BACK
DRAFT – 4/08/2015

obligations. In addition, fiduciaries to plans and IRAs are not permitted to engage in “prohibited transactions,” which pose special dangers to the security of retirement, health, and other benefit plans because of fiduciaries’ conflicts of interest with respect to the transactions. Under this regulatory structure, fiduciary status and responsibilities are central to protecting the public interest in the integrity of retirement and other important benefits, many of which are tax-favored.

In 1975, the Department issued regulations that significantly narrowed the breadth of the statutory definition of fiduciary investment advice by creating a five-part test that must, in each instance, be satisfied before a person can be treated as a fiduciary adviser. This regulatory definition applies to both ERISA and the Code. The Department created the test in a very different context, prior to the existence of participant-directed 401(k) plans, widespread investments in IRAs, and the now commonplace rollover of plan assets from fiduciary-protected plans to IRAs. Today, as a result of the five-part test, many investment professionals, consultants, and advisers¹ have no obligation to adhere to ERISA’s fiduciary standards or to the prohibited transaction rules, despite the critical role they play in guiding plan and IRA investments. Under ERISA and the Code, if these advisers are not fiduciaries, they may operate with conflicts of interest that they need not disclose and have limited liability under federal pension law for any harms resulting from the advice they provide. Non-fiduciaries may give imprudent and disloyal advice; steer plans and IRA owners to investments based on their own, rather than their customers’ financial interests; and act on conflicts of interest in ways that would be prohibited if the same persons were fiduciaries. In light of the breadth and intent of ERISA and the Code’s statutory definition, the growth of participant-directed investment arrangements and IRAs, and the need for plans and IRA owners to seek out and rely on sophisticated financial advisers to make critical investment decisions in an increasingly complex financial marketplace, the Department believes it is appropriate to revisit its 1975 regulatory definition as well as the Code’s virtually identical regulation. With this regulatory action, the Department proposes to replace the 1975 regulations with a definition of fiduciary investment advice that better reflects the broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty.

The Department has also sought to preserve beneficial business models by separately proposing new exemptions from ERISA’s prohibited transaction rules that will broadly permit firms to continue common fee and compensation practices, as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers. Rather than create a highly prescriptive set of transaction-specific exemptions, the Department instead is proposing a set of exemptions that flexibly accommodate a wide range of current business practices, while minimizing the harmful impact of conflicts of interest on the quality of advice.

¹ By using the term “adviser,” the Department does not intend to limit its use to investment advisers registered under the Investment Advisers Act of 1940 or under state law. For example, as used herein, an adviser can be an individual or entity who can be, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

Deleted: flatly

Comment [A3]:

EBSA: We would reject changes. Not all fee practices will be permitted by the exemptions. By deleting “all” we slightly soften this by leaving it at “common fee and compensation practices. . .”

Comment [A4]: Okay, but this is the phrasing we used in the previous fact sheet so we will need to keep using it there and in other materials like the FAQs.

EBSA Response: OK, but I think EBSA has commented on the other documents suggesting that “all” be deleted or the sentences be revised.

Deleted: to rely on all

Deleted:

COI EBSA PASS BACK
DRAFT – 4/08/2015

In particular, the Department is proposing a new exemption (the “Best Interest Contract Exemption”) that would provide conditional relief for common compensation, such as commissions and revenue sharing, that an adviser and the adviser’s employing firm might receive in connection with investment advice to retail retirement investors.² In order to protect the interests of plans, participants and beneficiaries, and IRA owners, the exemption requires the firm and the adviser to contractually acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, adopt policies and procedures reasonably designed to minimize the harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice. Central to the exemption is the adviser and firm’s agreement to meet fundamental obligations of fair dealing and fiduciary conduct – to give advice that is in the customer’s best interest; avoid misleading statements; receive no more than reasonable compensation; and comply with applicable federal and state laws governing advice. This standards-based approach aligns the adviser’s interests with those of the plan participant or IRA owner, while leaving the adviser and employing firm with the flexibility and discretion necessary to determine how best to satisfy these basic standards in light of the unique attributes of their business. The Department is similarly proposing to amend existing exemptions for a wide range of fiduciary advisers to ensure adherence to these basic standards of fiduciary conduct. In addition, the Department is proposing a new exemption for “principal transactions” in which advisers sell certain debt securities to plans and IRAs out of their own inventory, as well as an amendment to an existing exemption that would permit advisers to receive compensation for extending credit to plans or IRAs to avoid failed securities transactions. In addition to the Best Interest Contract Exemption, the Department is also seeking public comment on whether it should issue a separate streamlined exemption that would allow advisers to receive otherwise prohibited compensation in connection with plan, participant and beneficiary accounts, and IRA investments in certain high-quality low-fee investments, subject to fewer conditions. This is discussed in greater detail in the Federal Register notice related to the proposed Best Interest Contract Exemption.

This broad regulatory package aims to enable advisers and their firms to give advice that is in the best interest of their customers, without disrupting common compensation arrangements under conditions designed to ensure the adviser is acting in the best interest of the advice recipient. The proposed new exemptions and amendments to existing exemptions are published elsewhere in today’s edition of the Federal Register.

B. Summary of the Major Provisions of the Proposed Rule

The proposed rule clarifies and rationalizes the definition of fiduciary investment advice subject to specific carve-outs for particular types of communications that are best understood as non-fiduciary in nature. Under the definition, a person renders investment advice by (1) providing

² For purposes of the exemption, retail investors include (1) the participants and beneficiaries of participant-directed Plans, (2) IRA owners, and (3) the sponsors (including employees, officers, or directors thereof) of non participant-directed Plans with fewer than 100 participants to the extent it acts as a fiduciary with respect to plan investment decisions.

Deleted: almost all types of

Comment [A5]:
EBSA: We would reject adding word “all.”

Deleted: fundamental

Deleted: facilitating

Comment [A6]: Flagging that need to update this to Best Interest Contract Exemption throughout.
EBSA Response: OK

Deleted: limitations

Comment [A7]:
EBSA: Leaving out the concept that there are limitations to the definition of investment advice under the rule does not accurately summarize the construct of the rule. That is, the rule is in two parts basically. Part one of the rule is the definition of investment advice and part two, limitations on that definition.

Comment [A8]: As discussed, would search and replace all references to limitations and limits with “carve-outs” or “exceptions”.
EBSA Response: OK

COI EBSA PASS BACK
DRAFT – 4/08/2015

investment or investment management recommendations or appraisals to an employee benefit plan, a plan fiduciary, participant or beneficiary, or an IRA owner or fiduciary, and (2) either (a) acknowledging the fiduciary nature of the advice, or (b) acting pursuant to an agreement, arrangement, or understanding with the advice recipient that the advice is individualized to, or specifically directed to, the recipient for consideration in making investment or management decisions regarding plan assets. When such advice is provided for a fee or other compensation, direct or indirect, the person giving the advice is a fiduciary.

Although the new general definition of investment advice avoids the weaknesses of the current regulation, standing alone it could sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships. Accordingly, the proposed regulation includes a number of specific carve outs to the general definition. For example, the regulation draws an important distinction between fiduciary investment advice and non-fiduciary investment or retirement education. Similarly, under the “seller’s carve-out”³, the proposal would not treat recommendations made to a plan in an arm’s length transaction where there is generally no expectation of fiduciary investment advice, provided that the carve-out’s specific conditions are met. In addition, the proposal includes specific carve outs for advice rendered by employees of the plan sponsor, platform providers, and persons who offer or enter into swaps or security-based swaps with plans. All of the rule’s carve outs are subject to conditions designed to draw an appropriate line between fiduciary and non-fiduciary communications, consistent with the text and purpose of the statutory provisions.

Finally, in addition to the new proposal in this Notice, the Department is simultaneously proposing a new Best Interest Contract Exemption, revising other exemptions from the prohibited transaction rules of ERISA and the Code and is exploring through a request for comments the concept of an additional low-fee exemption.

C. Costs, Benefits and Transfers

C. Gains to Investors and Compliance Costs

When the Department promulgated the 1975 rule, 401(k) plans did not exist, IRAs had only just been authorized, and the majority of retirement plan assets were managed by professionals, rather than directed by individual investors. Today, individual retirement investors have much greater responsibility for directing their own investments, but they seldom have the training or specialized expertise necessary to prudently manage retirement assets on their own. As a result, they often depend on investment advice for guidance on how to manage their hard-earned savings to achieve a secure retirement. In the current marketplace for retirement investment advice, however, advisers commonly have direct and substantial conflicts of interest, which

³ Although referred to herein as the “seller’s carve-out,” we note that the carve out provided in paragraph (b)(1)(i) of the proposal is not limited to sales and would apply to incidental advice provided in connection with an arm’s length sale, purchase, loan, or bilateral contract between a plan investor with financial expertise and the adviser.

Deleted: limitations and

Comment [A9]: As discussed, would change all references to the exception to seller’s exception, but fine with continuing to use word counterparty when describing what it does.
EBSA Response: OK

Deleted:

Deleted: counterparty seller’s exception/limitation

Deleted: limitation’s

Deleted: limitations and

Deleted: alternative

Comment [A10]: Am not re-adding prior comments here per the highlighted note below. Tend to think it should mention the 100bps estimate somewhere.

Deleted: and

Deleted: (EBSA HAS NOT INCLUDED RESPONSES TO OMB COMMENTS IN THIS SECTION. EBSA SEPARATELY RESPONDED TO THE SAME ISSUES RAISED IN THE FULL RIA. ONCE RESOLVED IN THE FULL RIA, CORRESPONDING CHANGES WILL BE MADE HERE.)

Deleted: sophisticated

COI EBSA PASS BACK
DRAFT – 4/08/2015

encourage investment recommendations that generate higher fees for the advisers at the expense of their customers and often result in lower returns for customers even before fees.

A wide body of economic evidence supports a finding that the impact of these conflicts of interest on investment outcomes is large and, from the perspective of advice recipients, negative. As detailed in the Department's Regulatory Impact Analysis (available at { HYPERLINK "http://www.dol.gov/ebsa/xxxxxxxx" }). the supporting evidence includes, among other things, statistical analyses of conflicted investment channels, experimental studies, government reports documenting abuse, and basic economic theory on the dangers posed by conflicts of interest and by the asymmetries of information and expertise that characterize interactions between ordinary retirement investors and conflicted advisers. A careful review of this data, which consistently points to a substantial failure of the market for retirement advice, suggests that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 100 basis points per year over the next 20 years. The underperformance associated with conflicts of interest – in the mutual funds segment alone – could cost IRA investors more than \$210 billion over the next 10 years and nearly \$500 billion over the next 20 years. Some studies suggest that the underperformance of broker-sold mutual funds may be even higher than 100 basis points, possibly due to loads that are taken off the top and/or poor timing of broker sold investments. If the true underperformance of broker-sold funds is 200 basis points, IRA mutual fund holders could suffer from underperformance amounting to \$430 billion over 10 years and nearly \$1 trillion across the next 20 years. While the estimates based on the mutual fund market are large, the total market impact could be much larger. Insurance products, Exchange Traded Funds (ETFs), individual stocks and bonds, and other products are all sold by brokers with conflicts of interest.

The proposal is expected to deliver large gains for retirement investors. Because of data constraints, only some of these gains can be quantified with confidence. Cautiously focusing only on how load shares paid to brokers affect the size of loads IRA investors holding load funds pay and the returns they achieve, the proposal will deliver to IRA investors gains of between \$40 billion and \$44 billion over 10 years and between \$88 billion and \$100 billion over 20 years. These estimates assume that the rule will eliminate (rather than just reduce) underperformance associated with the practice of incentivizing broker recommendations through variable front-end-load sharing; if the rule's effectiveness in this area is substantially below 100 percent, these estimates may overstate these particular gains to investors in the front-load mutual fund segment of the IRA market.

This very cautious approach to the economic analysis accounts for only a fraction of potential conflicts, associated losses, and affected retirement assets. The total gains to IRA investors attributable to the rule may be much higher than these quantified gains alone. The proposal is expected to yield large, additional gains for IRA investors, including potential reductions in excessive trading and associated transaction costs and timing errors (such as might be associated with return chasing), improvements in the performance of IRA investments other than front-load mutual funds, and improvements in the performance of DC plan investments. As noted above, under current rules, adviser conflicts could cost IRA investors as much as \$410 billion over 10 years and \$1 trillion over 20 years, so the potential additional gains to IRA investors from this proposal could be very large.

Comment [A11]: Comments in previous pass-backs have suggested that we should 1) delete passages such as this that focus on the larger issue at hand (as opposed to the benefits that the rule will deliver) and 2) revise summaries of the analysis (such as in this section I.C) to achieve a more balanced description of the effects of the rule.

DOL: We disagree with these suggestions. This passage and others in the summary speak to the Need For Regulatory Action in this space. The Need For Regulatory Action is not only required by Circular A-4, but especially important to demonstrate in this case because it was heavily disputed following the 2010 proposal. We believe that the discussion in this summary and others is appropriately balanced between need for regulatory action, gains to investors, and compliance costs.

COI EBSA PASS BACK
DRAFT – 4/08/2015

The following accounting table summarizes the Department’s conclusions:

TABLE I.—*Partial Gains to Investors and Compliance Costs Accounting Table*

Category	Primary Estimate	Low Estimate	High Estimate	Year Dollar	Discount Rate	Period Covered
Partial Gains to Investors						
Annualized, Monetized (Smillions/year)	\$4,243	\$3,830		2015	7%	2017-2026
	\$5,170	\$4,666		2015	3%	2017-2026
<p>Notes: The proposal is expected to deliver large gains for retirement investors. Because of data constraints, only some of these gains can be quantified with confidence. The estimates in this table cautiously focus only on how load shares paid to brokers affect the size of loads IRA investors holding load funds pay and the returns they achieve. These estimates assume that the rule will eliminate (rather than just reduce) underperformance associated with the practice of incentivizing broker recommendations through variable front-end-load sharing; if the rule’s effectiveness in this area is substantially below 100 percent, these estimates may overstate these particular gains to investors in the front-load mutual fund segment of the IRA market. This very cautious approach to the economic analysis accounts for only a fraction of potential conflicts, associated losses, and affected retirement assets. The total gains to IRA investors attributable to the rule may be much higher than the quantified gains alone. The proposal is expected to yield large, additional gains for IRA investors, including potential reductions in excessive trading and associated transaction costs and timing errors (such as might be associated with return chasing), improvements in the performance of IRA investments other than front-load mutual funds, and improvements in the performance of DC plan investments. As noted above, under current rules, adviser conflicts could cost IRA investors as much as \$410 billion over 10 years and \$1 trillion over 20 years, so the potential additional gains to IRA investors from this proposal could be very large.</p> <p>The partial gains estimates are discounted to December 31, 2015.</p>						
Compliance Costs						
Annualized, Monetized (Smillions/year)	\$351		\$709	2015	7%	2016-2025
	\$331		\$667	2015	3%	2016-2025
<p>Notes: The compliance costs of the current proposal including the cost of compliance reviews, comprehensive compliance and supervisory system changes, policies and procedures and training programs updates, insurance increases, disclosure preparation and distribution, and some costs of changes in other business practices.</p>						
Insurance Premium Transfers						
Annualized, Monetized (Smillions/year)	\$63			2015	7%	2016-2025
	\$63			2015	3%	2016-2025
From/To	From: Service providers facing increased insurance premiums due to increased liability risk			To: Plans, participants, beneficiaries, and IRA investors through the payment of recoveries – funded from a portion of the increased insurance premiums		

Comment [A12]: Does the table have to be structured this way? Seems repetitive and hard to read.

DOL: Yes, we realize that this is repetitive with respect to the text above. However, tables can easily be removed from text and taken out of context. The context is extremely important here because we are able to quantify only a fraction of the gains to investors that the rule will achieve.

Comment [A13]: Should litigation costs be included here? Or does the RIA assume that all litigation costs are covered by insurance per the next row?

DOL: The RIA assumes that all litigation costs are covered by insurance. Part of the insurance premium increase is included in the Compliance Costs row and part is included in the Insurance Premium Transfers row.

COI EBSA PASS BACK
DRAFT – 4/08/2015

TABLE II.—*Social Welfare Economics and OMB Circular A-4 Accounting Table*

Category	Primary Estimate	Low Estimate	High Estimate	Year Dollar	Discount Rate	Period Covered
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Benefits – not quantified

Notes: The partial gains to investors estimates presented in the table above include both economic efficiency benefits and transfers from the financial services industry to IRA holders. The available data do not allow for the partial gains to investors estimates to be broken down into benefit and transfer components. Other benefits of the rule are not quantified and not included in the partial gains estimates. These benefits include, but are not limited to, reductions in excessive trading and associated transaction costs and timing errors (such as might be associated with return chasing), improvements in the performance of IRA investments other than front-load mutual funds, improvements in the performance of DC plan investments, healthier development of new business models for providing advice, an increase in investor education due to a clarification of the line between advice and education, and an improvement in the Department's ability to protect plan investors through enforcement of ERISA provisions.

Costs – not quantified

Notes: The compliance cost estimates presented in the table above include both economic efficiency costs and transfers from the financial services industry to employees and service providers. The available data do not allow for the compliance cost estimates to be broken down into cost and transfer components. Other costs of the rule are not quantified and not included in the compliance cost estimates. These costs include possible costs related to the movement of labor within the financial services industry as the demand for underperforming, broker-incentive-laden products decreases and the demand for better-performing, incentive-free products increases.

Transfers – not quantified

Notes: The partial gains estimates presented in the table above include both economic efficiency benefits and transfers from the financial services industry to IRA holders. Similarly, the compliance cost estimates presented in the table above include both economic efficiency costs and transfers from the financial services industry to employees and service providers. In both cases, available data do not allow for transfer estimates to be separated out from economic costs or benefits. Transfer impacts of the rule included in the partial gains estimates and broader gains to investors impact are transfers to IRA investors and DC plan participants from various parts of the financial services industry, including but not limited to, broker-dealers providing advisory services, asset managers, owners of equity in asset management companies, and broker-dealers providing trading services. Transfer impacts of the rule included in the compliance cost estimates are transfers from the financial services industry to employees and service providers. For example, compliance costs associated with the review of the proposal include both a pure economic cost and a transfer from the entity requiring the review to the employee or consultant asked to provide the review. Finally, the transfer impacts of the rule include transfers that are not included in the broad gains to investors impact, nor the compliance cost estimates. These other transfers include the quantified transfer from service providers facing increased insurance premiums due to increased liability risk to plans, participants, beneficiaries, and IRA investors through the payment of recoveries – funded from a portion of the increased insurance premiums. Other, unquantified transfer impacts include possible transfers within the financial services industry, such as transfers from providers of underperforming, broker-incentive-laden products to providers of better-performing, incentive-free products as demand for these products shifts.

For a detailed discussion of the gains to investors and compliance costs of the current proposal, please see Section J. Regulatory Impact Analysis, below.

II. OVERVIEW

A. Rulemaking Background

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Deleted: When the Department promulgated the 1975 rule, 401(k) plans did not exist, IRAs had only just been authorized, and the majority of retirement plan assets were managed by professionals, rather than directed by individual investors. Today, individual retirement investors have much greater responsibility for directing their own investments, but they seldom have the training or specialized expertise necessary to prudently manage retirement assets on their own. As a result, they often depend on investment advice for guidance on how to manage their hard-earned savings to achieve a secure retirement. In the current marketplace for retirement investment advice, however, advisers commonly have direct and substantial conflicts of interest, which encourage investment recommendations that generate higher fees for the advisers at the expense of their customers and often result in lower returns for customers even before fees. ¶

A wide body of economic evidence supports a finding that the impact of these conflicts of interest on investment outcomes is large and, from the perspective of advice recipients, negative. As detailed in the Regulatory Impact Analysis at { HYPERLINK

"http://www.dol.gov/ebsa/xxxxxxx", the supporting evidence includes, *inter alia*, statistical analyses of conflicted investment channels, experimental studies, government reports documenting abuse, and basic economic theory on the dangers posed by conflicts of interest and by the asymmetries of information and expertise that characterize interactions between ordinary retirement investors and conflicted advisers. A careful review of this data, which consistently points to a substantial failure of the market for retirement advice, suggests that IRA holders receiving conflicted investment advice can expect their investments to underperform exchange advisers. ¶

The proposal would narrow performance gaps attributable to adviser conflicts of interest and promote ERISA compliance. As a result, the Department is confident that the proposed rule would achieve a substantial reduction of the \$160 to \$320 billion of underperformance that IRA mutual fund assets affected by conflicted advice could otherwise suffer over the next 10 years. Over the same ten-year period, the Department estimates that the costs of the current proposal, including the cost of compliance, insurance, and some changes in business practices, will total about \$2.6 billion. This estimate does not account for market improvements in cost effectiveness or the new proposal's positive contribution to such improvements. Costs could be substantially lower if, as expected, newer and more cost-effective business models gain market share. As detailed in the Regulatory Impact Analysis, the size of the performance gap caused by conflicts of interest, and the likely costs, benefits and transfer impacts of the rule are all subject to uncertainty. ¶ Due to a lack of comprehensive data that would allow for a more precise calculation of the total benefit of the rule and the inherent uncertainties of such forecasting, the Department has taken the approach of specifically quantifying benefits related only to one category of investments and fee practices (front-end-load mutual funds) and one portfo... [1]

COI EBSA PASS BACK
DRAFT – 4/08/2015

The market for retirement advice has changed dramatically since the Department first promulgated the 1975 regulation. Individuals, rather than large employers and professional money managers, have become increasingly responsible for managing retirement assets as IRAs and participant-directed plans, such as 401(k) plans, have supplanted defined benefit pensions. At the same time, the variety and complexity of financial products have increased, widening the information gap between advisers and their clients. Plan fiduciaries, plan participants and IRA investors must often rely on experts for advice, but are unable to assess the quality of the expert's advice or effectively guard against the adviser's conflicts of interest. This challenge is especially true of small retail investors who typically do not have financial expertise and can ill-afford lower returns to of their retirement savings caused by conflicts. As baby boomers retire, they are increasingly moving money from ERISA-covered plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs where both good and bad investment choices are myriad and advice that is conflicted is commonplace. Such "rollovers" will total more than \$2 trillion over the next 5 years. These trends were not apparent when the Department promulgated the 1975 rule. At that time, 401(k) plans did not yet exist and IRAs had only just been authorized. These changes in the marketplace, as well as the Department's experience with the rule since 1975, support the Department's efforts to reevaluate and revise the rule through a public process of notice and comment rulemaking.

On October 22, 2010, the Department published a notice in the **Federal Register** (75 FR 65263) (2010 Proposal) proposing to amend 29 CFR 2510.3-21(e) (40 FR 50843, Oct. 31, 1975), which defines when a person renders investment advice to an employee benefit plan, and consequently acts as a fiduciary under ERISA section 3(21)(A)(ii) (29 U.S.C. 1002(21)(A)(ii)). In response to this proposal, the Department received over 300 comment letters. A public hearing on the 2010 Proposal was held in Washington, DC on March 1 and 2, 2011, at which 38 speakers testified. The transcript of the hearing was made available for additional public comment and the Department received over 60 additional comment letters. In addition, the Department has held more than three dozen meetings with interested parties.

A number of commenters urged consideration of other means to attain the objectives of the 2010 Proposal and of additional analysis of the proposal's expected costs and benefits. In light of these comments and because of the significance of this rule, the Department decided to issue a new proposed regulation. On September 19, 2011 the Department announced that it would withdraw the 2010 Proposal and propose a new rule defining the term "fiduciary" for purposes of section 3(21)(A)(ii) of ERISA. Today's notice in the **Federal Register** fulfills that announcement in publishing both a new proposed regulation and withdrawing the 2010 Proposal. Consistent with the President's Executive Orders 12866 and 13563, extending the rulemaking process will give the public a full opportunity to evaluate and comment on the revised proposal and updated economic analysis. In addition, we are simultaneously publishing proposed new and amended exemptions from ERISA and the Code's prohibited transaction rules designed to allow certain broker-dealers, insurance agents and others that act as investment advice fiduciaries to nevertheless continue to receive common forms of compensation that would otherwise be prohibited, subject to appropriate safeguards. The existing class exemptions will otherwise remain in place, affording flexibility to fiduciaries who currently use the exemptions or who wish to use the exemptions in the future. The proposed new regulatory package takes into account robust public comment and input and represents a substantial change from the 2010

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COI EBSA PASS BACK
DRAFT – 4/08/2015

proposal; balancing long overdue consumer protections with flexibility for the industry in order to minimize disruptions to current business models.

In crafting the current regulatory package, the Department has benefitted from the views and perspectives expressed in public comments to the 2010 Proposal. For example, the Department has responded to concerns about the impact of the prohibited transaction rules on the marketplace for retail advice by proposing a broad package of exemptions that are intended to ensure that advisers and their firms make recommendations that are in the best interest of plan participants and IRA owners, ~~without disrupting common fee arrangements.~~ In response to commenters, the Department has also determined not to include, as fiduciary in nature, appraisals or valuations of employer securities provided to ESOPs ~~or to certain collective investment funds holding assets of plan investors.~~ On a more technical point, the Department also followed recommendations that it not automatically assign fiduciary status to investment advisers under the Advisers Act, but instead follow an entirely functional approach to fiduciary status. In light of public comments, the new proposal also makes a number of other changes to the regulatory proposal. For example, the Department has addressed concerns that it could be misread to extend fiduciary status to persons that prepare newsletters, television commentaries, or conference speeches that contain recommendations made to the general public. Similarly, the rule makes clear that that fiduciary status does not extend to internal company personnel who give advice on behalf of their plan sponsor as part of their duties, but receive no compensation beyond their salary for the provision of advice. The Department is appreciative of the comments it received to the 2010 Proposal, and more fully discusses a number of the comments that influenced change in the sections that follow. In addition, the Department is eager to receive comments on the new proposal in general, and requests public comment on a number of specific aspects of the package as indicated below.

The following discussion summarizes the 2010 Proposal, describes some of the concerns and issues raised by commenters, and explains the new proposed regulation, which is published with this notice.

B. The Statute and Existing Regulation

ERISA (the “Act”) is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in the Act’s imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.⁴ In addition, they must refrain from engaging in “prohibited transactions,” which the Act ~~does not permit~~ because of the dangers to the interests of the plan

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Comment [A14]: EBSA revised to address OMB edits suggesting this clause was confusing.

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⁴ ERISA section 404(a).

COI EBSA PASS BACK
DRAFT – 4/08/2015

and IRA posed by the transactions.⁵ When fiduciaries violate ERISA’s fiduciary duties or the prohibited transaction rules, they may be held personally liable for any losses to the investor resulting from the breach.⁶ In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also protects individuals who save for retirement through tax-favored accounts that are not generally covered by ERISA, such as IRAs, through a more limited regulation of fiduciary conduct. Although ERISA’s general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs and other plans not covered by ERISA, these fiduciaries are subject to the prohibited transaction rules of the Code. In this context, however, the sole statutory sanction for engaging in the illegal transactions is the assessment of an excise tax enforced by the Internal Revenue Service (IRS). Thus, unlike participants in plans covered by Title I of ERISA, IRA owners do not have a statutory right to bring suit against fiduciaries under ERISA for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct.

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

The statutory definition contained in section 3(21)(A) deliberately casts a wide net in assigning fiduciary responsibility with respect to plan assets. Thus, “any authority or control” over plan assets is sufficient to confer fiduciary status, and any person who renders “investment advice for a fee or other compensation, direct or indirect” is an investment advice fiduciary, regardless of whether they have direct control over the plan’s assets, and regardless of their status as an investment adviser and/or broker under the federal securities laws. The statutory definition and associated fiduciary responsibilities were enacted to ensure that plans can depend on persons who provide investment advice for a fee to provide recommendations that are prudent, loyal, and untainted by conflicts of interest. In the absence of fiduciary status, persons who provide investment advice would neither be subject to ERISA’s fundamental fiduciary standards, nor accountable under ERISA or the Code for imprudent, disloyal, or tainted advice, no matter how egregious the misconduct or how substantial the losses. Plans, individual participants and beneficiaries, and IRA owners often are not financial experts and consequently must rely on professional advice to make critical investment decisions. The statutory definition, prohibitions

Comment [A15]: Is this emphasis added? If so, would acknowledge or not include it.
EBSA Response: OK

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⁵ ERISA section 406. The Act also prohibits certain transactions between a plan and a “party in interest.”

⁶ ERISA section 409; *see also* ERISA section 405.

COI EBSA PASS BACK
DRAFT – 4/08/2015

on conflicts of interest, and core fiduciary obligations of prudence and loyalty, all reflect Congress' recognition in 1974 of the fundamental importance of such advice to protect savers' retirement nest eggs. In the years since then, the significance of financial advice has become still greater with increased reliance on participant-directed plans and self-directed IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 C.F.R. 2510.3-21(c)(1975) defining the circumstances under which a person is treated as providing "investment advice" to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA (the "1975 regulation"), and the Department of the Treasury issued a virtually identical regulation under the Code.⁷ The regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the regulation, for advice to constitute "investment advice," an adviser who is not a fiduciary under another provision of the statute must – (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan or IRA. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue.

As the marketplace for financial services has developed in the years since 1975, the five-part test may now undermine, rather than promote, the statutes' text and purposes. The narrowness of the

⁷ The 1975 regulation provides in relevant part:

(c)(1) Investment advice. (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act) and this paragraph, only if:

(i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and

(ii) Such person either directly or indirectly (e.g., through or together with any affiliate)—

(A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or

(B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

40 FR 50842 (Oct. 31, 1975). The Department of Treasury issued a virtually identical regulation, at 26 CFR 54.4975-9(c), which interprets Code section 4975(e)(3). 40 FR 50840 (Oct. 31, 1975). Under section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), the authority of the Secretary of the Treasury to interpret section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. References in this document to sections of ERISA should be read to refer also to the corresponding sections of the Code.

COIEBSA PASS BACK
DRAFT – 4/08/2015

1975 regulation allows advisers, brokers, consultants and valuation firms to play a central role in shaping plan and IRA investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility. Even when plan sponsors, participants, beneficiaries, and IRA owners clearly rely on paid advisers for impartial guidance, the regulation allows many advisers to avoid fiduciary status and disregard ERISA’s fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest (e.g., products that generate higher fees for the adviser even if there are identical lower-fee products available), give imprudent advice, and engage in transactions that would otherwise not be permitted by the Act and the Code without fear of accountability under either ERISA or the Code.

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Instead of ensuring that trusted advisers give prudent and unbiased advice in accordance with fiduciary norms, the current regulation erects a multi-part series of technical impediments to fiduciary responsibility. The Department is concerned that the specific elements of the five-part test – which are not found in the text of the Act or Code – now work to frustrate statutory goals and defeat advice recipients’ legitimate expectations. In light of the importance of the proper management of plan and IRA assets, it is critical that the regulation defining investment advice draws appropriate distinctions between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not. In practice, the current regulation appears not to do so. Instead, the lines drawn by the five-part test frequently permit evasion of fiduciary status and responsibility in ways that undermine the statutory text and purposes.

One example of the five-part test’s shortcomings is the requirement that advice be furnished on a “regular basis.” As a result of the requirement, if a small plan hires an investment professional or appraiser on a one-time basis for an investment recommendation or valuation opinion on a large, complex investment, the adviser has no fiduciary obligation to the plan under ERISA. Even if the plan is considering investing all or substantially all of the plan’s assets, lacks the specialized expertise necessary to evaluate the complex transaction on its own, and the consultant fully understands the plan’s dependence on his professional judgment, the consultant is not a fiduciary because he does not advise the plan on a “regular basis.” The plan could be investing hundreds of millions of dollars in plan assets, and it could be the most critical investment decision the plan ever makes, but the adviser would have no fiduciary responsibility under the 1975 regulation. While a consultant who regularly makes less significant investment recommendations to the plan would be a fiduciary if he satisfies the other four prongs of the regulatory test, the one-time consultant on an enormous transaction has no fiduciary responsibility.

In such cases, the “regular basis” requirement, which is not found in the text of ERISA or the Code, fails to draw a sensible line between fiduciary and non-fiduciary conduct, and undermines the law’s protective purposes. A specific example is the one-time purchase of a group annuity to cover all of the benefits promised to substantially all of a plan’s participants for the rest of their lives when a defined benefit plan terminates or a plan’s expenditure of hundreds of millions of dollars on a single real estate transaction with the assistance of a financial adviser hired for purposes of that one transaction. Despite the clear importance of the decisions and the clear reliance on paid advisers, the advisers would not be plan fiduciaries. On a smaller scale that is still immensely important for the affected individual, the “regular basis” requirement also deprives individual participants and IRA owners of statutory protection when they seek

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COIEBSA PASS BACK
DRAFT – 4/08/2015

specialized advice on a one-time basis, even if the advice concerns the investment of all or substantially all of the assets held in their account (e.g., as in the case of an annuity purchase or a roll-over from a plan to an IRA or from one IRA to another).

Under the five-part test, fiduciary status can also be defeated by arguing that the parties did not have a *mutual* agreement, arrangement, or understanding that the advice would serve as a *primary basis* for investment decisions. Investment professionals in today's marketplace frequently market retirement investment services in ways that clearly suggest the provision of tailored or individualized advice, while at the same time disclaiming in fine print the requisite "mutual" understanding that the advice will be used as a primary basis for investment decisions.

Similarly, there appears to be a widespread belief among broker-dealers that they are not fiduciaries with respect to plans or IRAs because they do not hold themselves out as registered investment advisers, even though they often market their services as financial or retirement planners. The import of such disclaimers – and of the fine legal distinctions between brokers and registered investment advisers – is often completely lost on plan participants and IRA owners who receive investment advice. As shown in a study conducted by the RAND Institute for Civil Justice for the Securities and Exchange Commission (SEC), consumers often do not read the legal documents and do not understand the difference between brokers and registered investment advisers particularly when brokers adopt such titles as "financial adviser" and "financial manager."⁸

Even in the absence of boilerplate fine print disclaimers, however, it is far from evident how the "primary basis" element of the five-part test promotes the statutory text or purposes of ERISA and the Code. If, for example, a plan hires multiple specialized advisers for an especially complex transaction, it should be able to rely upon all of the consultants' advice, regardless of whether one could characterize any particular consultant's advice as primary, secondary, or tertiary. Presumably, paid consultants make recommendations – and retirement investors pay for them – with the hope or expectation that the recommendations could, in fact, be relied upon in making important decisions. When a plan, participant, beneficiary, or IRA owner directly or indirectly pays for advice upon which it can rely, there appears to be little statutory basis for drawing distinctions based on a subjective characterization of the advice as "primary," "secondary," or other.

In other respects, the current regulatory definition could also benefit from clarification. For example, a number of parties have argued that the regulation, as currently drafted, does not encompass advice as to the selection of money managers or mutual funds. Similarly, they have argued that the regulation does not cover advice given to the managers of pooled investment vehicles that hold plan assets contributed by many plans, as opposed to advice given to particular plans. Parties have even argued that advice was insufficiently "individualized" to fall within the

⁸ Angela A. Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, Farrukh Suvankulov, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND Institute for Civil Justice, commissioned by the U.S. Securities and Exchange Commission, 2008, at { HYPERLINK "http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf" } }

COI EBSA PASS BACK
DRAFT – 4/08/2015

scope of the regulation because the advice provider had failed to prudently consider the “particular needs of the plan,” notwithstanding the fact that both the advice provider and the plan agreed that individualized advice based on the plan’s needs would be provided, and the adviser actually made specific investment recommendations to the plan. Although the Department disagrees with each of these interpretations of the current regulation, the arguments nevertheless suggest that clarifying regulatory text could be helpful.

Changes in the financial marketplace have enlarged the gap between the 1975 regulation’s effect and the Congressional intent of the statutory definition. The greatest change is the predominance of individual account plans, many of which require participants to make investment decisions for their own accounts. In 1975, private-sector defined benefit pensions --- mostly large, professionally managed funds --- covered over 27 million active participants and held assets totaling almost \$186 billion. This compared with just 11 million active participants in individual account defined contribution plans with assets of just \$74 billion.⁹ Moreover, the great majority of defined contribution plans at that time were professionally managed, not participant-directed. In 1975, 401(k) plans did not yet exist and IRAs had just been authorized as part of ERISA’s enactment the prior year. In contrast, by 2012 defined benefit plans covered just under 16 million active participants, while individual account-based defined contribution plans covered over 68 million active participants -- including 63 million participants in 401(k)-type plans that are participant-directed.¹⁰

With this transformation, plan participants, beneficiaries and IRA owners have become major consumers of investment advice that is paid for directly or indirectly. By 2012, 97 percent of 401(k) participants were responsible for directing the investment of all or part of their own account, up from 86 percent as recently as 1999 and XX in 1975 when ERISA was enacted.¹¹ Also, in 2013, more than 34 million households owned IRAs.¹²

Many of the consultants and advisers who provide investment-related advice and recommendations receive compensation from the financial institutions whose investment products they recommend. This gives the consultants and advisers a strong bias, conscious or unconscious, to favor investments that provide them greater compensation rather than those that may be most appropriate for the participants. Unless they are fiduciaries, however, these consultants and advisers are free under ERISA and the Code, not only to receive such conflicted compensation, but also to act on their conflicts of interest to the detriment of their customers. In

⁹ U.S. Department of Labor, *Private Pension Plan Bulletin Historical Tables and Graphs*, (Dec. 2010), at { HYPERLINK "<http://www.dol.gov/ebsa/pdf/historicaltables.pdf>" }.

¹⁰ U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2008 Form 5500 Annual Reports*, (Dec. 2010), at { HYPERLINK "<http://www.dol.gov/ebsa/PDF/2008pensionplanbulletin.PDF>" }.

¹¹ U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 1999 Form 5500 Annual Reports*, Number 12, Summer 2004 (Apr. 2008), at { HYPERLINK "<http://www.dol.gov/ebsa/PDF/1999pensionplanbulletin.PDF>" }.

¹² Brien, Michael J., and Constantijn W.A. Panis. *Analysis of Financial Asset Holdings of Households on the United States: 2013 Update*. Advanced Analytic Consulting Group and Deloitte, Report Prepared for the U.S. Department of Labor, 2014.

addition, plans, participants, beneficiaries, and IRA owners now have a much greater variety of investments to choose from, creating a greater need for expert advice. Consolidation of the financial services industry and innovations in compensation arrangements have multiplied the opportunities for self-dealing and reduced the transparency of fees.

The absence of adequate fiduciary protections and safeguards is especially problematic in light of the growth of participant-directed plans and self-directed IRAs; the gap in expertise and information between advisers and the customers who depend upon them for guidance; and the advisers' significant conflicts of interest.

When Congress enacted ERISA in 1974, it made a judgment that plan advisers should be subject to ERISA's fiduciary regime and that plan participants, beneficiaries and IRA owners should be protected from conflicted transactions by the prohibited transaction rules. The wisdom of that judgment is amply supported by the economic analysis set forth herein. More fundamentally, however, the statutory language was designed to cover a much broader category of persons who provide fiduciary investment advice based on their functions and to limit their ability to engage in self-dealing and other conflicts of interest than is currently reflected in the five-part test.

While many advisers are committed to providing high-quality advice and always put their customers' best interests first, the 1975 regulation makes it far too easy for advisers in today's marketplace not to do so and to avoid fiduciary responsibility even when they clearly purport to give individualized advice and to act in the client's best interest, rather than their own.

C. The 2010 Proposal

In 2010, the Department proposed a new regulation that would have replaced the five-part test with a new definition of what counted as fiduciary investment advice for a fee. At that time, the Department did not propose any new prohibited transaction exemptions and acknowledged uncertainty regarding whether existing exemptions would be available, but specifically invited comments on whether new or amended exemptions should be proposed. The proposal also provided carve-outs for conduct that would not result in fiduciary status. The general definition included the following types of advice: (1) appraisals or fairness opinions concerning the value of securities or other property; (2) recommendations as to the advisability of investing in, purchasing, holding or selling securities or other property; and (3) recommendations as to the management of securities or other property. Reflecting the Department's longstanding interpretation of the 1975 regulations, the 2010 proposal made clear that investment advice under the proposal includes advice provided to plan participants, beneficiaries and IRA owners as well as to plan fiduciaries.

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Under the 2010 Proposal, a paid adviser would have been treated as a fiduciary if the adviser provided one of the above types of advice and either: (1) represented that he or she was acting as an ERISA fiduciary; (2) was already an ERISA fiduciary to the plan by virtue of having control over the management or disposition of plan assets, or by having discretionary authority over the administration of the plan; (3) was already an investment adviser under the Investment Advisers Act of 1940 (Advisers Act); or (4) provided the advice pursuant to an agreement or understanding that the advice may be considered in connection with plan investment or asset management decisions and would be individualized to the needs of the plan, plan participant or

COI EBSA PASS BACK
DRAFT – 4/08/2015

beneficiary, or IRA owner. The 2010 Proposal also provided that, for purposes of the fiduciary definition, relevant fees included any direct or indirect fees received by the adviser or an affiliate from any source. Direct fees are payments made by the advice recipient to the adviser including transaction-based fees, such as brokerage, mutual fund or insurance sales commissions. Indirect fees are payments to the adviser from any source other than the advice recipient such as revenue sharing payments from a mutual fund.

The 2010 Proposal included specific carve-outs for the following actions that the Department believed should not result in fiduciary status. In particular, a person would not have become a fiduciary by—

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1. Providing recommendations as a seller or purchaser with interests adverse to the plan, its participants, or IRA owners, if the advice recipient reasonably should have known that the adviser was not providing impartial investment advice and the adviser had not acknowledged fiduciary status.
2. Providing investment education information and materials in connection with an individual account plan.
3. Marketing or making available a menu of investment alternatives that a plan fiduciary could choose from, and providing general financial information to assist in selecting and monitoring those investments, if these activities include a written disclosure that the adviser was not providing impartial investment advice.
4. Preparing reports necessary to comply with ERISA, the Code, or regulations or forms issued thereunder, unless the report valued assets that lack a generally recognized market, or served as a basis for making plan distributions.

The 2010 Proposal applied to the definition of an “investment advice fiduciary” in section 4975(e)(3)(B) of the Code as well as to the parallel ERISA definition. These provisions apply to both certain ERISA covered plans, and certain non-ERISA plans such as individual retirement accounts.

In the preamble to the 2010 Proposal, the Department also noted that it had previously interpreted the 1975 regulation as providing that a recommendation to a plan participant on how to invest the proceeds of a contemplated plan distribution was not fiduciary investment advice. Advisory Opinion 2005-23A (Dec. 7, 2005). The Department specifically asked for comments as to whether the final rule should include such recommendations as fiduciary advice.

The 2010 Proposal prompted a large number of comments and a vigorous debate. As noted above, the Department made special efforts to encourage the regulated community’s participation in this rulemaking. In addition to an extended comment period, the Department held a two-day public hearing. Additional time for comments was allowed following the hearing and publication of the hearing transcript on the Department’s website and Department representatives held numerous meetings with interested parties. Many of the comments concerned the Department’s conclusions regarding the likely economic impact of the proposal, if adopted. A number of commenters urged the Department to undertake additional analysis of expected costs and benefits particularly with regard to the 2010 Proposal’s coverage of IRAs. After consideration of these comments and in light of the significance of this rulemaking to the

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retirement plan service provider industry, plan sponsors and participants, beneficiaries and IRA owners, the Department decided to take more time for review and to issue a new proposed regulation for comment.

D. The New Proposal

The new proposed rule makes many revisions to the 2010 Proposal, although it also retains aspects of that proposal’s essential framework. The new proposal broadly updates the definition of fiduciary investment advice, and also provides a series of carve-outs from the fiduciary investment advice definition for communications that should not be viewed as fiduciary in nature. The definition generally covers the following categories of advice: (1) investment recommendations, (2) investment management recommendations, (3) appraisals of investments, or (4) recommendations of persons to provide investment advice for a fee or to manage plan assets. Persons who provide such advice fall within the general definition of a fiduciary if they either (a) represent that they are acting as a fiduciary under ERISA or the Code or (b) provide the advice pursuant to an agreement, arrangement, or understanding that the advice is individualized or specifically directed to the recipient for consideration in making investment or investment management decisions regarding plan assets.

The new proposal includes several carve-outs for persons who do not represent that they are acting as ERISA fiduciaries, some of which were included in some form in the 2010 Proposal but many of which were not. Subject to specified conditions, these carve-outs cover —

- (1) statements or recommendations made to a “plan investor with financial expertise” by a counterparty acting in an arm’s length transaction;
- (2) offers or recommendations to plan fiduciaries of ERISA plans to enter into a swap or security-based swap that is regulated under the Securities Exchange Act or the Commodity Exchange Act;
- (3) statements or recommendations provided to a plan fiduciary of an ERISA plan by an employee of the plan sponsor if the employee receives no fee beyond his or her normal compensation;
- (4) marketing or making available a platform of investment alternatives to be selected by a plan fiduciary for an ERISA participant-directed individual account plan;
- (5) the identification of investment alternatives that meet objective criteria specified by a plan fiduciary of an ERISA plan or the provision of objective financial data to such fiduciary;
- (6) the provision of an appraisal, fairness opinion or a statement of value to an ESOP regarding employer securities, to a collective investment vehicle holding plan assets, or to a plan for meeting reporting and disclosure requirements; and

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Comment [A16]: Need to use a different term (and I think don’t use this term below) since sophisticated feels kind of condescending to other investors.
EBSA Response: OK. It is hard to find a concise substitute so we used phrase from Talking Points document.

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Comment [A17]: Need this clause if just said covers all swaps?
EBSA Response: Technically a “swap” is a defined term under Dodd Frank that does not include a “security based swap,” so we need both to be accurate.

Comment [A18]: Does this mean a DC plan? If so, would say so unless it will be obvious to everyone else what it means.
EBSA: It is a well understood term in the ERISA space, but we use “participant directed individual account plan” later in the document so we revised for consistency. Also, some DC plans are not participated directed.

COIEBSA PASS BACK
DRAFT – 4/08/2015

(7) information and materials that constitute “investment education” or “retirement education”.

The new proposal applies the same definition of “investment advice” to the definition of “fiduciary” in section 4975(e)(3) of the Code and thus applies to investment advice rendered to IRAs. “Plan” is defined in the new proposal to mean any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code. For ease of reference in this proposal, the term IRA has been inclusively defined to mean any account described in Code section 4975(e)(1)(B) through (F), such as a true individual retirement account described under Code section 408(a) and health savings account described in section 223(d) of the Code.¹³

Many of the differences between the new proposal and the 2010 Proposal reflect the input of commenters on the 2010 Proposal as part of the public notice and comment process. For example, some commenters argued that the 2010 Proposal swept too broadly by making investment recommendations fiduciary in nature simply because the adviser was a plan fiduciary for purposes unconnected with the advice or an investment adviser under the Advisers Act. In their view, such status-based criteria were in tension with the Act’s functional approach to fiduciary status and would have resulted in unwarranted and unintended compliance issues and costs. Other commenters objected to the lack of a requirement for these status-based categories that the advice be individualized to the needs of the advice recipient. The new proposal incorporates these suggestions: an adviser’s status as an investment adviser under the Advisers Act or as an ERISA fiduciary for reasons unrelated to advice are no longer factors in the definition. In addition, unless the adviser represents that he or she is a fiduciary with respect to advice, the advice must be provided pursuant to an agreement, arrangement, or understanding that the advice is individualized or specifically directed to the recipient to be treated as fiduciary advice.

Furthermore, the carve-outs that treat certain conduct as non-fiduciary in nature have been modified, clarified, and expanded in response to comments. For example, the carve-out for certain valuations from the definition of fiduciary investment advice has been modified and expanded. Under the 2010 Proposal, appraisals and valuations for compliance with certain reporting and disclosure requirements were not treated as fiduciary advice. The new proposal additionally provides a carve-out from fiduciary treatment for appraisal and fairness opinions for ESOPs regarding employer securities. Although, the Department remains concerned about valuation advice concerning an ESOP’s purchase of employer stock and about plans’ reliance on that advice, the Department has concluded that the concerns regarding valuations of closely held employer stock in ESOP transaction raise unique issues that are more appropriately addressed in a separate regulatory initiative. Additionally, the carve-out for valuations conducted for reporting and disclosure purposes has been expanded to include reporting and disclosure

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¹³ As discussed below in Section E. Coverage of IRAs and Other Non-ERISA Plans, in recognition of differences among the various types of non-ERISA plan arrangements described in Code section 4975(e)(1)(B) through (F), the Department solicits comments on whether it is appropriate for the regulation to cover the full range of these arrangements. These non-ERISA plan arrangements are tax favored vehicles under the Code like IRAs, but are not intended for retirement savings.

COI EBSA PASS BACK
DRAFT – 4/08/2015

obligations outside of ERISA and the Code, and is applicable to both ERISA plans and IRAs.

Many other modifications to the other ~~carve-outs~~ from fiduciary status, as well as new ~~carve-outs~~ and prohibited transaction exemptions, are described below in Section IV – “The Provisions of the New Proposal.”

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III. COORDINATION WITH OTHER FEDERAL AGENCIES

Many comments to the 2010 rulemaking emphasized the need to harmonize the Department’s efforts with rulemaking activities under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law No. 111-203, 124 Stat. 1376 (2010), (Dodd-Frank Act), in particular, the SEC’s standards of care for providing investment advice and the Commodity Futures Trading Commission’s (CFTC) business conduct standards for swap dealers. While the 2010 Proposal discussed statutes over which the SEC and CFTC have jurisdiction, it did not specifically describe inter-agency coordination efforts. In addition, commenters questioned the adequacy of coordination with other agencies regarding IRA products and services. They argued that subjecting SEC-regulated investment advisers and broker-dealers to a special set of ERISA rules for ~~plans and IRAs~~ could lead to additional costs and complexities for individuals who may have several different types of accounts at the same financial institution some of which may be subject only to the SEC rules, and others of which may be subject to both SEC rules and new regulatory requirements under ERISA.

Comment [A19]: Thought an IRA wasn’t a plan. Or at least earlier in preamble, I think you use the term plan to refer to ERISA plans and not IRAs.

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In the course of developing the new proposal and the related proposed prohibited transaction exemptions, the Department has consulted with staff of the SEC and other regulators on an ongoing basis regarding whether the proposals will subject investment advisers and broker-dealers who provide investment advice to requirements that create an undue compliance burden or conflict with their obligations under other federal laws. As part of this consultative process, SEC staff has provided technical assistance and information with respect to retail investors, the marketplace for investment advice and coordinating, to the extent possible, the agencies’ separate regulatory provisions and responsibilities. As the Department moves forward with this project in accordance with the specific provisions of ERISA and the Code, it will continue to consult with staff of the SEC and other regulators on its proposals and their impact on retail investors and other regulatory regimes. One result of these discussions, particularly with staff of the CFTC and SEC, is the new provision at paragraph (b)(1)(ii) of the proposed regulations concerning counterparty transactions with swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants. Under the terms of that paragraph, such persons will not be treated as ERISA fiduciaries merely because, when acting as counterparties to swap or security-based swap transactions, they give information and perform actions required for compliance with the requirements of the business conduct standards of the Dodd-Frank Act and its implementing regulations.

In pursuing these consultations, the Department has aimed to coordinate and minimize conflicting or duplicative provisions between ERISA, the Code and federal securities laws, to the extent possible. However, the governing statutes do not permit the Department to make the obligations of fiduciary investment advisers under ERISA and the Code identical to the duties of advice providers under the securities laws. ERISA and the Code establish consumer protections for some investment advice that does not fall within the ambit of federal securities laws, and vice

COIEBSA PASS BACK
DRAFT – 4/08/2015

versa. Even if each of the relevant agencies were to adopt an identical definition of “fiduciary”, the legal consequences of the fiduciary designation would vary between agencies because of differences in the specific duties and remedies established by the different federal laws at issue. ERISA and the Code place special emphasis on the elimination or mitigation of conflicts of interest and adherence to substantive standards of conduct, as reflected in the prohibited transaction rules and ERISA’s standards of fiduciary conduct. The specific duties imposed on fiduciaries by ERISA and the Code stem from legislative judgments on the best way to protect the public interest in tax-preferred benefit arrangements that are critical to workers’ financial and physical health. The Department has taken great care to honor ERISA and the Code’s specific text and purposes.

At the same time, the Department has worked hard to understand the impact of the proposed rule on firms subject to the securities laws and other federal laws, and to take the effects of those laws into account so as to appropriately calibrate the impact of the rule on those firms. The proposed regulation reflects these efforts. In the Department’s view, it neither undermines, nor contradicts, the provisions or purposes of the securities laws, but instead works in harmony with them. The Department has coordinated – and will continue to coordinate – its efforts with other federal agencies to ensure that the various legal regimes are harmonized to the fullest extent possible.

The Department has also consulted with the Department of the Treasury and the IRS, particularly on the subject of IRAs. Although the Department has responsibility for issuing regulations and prohibited transaction exemptions under section 4975 of the Code, which applies to IRAs, the IRS maintains general responsibility for enforcing the tax laws. The IRS’ responsibilities extend to the imposition of excise taxes on fiduciaries who participate in prohibited transactions.¹⁴ As a result, the Department and the IRS share responsibility for combating self-dealing by fiduciary investment advisers to tax-qualified plans and IRAs. Paragraph (e) of the proposed regulation, in particular, recognizes this jurisdictional intersection.

When the Department announced that it would issue a re-proposal, it stated that it would consider proposing new and/or amended prohibited transaction exemptions to address the concerns of commenters about the broader scope of the fiduciary definition and its impact on the fee practices of brokers and other advisers. Commenters had expressed concern about whether longstanding exemptions granted by the Department allowing advisers, despite their fiduciary status under ERISA, to receive commissions in connection with mutual funds, securities and insurance products would remain applicable under the new rule. As explained more fully below, the Department is simultaneously publishing in the notice section of today’s **Federal Register** proposed prohibited transaction class exemptions to address these concerns. The Department believes that existing exemptions and these new proposed exemptions will preserve the ability to engage in common fee arrangements, while protecting plan participants, beneficiaries and IRA owners from abusive practices that may result from conflicts of interest.

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¹⁴ Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 214 (2010 ed.).

COI EBSA PASS BACK
DRAFT – 4/08/2015

The terms of these new exemptions are discussed in more detail below and in the preambles to the proposed exemptions. While the exemptions differ in terms and coverage, each imposes a “best interest” standard on fiduciary investment advisers. Thus, for example, the Best Interest Contract Exemption requires the investment advice fiduciary and associated financial institution to expressly agree to provide advice that is in the “best interest” of the advice recipient. As proposed, the best interest standard is intended to mirror the duties of prudence and loyalty, as applied in the context of fiduciary investment advice under sections 404(a)(1)(A) and (B) of ERISA. Thus, the “best interest” standard is rooted in the longstanding trust-law duties of prudence and loyalty adopted in section 404 of ERISA and in the cases interpreting those standards.

Accordingly, the Best Interest Contract Exemption provides:

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

This “best interest” standard is not intended to add to or expand the ERISA section 404 standards of prudence and loyalty as they apply to the provision of investment advice to ERISA covered plans. Advisers to ERISA-covered plans are already required to adhere to the fundamental standards of prudence and loyalty, and can be held accountable for violations of the standards. Rather, the primary impact of the “best interest” standard is on the IRA market. Under the Code, advisers to IRAs are subject only to the prohibited transaction rules. Incorporating the best interest standard in the proposed Best Interest Contract Exemption effectively requires advisers to comply with these basic fiduciary standards as a condition of engaging in transactions that would otherwise be prohibited because of the conflicts of interest they create. Additionally, the exemption ensures that IRA owners and investors have a contract-based claim to hold their fiduciary advisers accountable if they violate these basic obligations of prudence and loyalty.

IV. THE PROVISIONS OF THE NEW PROPOSAL

The new proposal would amend the definition of investment advice in 29 CFR 2510.3-21 (1975) of the regulation to replace the restrictive five-part test with a new definition that better comports with the statutory language in ERISA and the Code.¹⁵ As explained below, the proposal accomplishes this by first describing the kinds of communications and relationships that would

¹⁵ For purposes of readability, this proposed rulemaking republishes 29 CFR 2510.3-21 in its entirety, as revised, rather than only the specific amendments to this section.” See 29 CFR 2510.3-21(d)-Execution of securities transactions.

Comment [A20]: Global comment: As a general matter, I'd flag ways that you adjusted the rule compared to the 2010 rule in response to comments, but otherwise would discuss how it compares to current law. I find it confusing to have a full comparison to both current law and the 2010 rule, including highlighting the similarities with the 2010 rule.

RESPONSE: We think it is important to discuss both changes from the existing 1975 rule and adjustments to the 2010 Proposal based on public comments. We want the regulated community to understand our rationale for making changes to the 1975 rule and to realize that we took the time to carefully deliberate their comments in shaping the revisions to the 2010 Proposal.

Comment [A21]: Agree. Just wouldn't flag similarities and differences compared to 2010 rule when are unrelated to comments.

generally constitute fiduciary investment advice if the adviser receives a fee or other compensation. Rather than add additional elements that must be met in all instances, as under the current regulation, the proposal describes several specific types of advice or communications that would not be treated as investment advice. In the Department’s view, this structure is faithful to the remedial purpose of the statute, but avoids burdening activities that do not implicate relationships of trust and expectations of impartiality.

A. Categories of Advice or Recommendations

Paragraph (a)(1) of the proposal sets forth the following types of advice, which, when provided in exchange for a fee or other compensation, whether directly or indirectly, and given under circumstances described in paragraph (a)(2), would be “investment advice” unless one of the ~~carve-outs~~ in paragraph (b) applies. The listed types of advice are—

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- (i) A recommendation as to the advisability of acquiring, holding, disposing of or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;
- (ii) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;
- (iii) An appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA; or
- (iv) A recommendation of a person who is also going to receive a fee or other compensation to provide any of the types of advice described in paragraphs (i) through (iii) above.

Except for the prong of the definition concerning appraisals and valuations discussed below, the proposal is structured so that communications must constitute a “recommendation” to fall within the scope of fiduciary investment advice. In that regard, as stated earlier in Section III concerning coordination with other Federal Agencies, the Department has consulted with staff of other agencies with rulemaking authority over investment advisers and broker-dealers. FINRA Policy Statement 01-23 sets forth guidelines to assist brokers in evaluating whether a particular communication could be viewed as a recommendation, thereby triggering application of FINRA’s Rule 2111 that requires that a firm or associated person have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer.¹⁶ Although the regulatory context for the FINRA guidance is

Comment [A22]: Makes it sound like (i) to (iii) don’t require the adviser to have received compensation.

RESPONSE: We disagree. It is necessary to keep this here. This paragraph captures a recommendation of another person to provide fiduciary investment advice or fiduciary management services. Without “for a fee or other compensation” in this paragraph – which refers to fee/compensation received by the other person – this would capture a person’s recommendation of a non-fiduciary adviser.

Comment [A23]: Don’t (i) to (iii) apply to indirect compensation too? If so, I think are covered by clarifying that as have done at top and is confusing to include the clause “for a fee or other compensation here.” If (i) to (iii) don’t cover indirect comp, then would add “paid by that person” at the end of this line.

EBSA Response: We have tried to revise this paragraph to make the point clearer, and show why this is still needed in (iv).

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¹⁶See also FINRA’s Regulatory Notice 11-02, 12-25 and 12-55. Regulatory Notice 11-02 includes the following discussion:

(Footnote continued on next page)

somewhat different, the Department believes that it provides useful standards and guideposts for distinguishing investment education from investment advice under ERISA. Accordingly, the Department specifically solicits comments on whether it should adopt some or all of the standards developed by FINRA in defining communications that rise to the level of a recommendation for purposes of distinguishing between investment education and investment advice under ERISA.

Additionally, as paragraph (d) of the proposal makes clear, the regulation does not treat the mere execution of a securities transaction at the direction of a plan or IRA owner as fiduciary activity. This paragraph remains unchanged from the 1975 regulation other than to update references to the proposal's structure. The definition's scope remains limited to advice relationships, as delineated in its text and does not impact merely administrative or ministerial activities necessary for a plan or IRA's functioning. It also does not apply to order taking where no advice is provided.

(1) Recommendations to distribute plan assets

Paragraph (a)(1)(i) specifically includes recommendations concerning the investment of securities to be rolled over or otherwise distributed from the plan or IRA. Noting the Department's position in Advisory Opinion 2005-23A that it is not fiduciary advice to make a recommendation as to distribution options even if that is accompanied by a recommendation as to where the distribution would be invested, (Dec. 7, 2005), the 2010 Proposal did not include this type of advice, but the Department requested comments on whether it should be included in a final regulation. Some commenters stated that exclusion of this advice from the final rule would fail to protect participant accounts from conflicted advice in connection with one of the most significant financial decisions that participants make concerning retirement savings. Other commenters argued that including this advice would give rise to prohibited transactions that could disrupt the routine process that occurs when a worker leaves a job, contacts a financial services firm for help rolling over a 401(k) balance, and the firm explains the investments it offers and the benefits of a rollover.

The proposed regulation, if finalized, would supersede Advisory Opinion 2005-23A. Thus, recommendations to take distributions (and thereby withdraw assets from existing plan or IRA

For instance, a communication's content, context and presentation are important aspects of the inquiry. The determination of whether a "recommendation" has been made, moreover, is an objective rather than subjective inquiry. An important factor in this regard is whether—given its content, context and manner of presentation—a particular communication from a firm or associated person to a customer reasonably would be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy. In addition, the more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation. Furthermore, a series of actions that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate. It also makes no difference whether the communication was initiated by a person or a computer software program. These guiding principles, together with numerous litigated decisions and the facts and circumstances of any particular case, inform the determination of whether the communication is a recommendation for purposes of FINRA's suitability rule.

investments or roll into a plan or IRA) or to entrust plan or IRA assets to particular money managers, advisers, or investments would fall within the scope of covered advice. However, as the proposal’s text makes clear, one does not act as a fiduciary merely by providing participants with information about plan or IRA distribution options, including the consequences associated with the available types of benefit distributions. In this regard, the new proposal draws an important distinction between fiduciary investment advice and non-fiduciary investment information and educational materials. The Department believes that the proposal’s treatment of such non-fiduciary educational and informational materials adequately covers the common types of distribution-related information that participants find useful, including information relating to annuitizations and other forms of lifetime income payment options, but welcomes input on other types of information that would help clarify the line between advice and education in this context.

(2) Recommendations as to the management of plan investments

The preamble to the 2010 Proposal stated that the “management of securities or other property” would include advice and recommendations as to the exercise of rights appurtenant to shares of stock (e.g., voting proxies). 75 Fed. Reg. 65266 (Oct. 22, 2010). The Department has long viewed the exercise of ownership rights as a fiduciary responsibility because of its material effect on plan investment goals. 29 CFR 2509.08-2 (2008). Consequently, individualized or specifically directed advice and recommendations on the exercise of proxy or other ownership rights are appropriately treated as fiduciary in nature. Accordingly, the proposed regulation’s provision on advice regarding the management of securities or other property would continue to cover individualized advice or recommendations as to proxy voting and the management of retirement assets in paragraph (a)(1)(ii).

We received comments on the 2010 proposal seeking some clarification regarding its application to certain practices. ~~In this regard, it is the Department’s view that guidelines or other information on voting policies for proxies that are provided to a broad class of investors without regard to a client’s individual interests or investment policy, and which are not directed or presented as a recommended policy for the plan or IRA to adopt, would not rise to the level of fiduciary investment advice under the proposal. Additionally, a recommendation addressed to all shareholders in a proxy statement would not result in fiduciary status on the part of the issuer of the statement or the person who distributes the proxy statement.~~

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Comment [A24]: Are these different from 2010 and in response to comments? If so, would say so.
EBSA Response: OK.

(3) Appraisals

The new proposal, like the current regulation which includes “advice as to the value of securities or other property,” continues to cover certain appraisals and valuation reports. However, it is considerably more focused than the 2010 Proposal. Responding to comments, the proposal in paragraph (a)(1)(iii) covers only appraisals, fairness opinions, or similar statements that relate to a particular transaction. The Department also expanded the 2010 Proposal’s carve-out for general reports or statements of value provided to satisfy required reporting and disclosure rules under ERISA or the Code. The carve-out in the 2010 proposal covered general reports or statements of value that merely reflected the value of an investment of a plan or a participant or beneficiary, provided for purposes of compliance with the reporting and disclosure requirements

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COIEBSA PASS BACK
DRAFT – 4/08/2015

of the ERISA, the Code, and the regulations, forms and schedules issued thereunder, unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries. The ~~carve-out~~ was broadened in this proposal to include valuations provided solely for purposes of compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization (e.g., FINRA) without regard to the type of asset involved. In this manner, the new proposal focuses on instances where the plan or IRA owner is looking to the appraiser for advice on the market value of an asset that the investor is considering to acquire, dispose, or exchange. In many cases the most important investment advice that an investor receives is advice as to how much it can or should pay for hard to value assets. In response to comments, the proposal also contains an entirely new ~~carve-out~~ at paragraph (b)(5)(ii) specifically addressing valuations or appraisals provided to an investment fund (e.g., collective investment fund or pooled separate account) holding assets of various investors in addition to at least one plan or IRA. Also, as mentioned, the Department has decided not to extend fiduciary coverage to valuations or appraisals for ESOPs relating to employer securities at this time because the Department has concluded that its concerns in this space raise unique issues that are more appropriately addressed in a separate regulatory initiative. The proposal's ~~carve-outs~~ do not apply, however, if the provider of the valuation represents or acknowledges that it is acting as a fiduciary with respect to the advice.

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Some representatives of the appraisal industry submitted comments on the 2010 Proposal arguing that ERISA's fiduciary duty to act solely in the interest of the plan and its participants and beneficiaries is inconsistent with the duty of appraisers to provide objective, independent value determinations. The Department disagrees. A biased or inaccurate appraisal does not help a plan, a participant or a beneficiary make prudent investment decisions. Like other forms of investment advice, an appraisal is a tool for plan fiduciaries, participants, beneficiaries, and IRA owners to use in deciding what price to pay for assets and whether to accept or decline proposed transactions. An appraiser complies with his or her obligations as an appraiser – and as a loyal fiduciary – by giving plan fiduciaries or participants an impartial and accurate assessment of the value of an asset in accordance with appraisers' professional standard of care. Nothing in ERISA or this regulation should be read as compelling an appraiser to slant valuation opinions to reflect what the plan wishes the asset were worth rather than what it is really worth. As stated in the preamble to the 2010 Proposal, the Department would expect a fiduciary appraiser's determination of value to be unbiased, fair and objective and to be made in good faith based on a prudent investigation under the prevailing circumstances then known to the appraiser. In the Department's view, these fiduciary standards are fully consistent with professional standards, such as the Uniform Standards of Professional Appraisal Practice (USPAP).¹⁷

¹⁷ A number of commenters also pointed to such professional standards as alternatives to fiduciary treatment under ERISA. While the Department believes that such professional standards are fully consistent with the fiduciary duties, the rights, remedies and sanctions under both ERISA and the Code importantly turn on fiduciary status, and advice on the value of an asset is often the most critical investment advice a plan receives. As a result, treating appraisals as fiduciary advice provides an additional layer of protection for consumers without changing the duties of appraisers.

(4) Recommendations of a person to provide investment advice or management services

The proposal would treat recommendations on the selection of investment managers or advisers as fiduciary investment advice. In the Department’s view, the current regulation already covers such advice. The proposal simply revises the regulation’s text to remove any possible ambiguity. The Department believes that such advice should be treated as fiduciary in nature if provided under the circumstances in paragraph (a)(1)(iv) and for direct or indirect compensation. Covered advice would include recommendations of persons to perform asset management services or to make investment recommendations. Advice as to the identity of the person entrusted with investment authority over retirement assets is often critical to the proper management and investment of those assets. On the other hand, general advice as to the types of qualitative and quantitative criteria to consider in hiring an investment manager would not rise to the level of a recommendation of a person to manage plan investments nor would a trade journal’s endorsement of an investment manager. Similarly, the proposed regulation would not cover recommendations of administrative service providers, property managers, or other service providers who do not provide investment services.

B. The Circumstances Under Which Advice is Provided

As provided in paragraph (a)(2) of the proposal, unless a carve-out applies, a category of advice listed in the proposal would constitute “investment advice” if the person providing the advice, either directly or indirectly (e.g., through or together with any affiliate)—

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- (i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act or Code with respect to the advice described in paragraph (a)(1); or
- (ii) Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

Under paragraph (a)(2)(i), advisers who claim fiduciary status under ERISA or the Code in providing advice will be taken at their word. They may not later argue that the advice was not fiduciary in nature. Nor may they rely upon the carve-outs described in paragraph (b) on the scope of the definition of fiduciary investment advice.

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The 2010 Proposal provided that investment recommendations provided by an investment adviser under the Advisers Act would, in the absence of a carve-out, automatically be treated as investment advice. In response to comments, the new proposal drops this provision. Thus, the proposal avoids making such persons fiduciaries based solely on their or an affiliate’s status as an investment adviser under the Advisers Act. Instead, their fiduciary status will be determined by reference to the same functional test that applies to all persons under the regulation.

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Paragraph (a)(2)(ii) of the proposal avoids treating recommendations made to the general public, or to no one in particular, as investment advice and thus addresses concerns that the general circulation of newsletters, television talk show commentary, or remarks in speeches and

presentations at financial industry educational conferences would result in the person being treated as a fiduciary. This paragraph requires an agreement, arrangement, or understanding that advice is directed to, a specific recipient for consideration in making investment decisions. The parties need not have a meeting of the minds on the extent to which the advice recipient will actually rely on the advice, but they must agree or understand that the advice is individualized or specifically directed to the particular advice recipient for consideration in making investment decisions. In this respect, paragraph (a)(2)(ii) differs significantly from its counterpart in the 2010 Proposal. In particular, and in response to comments, the proposal does not require that advice be individualized to the needs of the plan, participant or beneficiary or IRA owner if the advice is specifically directed to such recipient. Under the proposal, advisers could not specifically direct investment recommendations to individual persons, but then deny fiduciary responsibility on the basis that they did not, in fact, consider the advice recipient's individual needs or intend that the recipient base investment decisions on their recommendations.

Like the 2010 Proposal, and unlike the 1975 regulation, the new proposal does not require that advice be provided on a regular basis. Investment advice that meets the requirements of the proposal, even if provided only once, can be critical to important investment decisions. If the adviser received a direct or indirect fee in connection with its advice, the advice recipients should reasonably expect adherence to fiduciary standards on the same terms as other retirement investors who get recommendations from the adviser on a more routine basis.

C. Carve-Outs from the General Definition

The Department recognizes that in many circumstances, plan fiduciaries, participants, beneficiaries, and IRA owners may receive recommendations or appraisals that, notwithstanding the general definition set forth in paragraph (a) of the proposal, should not be treated as fiduciary investment advice. Accordingly, paragraph (b) contains a number of specific carve-outs from the scope of the general definition. The carve-out at paragraph (b)(5) of the proposal concerning financial reports and valuations was discussed above in connection with appraisals. The carve-out at paragraphs (b)(5)(iii) and (b)(6) of the proposal include communications to plans, plan fiduciaries, plan participants, beneficiaries and IRA owners. The carve-out in paragraph (b)(5)(iii) covers communications to a plan, a plan fiduciary, a plan participant or beneficiary, an IRA or IRA owner solely for purposes of compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation. The carve-out in paragraph (b)(6) covers education. The other carve-outs are limited to communications with plans and plan fiduciaries and do not cover communications to participants, beneficiaries or IRA owners. Those more limited carve-outs are described more fully below. In each instance, the proposed carve-outs are intended to carve out communications that the Department believes Congress did not intend to cover as fiduciary “investment advice” and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality. None of the carve-outs apply where the adviser represents or acknowledges that it is acting as a fiduciary under ERISA with respect to the advice.

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Comment [A25]: Don't follow. Would spell out.
RESPONSE: See text change “at paragraph b1-4, . . .”

Comment [A26]: Don't see any text change here?
EBSA Response: Text revised.

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(1) Seller's

(a) General seller's transactions¹⁸

Paragraph (b)(1)(i) of the proposed regulation provides a carve-out from the general definition for incidental advice provided in connection with an arm's length sale, purchase, loan, or bilateral contract between an expert plan investor and the adviser. It also applies in connection with an offer to enter into such a transaction or when the person providing the advice is acting as a representative, such as an agent, for the plan's counterparty. This carve-out is subject to the following conditions:

The person must provide advice to an ERISA plan fiduciary who is independent of such person and who exercises authority or control respecting the management or disposition of the plan's assets, with respect to an arm's length sale, purchase, loan or bilateral contract between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract.

The carve-out applies if either of two alternative sets of conditions is met. First, the carve-out is available, if prior to providing any recommendation with respect to the transaction, such person:

- (1) obtains a written representation from the plan fiduciary that he/she is a fiduciary who exercises authority or control respecting the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act), that the employee benefit plan has 100 or more participants covered under the plan, and that the fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity;
- (2) fairly informs the plan fiduciary of the existence and nature of the person's financial interests in the transaction;
- (3) does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice in connection with the transaction (this does not preclude a person from receiving a fee or compensation for other services);
- (4) knows or reasonably believes that the independent plan fiduciary has sufficient expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan participants (such person may rely on written representations from the plan or the plan fiduciary to satisfy this condition).

The second alternative applies if the person knows or reasonably believes that plan fiduciary has responsibility for managing at least \$100 million in employee benefit plan assets (for purposes of

¹⁸ Although referred to herein as the "seller's carve-out," we note that the carve out provided in paragraph (b)(1)(i) of the proposal is not limited to sales and would apply to incidental advice provided in connection with an arm's length sale, purchase, loan, or bilateral contract between a plan investor with financial expertise and the adviser.

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Comment [A27]: What does the footnote mean when it uses the term "incidental advice" ... I don't want to fall into the trap where this incidental test manages to carve out advice given by a broker under the guise of being a mere order taker. That's how the SEC muddied the waters in the first place.

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Comment [A28]: Same concern with this term as flagged above.

RESPONSE: The concern is unclear. Arm's length goes to the lack of relationship between the plan and the counterparty, to remove it would imply more of a relationship and, with that, possible fiduciary duties.

Comment [A29]: What do you mean by relationship? A financial relationship because they share common ownership? That's how the term is used in the tax world. An arm's length transaction is one between two parties who do not have the same owner and aren't related by family ties.

EBSA Response: We think the term has a common law of trust basis in Title I of ERISA. For example, term "arm's length transaction" is used in ERISA statutory prohibited transaction exemptions, e.g., block trade, ECN transactions, and foreign exchange exemptions all include a condition that the compensation for the purchase or sale is not greater than "compensation associated with an arm's length transaction with an unrelated party." In general, an arm's length transaction in the common law of trusts is one in which the parties owe each other no special duties and each is acting in his or her own self interest. See Restatement of Trusts (Second) §70. In light of the ERISA statutory references and the trust law, we do not believe this term requires special definition in the proposal.

Comment [A30]: I think you need this to clarify that the fiduciary can still get compensation; they just can't get it for investment advice specifically.
EBSA Response: OK, but we expanded the text to make the point separately.

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COIEBSA PASS BACK
DRAFT – 4/08/2015

this condition, when dealing with an individual employee benefit plan, a person may rely on the information on the most recent Form 5500 Annual Return/Report filed by the plan to determine the value of plan assets, and, in the case of an independent fiduciary acting as an asset manager for multiple employee benefit plans, a person may rely on representations from the independent plan fiduciary regarding the value of employee benefit plan assets under management). In that circumstance, the adviser need not obtain written representations from its counterparty to avail itself of the carve-out, but must fairly inform the independent plan fiduciary that the adviser is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity; and cannot receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice in connection with the transaction. In that circumstance, the adviser must also reasonably believe that the independent plan fiduciary has sufficient expertise to prudently evaluate the transaction.

The purpose of this carve-out is to avoid imposing ERISA fiduciary obligations on arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of proposed deals. Under appropriate circumstances, reflected in the conditions to this carve-out, these counterparties to the plan do not suggest that they are an impartial and plans do not expect a relationship of undivided loyalty or trust. Both sides of such transactions understand that they are acting at arm's length, and neither party expects that recommendations will necessarily be based on the buyer's best interests. In such a sales transaction, the buyer understands that it is buying an investment product, not advice about whether it is a good product, from a seller who has opposing financial interests. The seller's invitation to buy the product is understood as a sales pitch, not a recommendation. Also, a representative for the plan's counterparty, such as a broker, in such a transaction, would be able to use the carve-out if the conditions are met.

Although the 2010 Proposal also had a carve-out for counterparties, the carve-out in the new proposal is significantly different. The changes are designed to ensure that the carve-out appropriately distinguishes incidental advice as part of an arm's length transactions with no expectation of trust or acting in the customer's best interest, from those where the customer may be expecting unbiased investment advice that is in their best interest. For example, the seller's carve-out is unavailable to an adviser if the plan directly pays a fee for investment advice. If a plan expressly pays a fee for advice, the essence of the relationship is advisory, and the statute clearly contemplates fiduciary status. Thus, a service provider may not charge the plan a direct fee to act as an adviser, and then disclaim responsibility as a fiduciary adviser by asserting that he or she is merely an arm's length counterparty.

Commenters on the 2010 Proposal differed on whether the carve-out should apply to transactions involving plan participants, beneficiaries or IRA owners. After carefully considering the issue and the public comments, the Department does not believe such a carve-out can or should be crafted to cover recommendations to retail investors, including small plans, IRA owners and plan participants and beneficiaries. As a rule, investment recommendations to such retail customers do not fit the "arms-length" characteristics that the seller's carve-out is designed to preserve. Recommendations to retail investors and small plan providers are routinely presented as advice, consulting, or financial planning services. In the securities markets, brokers' suitability obligations generally require a significant degree of individualization. Research has shown that

COI EBSA PASS BACK
DRAFT – 4/08/2015

disclaimers are ineffective in alerting retail investors to the potential costs imposed by conflicts of interest, or the fact that advice is not necessarily in their best interest, and may even exacerbate these costs.¹⁹ Most retail investors and many small plan sponsors are not financial experts, are unaware of the magnitude and impact of conflicts of interest, and are unable effectively to assess the quality of the advice they receive. IRA owners are especially at risk because they lack the protection of having a menu of investment options chosen by a plan fiduciary who is charged to protect the interests of the IRA owner. Similarly, small plan sponsors are typically experts in the day-to-day business of running an operating company, not in managing financial investments for others. In this retail market, a seller's carve-out would run the risk of creating a carve-out that would result in the rule failing to improve consumer protections by permitting the same type of boilerplate disclaimers that some advisers now use to avoid fiduciary status under the current "five-part test" regulation. Persons making investment recommendations should be required to put the interests of the investors they serve ahead of their own. The Department has addressed legitimate concerns about preserving existing fee practices and minimizing market disruptions through proposed prohibited transaction exemptions detailed below, rather than through a blanket carve-out from fiduciary status.

Moreover, excluding retail investors from the seller's carve-out is consistent with recent congressional action, the Pension Protection Act of 2006 (PPA). Specifically, the PPA created a new statutory exemption that allows fiduciaries giving investment advice to individuals (pension plan participants, beneficiaries and IRA owners) to receive compensation from investment vehicles that they recommend in certain circumstances. 29 U.S.C. 1108(b)(14); 26 U.S.C. 4975(d)(17). Recognizing the risks presented when advisers receive fees from the investments they recommend to individuals, Congress placed important constraints on such advice arrangements that are calculated to limit the potential for abuse and self-dealing, including requirements for fee-leveling or the use of independently certified computer models. The Department has issued regulations implementing this provision at 29 CFR 2550.408g-1 and 408g-2. Including retail investors in the seller's carve-out would undermine the protections for retail investors that Congress required under this PPA provision.²¹

Although the seller's carve-out may not be available in the retail market, the proposal is intended to ensure that small plan fiduciaries, plan participants, beneficiaries and IRA owners will be able to obtain essential information regarding important decisions they make regarding their investments without the providers of that information crossing the line into fiduciary status. Under the platform provider carve-out under paragraph (b)(3), platform providers (i.e., persons that provide access to securities or other property through a platform or similar mechanism) and

¹⁹ Loewenstein, George, Daylian Cain, Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, American Economic Review: Papers and Proceedings 101, no.3 (2011).

²¹ This restriction is also consistent with the limited relief from fiduciary liability available under ERISA section 404(c) for investments made by participants and beneficiary in individual account plans. A person who is a fiduciary by reason of rendering investment advice to a participant or beneficiary is not able to rely on the relief from fiduciary liability under ERISA section 404(c). The fiduciary adviser would be liable for imprudent investment advice and fiduciary self-dealing violations because such actions would not have been the direct and necessary result of the participant's exercise of control, even though the participant followed the fiduciary adviser's recommendation.

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Comment [A31]: What is this? Haven't heard about this before. What exactly does it apply to?

RESPONSE: This is in reference to a statutory exemption for the prohibited transactions relating to investment advice. The point of including it is that Congress believed it was important to protect participants when they receive advice. It emphasizes the point that advice participants need protection.

Comment [A32]: Would say that more explicitly. Also, this exemption sounds like it applies to everything—is that right? Or is it just sales transactions where there is incidental advice? Would clarify.

EBSA Response: Text revised to clarify point. The PPA provision is not limited to incidental advice.

Comment [A33]: EBSA revised the footnote and moved it to address questions about 404(c) and purpose of footnote.

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persons that help plan fiduciaries select or monitor investment alternatives for their plans can perform those services without incurring fiduciary status. Similarly, under the investment education carve-out of paragraph (b)(6), general plan information, financial, investment and retirement information and information and education regarding asset allocation models will all be available to a plan, plan fiduciary, participant, beneficiary or IRA owner and will not constitute the provision of investment advice, irrespective of who receives that information.

The Department invites comments on whether the proposed seller's carve-out should be available for advice given directly to plan participants, beneficiaries, and IRA owners. Further, the Department invites comments on the scope of the seller's carve-out and whether the plan size limitation of 100 plan participants and 100 million dollar asset requirement in the proposal are appropriate conditions or whether other conditions would be more appropriate proxies for identifying persons with sufficient investment-related expertise to be included in a seller's carve-out.²² The Department is also interested in whether existing and proposed prohibited transaction exemptions eliminate or mitigate the need for any seller's carve-out.

(b) Sellers in swap and security-based swap transactions.

Paragraph (b)(1)(ii) of the proposal specifically addresses advice and other communications by counterparties in connection with certain swap or security-based swap transactions under the Commodity Exchange Act or the Securities Exchange Act. This broad class of financial transactions is defined and regulated under amendments to the Commodity Exchange Act and the Securities Exchange Act by the Dodd-Frank Act Section 4s(h) of the Commodity Exchange Act (7 U.S.C. 6s(h)), and section 15F of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10(h)) establishes similar business conduct standards for dealers and major participants in swaps or security-based swaps. Special rules apply for transactions involving "special entities," a term that includes employee benefit plans under ERISA, but not IRAs and other non-ERISA plans.

Comment [A34]: Can swaps still be eligible for the other carve-outs? If so, would clarify that and be clear about what this adds.

Also, why need to say "security-based swap" if covers "swaps"? Seems redundant.

EBSA Response: The nature of the swap and security based swap transactions makes it difficult to fit them squarely in another carve-out, which is the reason we have a separate carve out. So, although it may be possible to fit a swap transaction in the "seller's exception," making that point might require a complicated explanation. On the "Also" comment, see comment above on same point. Swap transaction is a defined term under Dodd Frank that does not include security based swaps so we need both terms.

²² The proposed thresholds of 100 or more participants and assets of \$100 million are consistent with thresholds used for similar purposes under existing rules and practices. For example, administrators of plans with 100 or more participants, unlike smaller plans, generally are required to report to the Department details on the identity, function, and compensation of their services providers; file a schedule of assets held for investments; and submit audit reports to the Department. Smaller plans are not subject to these same filing requirements that are imposed on large plans. The vast majority of plans with fewer than 100 participants have 10 or less participants. They are much more similar to individual retail investors than to large financially sophisticated institutional investors, who employ lawyers and have the time and expertise to scrutinize advice they receive for bias. Similarly, Congress established a \$100 million asset threshold in enacting the PPA statutory cross-trading exemption under ERISA section 408(b)(19). In the transactions covered by 408(b)(19), an investment manager has discretion with respect to separate client accounts that are on opposite sides of the trade. The cross trade can create efficiencies for both clients, but it also gives rise to a prohibited transaction under ERISA §406(b)(2) because the adviser or manager is "representing" both sides of the transaction and, therefore, has a conflict of interest. The exemption generally allows an investment manager to effect cash purchases and sales of securities for which market quotations are readily available between large sophisticated plans with at least \$100 million in assets and another account under management by the investment manager, subject to certain conditions. In this context, the \$100 million threshold serves as a proxy for identifying institutional fiduciaries that can be expected to have the expertise to protect their own interests in the conflicted transaction.

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COI EBSA PASS BACK
DRAFT – 4/08/2015

In outline, paragraph (b)(1)(ii) of the proposal would allow swap dealers, security-based swap dealers, major swap participants and security-based major swap participants who make recommendations to plans to avoid becoming ERISA investment advice fiduciaries when acting as counterparties to a swap or security-based swap transaction. Under the swap carve out, if the person providing recommendations is a swap dealer or security-based swap dealer, it must not be acting as an adviser to the plan, within the meaning of the applicable business conduct standards regulations of the CFTC or the SEC. In addition, before providing any recommendations with respect to the transaction, the person providing recommendations must obtain a written representation from the independent plan fiduciary, that the fiduciary will not rely on recommendations provided by the person.

Under the Commodity Exchange Act, swap dealers or major swap participants that act as counterparties to ERISA plans, must have a reasonable basis to believe that the plans have independent representatives who are fiduciaries under ERISA. 7 U.S.C. 6s(h)(5). Similar requirements apply for security-based swap transactions. 15 U.S.C 78o-10(h)(4) and (5). The CFTC has issued a final rule to implement these requirements and the SEC has issued a proposed rule that will cover security-based swaps. 17 CFR 23.400 to 23.451 (2012).

Paragraph (b)(1)(ii) reflects the Department's coordination of its efforts with staff of the SEC and CFTC, and is intended to provide a clear road-map for swap counterparties to avoid ERISA fiduciary status in arm's length transactions with plans. The provision addresses commenters' concerns that the conduct required for compliance with the Dodd-Frank Act's business conduct standards could constitute fiduciary investment advice under ERISA even in connection with arm's length transactions with plans that are separately represented by independent fiduciaries who are not looking to their counterparties for disinterested advice. If that were the case, swaps and security-based swaps with plans would often constitute prohibited transactions under ERISA. Commenters also argued that their obligations under the business conduct standards could effectively preclude them from relying on the carve-out for counterparties in the 2010 Proposal. Although the Department does not agree that the carve-out in the 2010 Proposal would have been unavailable to plan's swap counterparty (see letter dated April 28, 2011, to CFTC Chairman Gary Gensler from EBSA's Assistant Secretary Phyllis Borzi), the separate proposed carve out for swap and security-based swap transactions in the proposal should avoid any uncertainty.²³ The Department will continue to coordinate its efforts with staff of the SEC and CFTC to ensure that any final regulation is consistent with the agencies' work in connection with the Dodd-Frank Act's business conduct standards.

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(2) Employees of the Plan Sponsor

The proposal at paragraph (b)(2) provides that employees of a plan sponsor of an ERISA plan will not be treated as investment advice fiduciaries with respect to advice they provide to the fiduciaries of the sponsor's plan as long as they receive no compensation for the advice beyond their normal compensation as employees of the plan sponsor. This carve-out on the scope of the fiduciary investment advice definition recognizes that internal employees, such as members of a

²³ <http://www.dol.gov/ebsa/pdf/cftc20110428.pdf>.

COI EBSA PASS BACK
DRAFT – 4/08/2015

company's human resources department, routinely develop reports and recommendations for investment committees and other named fiduciaries of the sponsors' plans, without acting as paid fiduciary advisers. The carve-out responds to and addresses the concerns of commenters who said that these personnel should not be treated as fiduciaries because their advice is largely incidental to their duties on behalf of the plan sponsor and they receive no compensation for these advice-related functions.

(3) Platform Providers/Selection and Monitoring Assistance

The carve-out at paragraph (b)(3) of the proposal is directed to service providers, such as recordkeepers and third party administrators, that offer a "platform" or selection of investment vehicles to participant-directed individual account plans under ERISA. Under the terms of the carve-out, the plan fiduciaries must choose the specific investment alternatives that will be made available to participants for investing their individual accounts. The carve-out merely makes clear that persons would not act as investment advice fiduciaries simply by marketing or making available such investment vehicles, without regard to the individualized needs of the plan or its participants and beneficiaries, as long as they disclose in writing that they are not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

Comment [A35]: Does this just mean DC plan? If so, would say so.
EBSA Response: No. Not all DC plans are participant directed.

Similarly, a separate provision at paragraph (b)(4) carves out certain common activities that platform providers may carry out to assist plan fiduciaries in selecting and monitoring the investment alternatives that they make available to plan participants. Under paragraph (b)(4), merely identifying offered investment alternatives meeting objective criteria specified by the plan fiduciary or providing objective financial data regarding available alternatives to the plan fiduciary would not cause a platform provider to be a fiduciary investment adviser. These two carve-outs are clarifying modifications to the corresponding provisions of the 2010 Proposal. They address certain common practices that have developed with the growth of participant-directed individual account plans and recognize circumstances where the platform provider and the plan fiduciary clearly understand that the provider has financial or other relationships with the offered investments and is not purporting to provide impartial investment advice. It also accommodates the fact that platform providers often provide general financial information that falls short of constituting actual investment advice or recommendations, such as information on the historic performance of asset classes and of the investments available through the provider. The carve-outs also reflect the Department's agreement with commenters that a platform provider who merely identifies investment alternatives using objective third-party criteria (e.g., expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives should not be considered to be rendering investment advice.

While recognizing the utility of the provisions in paragraphs (b)(3) and (b)(4) for the effective and efficient operation of plans by plan sponsors, plan fiduciaries and plan service providers, the Department reiterates its longstanding view, recently codified in 29 CFR 2550.404a-5(f) and 2550.404-c-1(d)(2)(iv) (2010), that a fiduciary is always responsible for prudently selecting and monitoring providers of services to the plan or designated investment alternatives offered under the plan.

COI EBSA PASS BACK
DRAFT – 4/08/2015

Several commenters also asked the Department to clarify that the platform provider carve-out is available in the 403(b) plan marketplace. In the Department’s view, a 403(b) plan that is subject to Title I of ERISA would be an individual account plan within the meaning of ERISA section 3(34) of the Act for purposes of the proposed regulation, so the platform provider carve-out would be available with respect to such plans.

Other commenters asked that the platform provider provision be generally extended to apply to IRAs. In the IRA context, however, there typically is no separate independent “plan fiduciary” who interacts with the platform provider to protect the interests of the account owners. As a result, it is much more difficult to conclude that the transaction is truly arm’s length or to draw a bright line between fiduciary and non-fiduciary communications on investment options. Consequently, the proposed regulation declines to extend application of this carve-out to IRAs and other non-ERISA plans. As the Department continues its work on this regulatory project, however, it requests specific comment as to the types of platforms and options that may be offered to IRA owners, how they may be similar to or different from platforms offered in connection with participant-directed individual account plans, and whether it would be appropriate for service providers not to be treated as fiduciaries under this carve-out when marketing such platforms to IRA owners.

As a corollary to the proposal’s restriction of the applicability of the platform provider carve-out to only ERISA plans, the selection and monitoring assistance carve-out is similarly not available in the IRA and other non-ERISA plans context. Commenters on the platform provider restriction are encouraged to offer their views on the effect of this restriction in the non-ERISA plan marketplace.

(4) Investment Education

Paragraph (b)(6) of the proposed regulation is similar to a carve-out in the 2010 Proposal for the provision of investment education information and materials within the meaning of an earlier Interpretive Bulletin issued by the Department in 1996. 29 CFR 2509.96-1 (IB 96-1). Paragraph (b)(6) incorporates much of IB 96-1 bulletin’s operative text, but with the important exceptions explained below. Paragraph (b)(6) of the proposed regulation, if finalized, would supersede IB 96-1. Consistent with IB 96-1, paragraph (b)(6) makes clear that furnishing or making available the specified categories of information and materials to a plan, plan fiduciary, participant, beneficiary or IRA owner will not constitute the rendering of investment advice, irrespective of who provides the information (e.g., plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (e.g., on an individual or group basis, in writing or orally, or via a call center, or by way of video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of investment or retirement information and materials identified in paragraph (b)(6), or the type of plan or IRA involved. As a departure from IB 96-1, a new condition to furnishing or making available the described information or materials as investment education is that the information and materials not include advice or recommendations as to specific investment products, specific investment managers, or the value of particular securities or other property. The paragraph reflects the Department’s view that the statutory reference to “investment advice” is not meant to encompass

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Comment [A36]: Are these new, permissive changes or clarifications relative to the IB? Were they responsive to comments? If so, would make that clear.
RESPONSE: Some of the highlighted material e.g., call center or video or computer software is new language but done as a matter of clarification and as noted in new text added is “consistent with IB 96-1.” Anything new is not in response to comments. Beyond its clarifying nature, the highlighted material does not change anything from the current IB. See inserted clause in highlighted area (“consistent with IB 96-1”).
Comment [A37]: No inserted clause? EBSA Response: Clause inserted.

general investment information and educational materials, but rather is targeted at more specific recommendations and advice on the investment of plan and IRA assets.

Similar to IB 96-1, paragraph (b)(6) of the proposed regulation divides investment education information and materials into four general categories: (i) plan information; (ii) general financial, investment and retirement information; (iii) asset allocation models; and (iv) interactive investment materials. The proposed regulation in paragraph (b)(6)(v) also adopts the provision from IB 96-1 stating that there may be other examples of information, materials and educational services which, if furnished, would also not constitute investment advice or recommendations within the meaning of the proposed regulation and that no inference should be drawn regarding materials or information which are not specifically included in paragraph (b)(6)(i) through (iv).

Although paragraph (b)(6) incorporates most of the relevant text of IB 96-1, there are important changes. One change from IB 96-1 is that paragraph (b)(6) makes clear that the distinction between non-fiduciary education and fiduciary advice applies equally to information provided to plan fiduciaries as well as information provided to plan participants and beneficiaries and IRA owners, and that it applies equally to participant-directed plans and other plans. In addition, the provision applies without regard to whether the information is provided by a plan sponsor, fiduciary, or service provider.

Based on public input received in connection with its joint examination of lifetime income issues with the Department of the Treasury, the Department is persuaded that additional guidance may help improve retirement security by facilitating the provision of information and education relating to retirement needs that extend beyond a participant's or beneficiary's date of retirement. Accordingly, paragraph (b)(6) of the proposal includes specific language to make clear that the provision of certain general information that helps an individual assess and understand retirement income needs past retirement and associated risks (e.g., longevity and inflation risk), or explains general methods for the individual to manage those risks both within and outside the plan, would not result in fiduciary status under the proposal.²⁴

²⁴ Although the proposal would formally remove IB 96-1 from the CFR, the Department notes that paragraph (e) of IB 96-1 provides generalized guidance under section 405 and 404(c) of ERISA with respect to the selection by employers and plan fiduciaries of investment educators and the lack of responsibility of employers and fiduciaries with respect to investment educators selected by participants. Specifically, paragraph (e) states:

As with any designation of a service provider to a plan, the designation of a person(s) to provide investment educational services or investment advice to plan participants and beneficiaries is an exercise of discretionary authority or control with respect to management of the plan; therefore, persons making the designation must act prudently and solely in the interest of the plan participants and beneficiaries, both in making the designation(s) and in continuing such designation(s). See ERISA sections 3(21)(A)(i) and 404(a), 29 U.S.C. 1002 (21)(A)(i) and 1104(a). In addition, the designation of an investment advisor to serve as a fiduciary may give rise to co-fiduciary liability if the person making and continuing such designation in doing so fails to act prudently and solely in the interest of plan participants and beneficiaries; or knowingly participates in, conceals or fails to make reasonable efforts to correct a known breach by the investment advisor. See ERISA section 405(a), 29 U.S.C. 1105(a). The Department notes, however, that, in the context of an ERISA section 404(c) plan, neither the designation of a person to provide education nor

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COI EBSA PASS BACK
DRAFT – 4/08/2015

As noted, another change is that the Department is not incorporating the provisions at paragraph (d)(3)(iii) and (4)(iv) of IB 96-1. Those provisions of IB 96-1 permit the use of asset allocation models with reference to specific investment products available under the plan or IRA, as long as those specific allocations are accompanied by a statement that other investment alternatives having similar risk and return characteristics may be available. Based on its experience with the IB 96-1 since publication, as well as views expressed by commenters to the 2010 Proposal, the Department now believes that, even when accompanied by a statement as to the availability of other investment alternatives, these types of specific asset allocations that identify specific investment alternatives function as tailored, individualized investment recommendations, and can effectively steer recipients to particular investments, but without adequate protections against potential abuse.²⁵ In particular, the Department agrees with those commenters to the 2010 Proposal who argued that cautionary disclosures to participants, beneficiaries, and IRA owners may have limited effectiveness in alerting them to the merit and wisdom of evaluating investment alternatives not used in the model. In practice, asset allocation models concerning hypothetical individuals, and interactive materials which arrive at specific investment products and plan alternatives, can be indistinguishable to the average retirement investor from individualized recommendations, regardless of caveats. Accordingly, paragraphs (b)(6)(iii) and (iv) relating to asset allocation models and interactive investment materials preclude the identification of specific investment alternatives available under the plan or IRA in order for the materials described in those paragraphs to be considered investment education. Thus, for example, we would not treat an asset allocation model as mere education if it called for a certain percentage of the investor's assets to be invested in large cap mutual funds, and accompanied that proposed allocation with the identity of a specific fund or provider. In that circumstance, the adviser has made a specific investment recommendation that should be treated as fiduciary advice and adhere to fiduciary standards. Further, materials that identify specific plan investment alternatives also appear to fall within the definition of "recommendation" in paragraph (f)(1) of the proposal, and could result in fiduciary status on the part of a provider if the other provisions of the proposal are met. The Department believes that effective and useful

the designation of a fiduciary to provide investment advice to participants and beneficiaries would, in itself, give rise to fiduciary liability for loss, or with respect to any breach of part 4 of title I of ERISA, that is the direct and necessary result of a participant's or beneficiary's exercise of independent control. 29 CFR 2550.404c-1(d). The Department also notes that a plan sponsor or fiduciary would have no fiduciary responsibility or liability with respect to the actions of a third party selected by a participant or beneficiary to provide education or investment advice where the plan sponsor or fiduciary neither selects nor endorses the educator or advisor, nor otherwise makes arrangements with the educator or advisor to provide such services.

Unlike the remainder of the IB, this text does not belong in the investment advice regulation. Also, the principles articulated in paragraph (e) are generally understood and accepted such that retaining the paragraph as a stand-alone IB does not appear necessary or appropriate.

²⁵ When the Department issued IB 96-1, it expressed concern that service providers could effectively steer participants to a specific investment alternative by identifying only one particular fund available under the plan in connection with an asset allocation model. As a result, where it was possible to do so, the Department encouraged service providers to identify other investment alternatives within an asset class as part of a model. Ultimately, however, when asset allocation models and interactive investment materials identified any specific investment alternative available under the plan, the Department required an accompanying statement both indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where information on those investment alternatives could be obtained. 61 Fed. Reg. 29586, 29587 (June 11, 1996).

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Comment [A38]: Makes it sound like you are referring to a recommendation to, say, invest in 59% stock and 41% bonds, rather than in specific stock and bond products.

EBSA Response: Text is revised to clarify that this sentence is reciting what is allowed under IB 96-1. The IB would allow use of specific stock and bond products as long as the asset allocation using those products is accompanied by a statement that other investment alternatives are available. The proposed reg would not allow that any longer.

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Comment [A39]: Revised these two sentences to clarify.

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COIEBSA PASS BACK
DRAFT – 4/08/2015

asset allocation education materials can be prepared and delivered to participants and IRA owners without including specific investment products and alternatives available under the plan. The Department understands that not incorporating the provisions of IB 96-1 at paragraph (d)(3)(iii) and (4)(iv) into the proposal represents a significant change in the information and materials that may constitute investment education. Accordingly, the Department invites comments on whether this change is appropriate.²⁶

D. Fee or Other Compensation

A necessary element of fiduciary status under section 3(21)(A)(ii) of ERISA is that the investment advice be for a “fee or other compensation, direct or indirect.” Consistent with the statute, paragraph (f)(6) of the proposed regulation defines this phrase to mean any fee or compensation for the advice received by the advice provider (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. It further provides that the term “fee or compensation” includes, but is not limited to, brokerage fees, mutual fund sales, and insurance sales commissions.

Paragraph (c)(3) of the 2010 Proposal used similar language, but it also provided that the term included fees and compensation based on multiple transactions involving different parties. Commenters found this provision confusing and it does not appear in the new proposal. The provision was intended to confirm the Department’s position that fees charged on a so-called “omnibus” basis (e.g., compensation paid based on business placed or retained that includes plan or IRA business) would constitute fees and compensation for purposes of the rule.

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Direct or indirect compensation also includes any compensation received by affiliates of the adviser that is connected to the transaction in which the advice was provided. For example, when a fiduciary adviser recommends that a participant or IRA owner invest in a mutual fund, it is not unusual for an affiliated adviser to the mutual fund to receive a fee. The receipt by the affiliate of advisory fees from the mutual fund is indirect compensation in connection with the rendering of investment advice to the participant.

Some commenters additionally suggested that call center employees should not be treated as investment advice fiduciaries where they are not specifically paid to provide investment advice and their compensation does not change based on their communications with participants and beneficiaries. The carve-out from the fiduciary investment advice definition for investment education provides guidelines under which call center staff and other employees providing similar investor assistance services may avoid fiduciary status. However, commenters stated that a specific carve-out for such call centers would provide a greater level of certainty so as not to inhibit mutual funds, insurance companies, broker-dealers, recordkeepers and other financial service providers from continuing to make such assistance available to participants and

²⁶ As indicated earlier in this Notice, the Department believes that FINRA’s guidance in this area may provide useful standards and guideposts for distinguishing investment education from investment advice under ERISA. The Department specifically solicits comments on the discussion in FINRA’s “Frequently Asked Questions, FINRA Rule 2111 (Suitability)” of the term “recommendation” in the context of asset allocation models and general investment strategies.

COI EBSA PASS BACK
DRAFT – 4/08/2015

beneficiaries in 401(k) and similar participant-directed plans. In the Department's view, such a carve-out would be inappropriate. The fiduciary definition is intended to apply broadly to all persons who engage in the activities set forth in the regulation, regardless of job title or position, or whether the advice is rendered in person, in writing or by phone. If, in the performance of their jobs, call center employees make specific investment recommendations to plan participants or IRA owners under the circumstances described in the proposal, it is appropriate to treat them, and possibly their employers, as fiduciaries unless they meet the conditions of one of the carve-outs set forth above.

E. Coverage of IRAs and Other Non-ERISA Plans

Certain provisions of Title I of ERISA, 29 U.S.C. 1001 - 1108, such as those relating to participation, benefit accrual, and prohibited transactions also appear in the Code. This parallel structure ensures that the relevant provisions apply to all tax-qualified plans, including IRAs. With regard to prohibited transactions, the Title I provisions generally authorize recovery of losses from, and imposition of civil penalties on, the responsible plan fiduciaries, while the Code provisions impose excise taxes on persons engaging in the prohibited transactions. The definition of fiduciary with respect to a plan is the same in section 4975(e)(3)(B) of the IRC as the definition in section 3(21)(A)(ii) of ERISA, 29 U.S.C. 1002(21)(A)(ii), and the Department's 1975 regulation defining fiduciary investment advice is virtually identical to regulations that define the term "fiduciary" under the Code. 26 CFR 54.4975-9(c) (1975).

To rationalize the administration and interpretation of dual provisions under ERISA and the Code, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. (2010), divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the Treasury, so that, in general, the agency with responsibility for a given provision of Title I of ERISA would also have responsibility for the corresponding provision in the IRC. Among the sections transferred to the Department were the prohibited transaction provisions and the definition of a fiduciary in both Title I of ERISA and in the IRC. ERISA's prohibited transaction rules, 29 U.S.C. 1106 – 1108, apply to ERISA-covered plans, and the Code's corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply both to ERISA-covered pension plans that are tax-qualified pension plans, as well as other tax-advantaged arrangements, such as IRAs, that are not subject to the fiduciary responsibility and prohibited transaction rules in ERISA.²⁷

Given this statutory structure, and the dual nature of the 1975 regulation, the proposal would apply to both the definition of "fiduciary" in section 3(21)(A)(ii) of ERISA and the definition's counterpart in section 4975(e)(3)(B) of the Code. As a result, it applies to persons who give investment advice to IRAs. In this respect, the new proposal is the same as the 2010 Proposal.

Many comments on the 2010 Proposal concerned its impact on IRAs and questioned whether the Department had adequately considered possible negative impacts. Some commenters were especially concerned that application of the new rule could disrupt existing brokerage

²⁷ The Secretary of Labor also was transferred authority to grant administrative exemptions from the prohibited transaction provisions of the Code.

Comment [A40]: Are there penalties beyond the losses to the investor?

RESPONSE: These are "civil penalties" that the DOL is authorized by ERISA to collect from a fiduciary. These are distinct from liability to a plan or participant for plan losses. Liability for losses and civil penalties are both discussed earlier in the document.

Comment [A41]: Thanks. Just to make sure we're tracking, does this mean that DOL keeps the penalties or the investor does?
EBSA Response: Neither. The civil penalties are paid to the US Treasury.

COIEBSA PASS BACK
DRAFT – 4/08/2015

arrangements that they believe are beneficial to customers. In particular, brokers often receive revenue sharing, 12b-1 fees, and other compensation from the parties whose investment products they recommend. If the brokers were treated as fiduciaries, the receipt of such fees could violate the Code's prohibited transaction rules, unless eligible for a prohibited transaction exemption. According to these commenters, the disruption of such current fee arrangements could result in a reduced level of assistance to investors, higher up-front fees, and less investment advice, particularly to investors with small accounts. In addition, some commenters expressed skepticism that the imposition of fiduciary standards would result in improved advice and questioned the view that current compensation arrangements could cause sub-optimal advice. Additionally, commenters stressed the need for coordination between the Department and other regulatory agencies, such as the SEC, CFTC, and Treasury.

As discussed above, to better align the regulatory definition of fiduciary with the statutory provisions and underlying Congressional goals, the Department is proposing a definition of a fiduciary investment adviser that would encompass investment recommendations that are individualized or specifically directed to plans, participants, beneficiaries or IRA owners, if the adviser receives a direct or indirect fee. Neither the relevant statutory provisions, nor the current regulation, draw a distinction between brokers and other advisers or carve brokers out of the scope of the fiduciary provisions of ERISA and of the Code. The relevant statutory provisions, and accordingly the proposed regulation, establish a functional test based on the service provider's actions, rather than the provider's title (e.g., broker or registered investment adviser). If one engages in specified activities, such as the provision of investment advice for a direct or indirect fee, the person engaging in those activities is a fiduciary, irrespective of labels. Moreover, the statutory definition of fiduciary advice is identical under both ERISA and the Code. There is no indication that the definition should vary between plans and IRAs.

In light of this statutory framework, the Department does not believe it would be appropriate to carve out a special rule for IRAs, or for brokers or others who make specific investment recommendations to IRA owners or to other participants in non-ERISA plans for direct or indirect fees. When Congress enacted ERISA and the corresponding Code provisions, it chose to impose fiduciary status on persons who provide investment advice to plans, participants, beneficiaries and IRA owners, and to specifically prohibit a wide variety of transactions in which the fiduciary has financial interests that potentially conflict with the fiduciary's obligation to the plan or IRA. It did not provide a special carve-out for brokers or IRAs, and the Department does not believe it would be appropriate to write such a carve-out into the regulation implementing the statutory definition.

Indeed, brokers who give investment advice to IRA owners or plan participants, and who otherwise meet the terms of the current five-part test, are already fiduciaries under the existing fiduciary regulation. If, for example, a broker regularly advises an individual IRA owner on specific investments, the IRA owner routinely follows the recommendations, and both parties understand that the IRA owner relies upon the broker's advice, the broker is almost certainly a fiduciary. In such circumstances, the broker is already subject to the excise tax on prohibited transactions if he or she receives fees from a third party in connection with recommendations to invest IRA assets in the third party's investment products, unless the broker satisfies the conditions of a prohibited transaction exemption that covers the particular fees. Indeed, broker-

COI EBSA PASS BACK
DRAFT – 4/08/2015

dealers today can provide fiduciary investment advice by complying with prohibited transaction exemptions that permit the receipt of commission-based compensation for the sale of mutual funds and other securities. Moreover, both ERISA and the IRC were amended as part of the PPA to include a new prohibited transaction exemption that applies to investment advice in both the plan and IRA context. The PPA exemption clearly reflects the longstanding concern under ERISA and the Code about the dangers posed by conflicts of interest, and the need for appropriate safeguards in both the plan and IRA markets. Under the terms of the exemption, the investment recommendations must either result from the application of an unbiased and independently certified computer program or the fiduciary's fees must be level (i.e., the fiduciary's compensation cannot vary based on their particular investment recommendations).

Moreover, as discussed in the regulatory impact analysis below, there is substantial evidence to support the statutory concern about conflicts of interest. As the analysis reflects, unmitigated conflicts can cause significant harm to investors. The available evidence supports a finding that the negative impacts are present and often times large. The proposal would curtail the harms to investors from such conflicts and thus deliver significant benefits to plan participants and IRA owners. Plans, plan participants, beneficiaries and IRA owners would all benefit from advice that is impartial and puts their interests first.²⁸ Moreover, broker-dealer interactions with plan fiduciaries, participants, and IRA owners present some of the most obvious conflict of interest problems in this area. Accordingly, in the Department's view, broker-dealers that provide investment advice should be subject to fiduciary duties to mitigate conflicts of interest and increase investor protections.

Some commenters additionally suggested that the application of special fiduciary rules in the retail investment market to IRA accounts, but not savings outside of tax-preferred retirement accounts, is inappropriate and could lead to confusion among investors and service providers. The distinction between IRAs and other retail accounts, however, is a direct result of a statutory structure that draws a sensible distinction between tax-favored IRAs and other retail investment accounts. The Code itself treats IRAs differently, bestowing uniquely favorable tax treatment on such accounts and prohibiting self-dealing by persons providing investment advice for a fee. In these respects, and in light of the special public interest in retirement security, IRAs are more like plans than like other retail accounts. Indeed, as noted above, the vast majority of IRA assets today are attributable to rollovers from plans.²⁹ In addition, IRA owners may be at even greater risk from conflicted advice than plan participants. Unlike ERISA plan participants, IRA owners do not have the benefit of an independent plan fiduciary to represent their interests in selecting a menu of investment options or structuring advice arrangements. They cannot sue fiduciary advisers under ERISA for losses arising from fiduciary breaches, nor can the Department sue on their behalf. Compared to participants with ERISA plan accounts, IRA owners often have larger account balances and are more likely to be elderly. Thus, limiting the harms to IRA investors

²⁸ As noted above, the Department does not agree that the inclusion of such language in an IRA agreement automatically ensures that a broker is not a fiduciary under the 1975 regulation.

²⁹ Peter Brady, Sarah Holden, and Erin Shon, *The U.S. Retirement Market, 2009*, Investment Company Institute, Research Fundamentals, Vol. 19, No. 3, May 2010, at <http://www.ici.org/pdf/fm-v19n3.pdf>.

Comment [A42]:
EBSA: We believe "combat" is a more accurate description of the proposal than "mitigate"

Comment [A43]: Think we need less war-like language than combat.
EBSA Response: OK

COI EBSA PASS BACK
DRAFT – 4/08/2015

resulting from conflicts of interest of advisers is at least as important as protecting ERISA plans and plan participants against conflicts of interest of advisers.

The Department believes that it is important to address the concerns of brokers and others providing investment advice to IRA owners about undue disruptions to current fee arrangements, but also believes that such concerns are best resolved within a fiduciary framework, rather than by simply relieving advisers from all fiduciary responsibility. As previously discussed, the proposed regulation permits investment professionals to provide important financial information and education, without acting as fiduciaries or being subject to the prohibited transaction rules. Moreover, ERISA and the Code create a flexible process that enables the Department to grant class and individual exemptions from the prohibited transaction rules for fee practices that it determines are beneficial to plan participants and IRA owners. For example, existing prohibited transaction exemptions already allow brokers who provide fiduciary advice to receive commissions generating conflicts of interest for trading the types of securities and funds that make up the large majority of IRA assets today. In addition, simultaneous with the publication of this proposed regulation, the Department is publishing new exemption proposals that would permit common fee practices, while at the same time protecting plan participants, beneficiaries and IRA owners from abuse and conflicts of interest. As noted above, in contrast with many previously adopted PTE exemptions that are transaction-specific, the Best Interest Contract PTE described below reflects a more flexible approach that accommodates a wide range of current business practices while minimizing the impact of conflicts of interest and ensuring that plans and IRAs receive investment recommendations that are in their best interests.

As discussed, the Department received extensive comment on the application of the 2010 Proposal's provisions to IRAs, but commenters regarding other non-ERISA plans such as Health Savings Accounts, Archer Medical Savings Accounts and Coverdell Education Savings Accounts were less prolific. The Department notes that these accounts are given tax preferences as are IRAs. Further, some of the accounts, such as HSAs, can be used as long term savings accounts for retiree health care expenses. These types of accounts also are expressly defined by Code section 4975(e)(1) as plans that are subject to the Code's prohibited transaction rules. Thus, although they generally may hold fewer assets and may exist for shorter durations than IRAs, the owners of these accounts or the persons for whom these accounts were established are entitled to receive the same protections from conflicted investment advice as IRA owners. Accordingly, these accounts are included in the scope of covered plans in paragraph (f)(2) of the new proposal. However, the Department solicits specific comment as to whether it is appropriate to cover and treat these plans under the proposed regulation in a manner similar to IRAs as to both coverage and applicable carve-outs.

F. Administrative Prohibited Transaction Exemptions

In addition to the new proposal in this Notice, the Department is also proposing, elsewhere in this edition of the **Federal Register**, certain administrative class exemptions from the prohibited transaction provisions of ERISA (29 U.S.C. 1106), and the Code (26 U.S.C. 4975(c)(1)) as well as proposed amendments to previously adopted exemptions. The proposed exemptions and amendments would allow, subject to appropriate safeguards, certain broker-dealers, insurance agents and others that act as investment advice fiduciaries to nevertheless continue to receive a

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Comment [A44]:

RESPONSE: We believe the rule is about limiting dangers not just the actual harms. Sentence revised accordingly..

Comment [A45]: Why would we care about dangers that we agree aren't going to materialize?

EBSA Response: We do not understand the point being made in this comment. We revised text to see if this clarifies.

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Comment [A46]: Think we need to be consistent with previous fact sheet and this feels stronger (fact sheet said "all").

EBSA Response: We are concerned that "all" is an overstatement. We also commented on this issue in connection with the Fact Sheet.

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Comment [A47]: Would note tax preferences and special uses of these accounts for retirement as rationale

RESPONSE: We believe that the explicit language in the Code is sufficient rationale. See added sentence.

"Furthermore, these types of accounts are defined by Code section 4975(e)(1) as plans that are subject to the Code's prohibited transaction rules."

Comment [A48]: Disagree. I think this is too impenetrable and you should make these arguments explicitly.

EBSA Response: Text revised

Comment [A49]: I assume there is a statutory basis for applying fiduciary protections for retirement savings to accounts that aren't explicitly for retirement savings?

RESPONSE: See added sentence.

"Furthermore, these types of accounts are defined by Code section 4975(e)(1) as plans that are subject to the Code's prohibited transaction rules."

Comment [A50]: Don't see this added sentence?

EBSA Response: Text revised.

COI EBSA PASS BACK
DRAFT – 4/08/2015

variety of forms of compensation that would otherwise violate prohibited transaction rules and trigger excise taxes. The proposed exemptions would supplement statutory exemptions at 29 U.S.C. 1108 and 26 U.S.C. 4975(d), and previously adopted class exemptions.

Investment advice fiduciaries to plans and plan participants must meet ERISA's standards of prudence and loyalty to their plan customers. Such fiduciaries also face taxes, remedies and other sanctions for engaging in certain transactions, such as self-dealing with plan assets or receiving payments from third parties in connection with plan transactions, unless the transactions are permitted by an exemption from ERISA's and the Code's prohibited transaction rules. IRA fiduciaries do not have the same general fiduciary obligations of prudence and loyalty under the statute, but they too must adhere to the prohibited transaction rules or they must pay an excise tax. The prohibited transaction rules help ensure that investment advice provided to plan participants and IRA owners is not driven by the adviser's financial self-interest.

*Proposed **Best Interest** Contract Exemption (**Best Interest** Contract PTE)*

The proposed **Best Interest** Contract PTE would provide broad and flexible relief from the prohibited transaction restrictions on certain compensation received by investment advice fiduciaries as a result of a plan's or IRA's purchase, sale or holding of specifically identified investments. The conditions of the exemption are generally principles-based rather than prescriptive and require, in particular, that advice be provided in the best interest of the plan or IRA. This exemption was developed partly in response to the comments received on the 2010 proposal that suggested such an approach. It is a departure from existing exemptions, examples of which are discussed below, which are limited to much narrower categories of investments under more prescriptive and less flexible and adaptable conditions.

The proposed **Best Interest** Contract PTE was developed to promote the provision of investment advice that is in the best interest of retail investors, such as plan participants and beneficiaries, IRA owners, and small plans. The proposed exemption would apply to compensation received by an individual investment advice fiduciary,³⁰ a firm individual investment advice fiduciary that employs or otherwise contracts with such an individual, and such a firm's affiliates and related entities that is provided in connection with the purchase, sale or holding of certain assets by the plans, participants and beneficiaries, and IRAs. In order to protect the interests of these investors, the exemption requires the firm and the adviser to contractually acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, warrant that they have adopted policies and procedures reasonably designed to mitigate any harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice. The basic standards of impartial conduct to which the adviser and firm must commit are basic obligations of fair dealing and fiduciary conduct to which the Department believes advisers and firms often informally commit— to give advice that is in the customer's best interest; avoid

³⁰ By using the term "adviser," the Department does not intend to limit the exemption to investment advisers registered under the Investment Advisers Act of 1940; under the exemption an adviser is individual who can be a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

Comment [A51]: It would do more than trigger excise taxes, right?
EBSA Response: Yes, text revised.

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Deleted: under the prohibited transaction rules, subject to appropriate safeguards

Deleted: EBSA HAS SUBSTANTIALLY REWRITTEN THIS SECTION TO ADDRESS THE COMMENTS THAT WERE PROVIDED. THROUGHOUT THIS SECTION WE WILL INDICATE WHERE WE ADDED LANGUAGE AND WHERE WE DELETED PREVIOUS TEXT. *

Comment [A52]: EBSA response to this edit: We are not sure there are written comments suggesting a principles based approach, but there were probably at least verbal comments that the current exemptions are too narrow and inflexible. If that is sufficient support for this statement, then we are ok with it.

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Comment [A53]: Thought earlier in the preamble you defined "adviser" to include the firm as well. Also, doesn't it confuse things to use the fiduciary modifier for the individual here and not the financial institution?

EBSA response: Suggested re-write: "The proposed exemption would apply to compensation received by investment advice fiduciaries – both individual "advisers" and "financial institutions" that employ or otherwise contract with such individuals – as well as their affiliates and related entities, that is provided in connection with the purchase sale or holding...."

Comment [A54]: EBSA response to this edit: Technically, the compliance with applicable federal and state law is not an "impartial conduct standard." It is only a required warranty, so we should probably leave the text as it was: "The adviser and firm must agree to meet fundamental obligations of fair dealing and fiduciary conduct... We can of course replace "agree" with "commit" in that sentence.

COI EBSA PASS BACK
DRAFT – 4/08/2015

misleading statements; receive no more than reasonable compensation; and comply with applicable federal and state laws governing advice. This standards-based approach aligns the adviser's interests with those of the plan or IRA customer, while leaving the adviser and employing firm the flexibility and discretion necessary to determine how best to satisfy these basic standards in light of the unique attributes of their business.

As an additional protection for retail investors, the exemption would not apply if the contract contains exculpatory provisions disclaiming or otherwise limiting liability of the adviser or financial institution for violation of the contract's terms. While the contract could require the parties to arbitrate individual claims, it could not limit the rights of the plan, participant, beneficiary, or IRA owner to bring or participate in a class action against the adviser or financial institution.

Additional conditions would apply to firms that limit the products that their advisers can recommend based on the receipt of third party payments or the proprietary nature of the products (i.e., products offered or managed by the firm or its affiliates) or for other reasons.

Finally, certain notice and data collection requirements would apply to all firms relying on the exemption. Specifically, firms would be required to notify the Department in advance of doing so, and they would have to maintain certain data, and make it available to the Department upon request, to help evaluate the effectiveness of the exemption in safeguarding the interests of plan and IRA investors.

The Department's intent in crafting the **Best Interest** Contract PTE is to permit common compensation structures that create conflicts of interest, while minimizing the costs imposed on investors by such conflicts. The exemption is designed both to impose broad fiduciary standards of conduct on advisers and financial institutions, and to give them sufficient flexibility to accommodate a wide range of business practices and compensation structures that currently exist or that may develop in the future.

The Department is also considering an additional streamlined exemption that would apply to compensation received in connection with investments by plans, participants and beneficiaries, and IRA owners, in certain high-quality, low-fee investments, subject to fewer conditions than in the proposed **Best Interest** Contract PTE. If properly crafted, the streamlined exemption could achieve important goals of minimizing compliance burdens for advisers and financial institutions when they offer investment products with little potential for material conflicts of interest. The Department is not proposing text for such a streamlined exemption due to the difficulty in operationalizing this concept. However we are eager to receive comments on whether such an exemption would be worthwhile and, as part of the notice proposing the **Best Interest** Contract PTE, are soliciting comments on a number of issues relating to the design of a streamlined exemption.

Proposed Principal Transaction Exemption (Principal Transaction PTE)

Broker-dealers and other advisers commonly sell debt securities out of their own inventory to plan and IRA participants in a type of transaction known as a "principal transaction." Fiduciaries

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Comment [A55]: Would make clear that this is (I think) exactly how FINRA works and say that this approach is modeled on them.

EBSA response: Just to be clear, we are adopting FINRA's approach only in the second sentence. The first sentence is not an issue that FINRA has taken on to my knowledge. So, second sentence could be revised as follows: "And, adopting the approach taken by FINRA, the contract could require the parties to arbitrate individual claims, but it could not limit the rights of the plan participant, beneficiary or IRA owner..."

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Comment [A56]: I don't follow this. Sounds like it is just the principal transaction PTE, which is summarized below. If so, would cut or say is summarized below. If not, could you explain and say what the conditions are?

EBSA response: This is not from the Principal PTE. This is from Section IV of the Contract PTE "Range of Investment Options." It imposes additional conditions if firms limit investment options that their advisers can recommend to customers to investments that are proprietary investments or that generate third party payments (or for other reasons). We could add the following sentences to explain the conditions: "The conditions require such firms to provide notice of the limitations to plans, participants, beneficiaries, and IRA owners, as well as make a written finding that the limitations do not prevent advisers from providing advice in those investors' best interest."

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Comment [A57]: Fixed typo

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Comment [A58]: Think we need to broaden since this applies to more than BDs, right?

EBSA response: Comment accepted.

Comment [A59]: EBSA response to this edit: Would prefer to use "plans, participants, beneficiaries and IRA owners."

COI EBSA PASS BACK
DRAFT – 4/08/2015

trigger taxes, remedies and other legal sanctions when they engage in such activities, unless they qualify for an exemption from the prohibited transaction rules. These principal transactions raise issues similar to those addressed in the **Best Interest** Contract PTE, but also raise unique concerns because the conflicts of interest are particularly acute. In these transactions, the adviser sells the stock directly from its own inventory, and may be able to dictate the price that the plan or IRA participant pays.

Because of the prevalence of the practice in the market for fixed income securities, the Department has proposed a separate Principal Transactions PTE that would permit principal transactions in certain debt securities between a plan or IRA owner and an investment advice fiduciary, under certain circumstances.

The Principal Transaction PTE would include all of the requirements of the **Best Interest** Contract PTE. In addition, however, it would include specific conditions related to the price of the debt security involved in the transaction. The adviser would have to obtain two price quotes from unaffiliated counterparties for the same or a similar security, and the transaction would have to occur at a price at least as favorable to the plan as the two price quotes. Additionally, the adviser would have to disclose the amount of compensation and profit (sometimes referred to as a “mark up” or “mark down”) that it expects to receive on the transaction.

Amendments to Existing PTEs

In addition to the **Best Interest** Contract PTE and the Principal Transaction PTE, the Department is also proposing elsewhere in the **Federal Register** amendments to certain existing PTEs:

- Prohibited Transaction Exemption (PTE) 86-128³¹ currently allows an investment advice fiduciary to cause the recipient plan or IRA to pay the investment advice fiduciary or its affiliate a fee for effecting or executing securities transactions as agent. To prevent churning, the exemption does not apply if such transactions are excessive in either amount or frequency. The exemption also allows the investment advice fiduciary to act as an agent for both the plan and the other party to the transaction (i.e., the buyer and the seller of securities) and receive a reasonable fee. To use the exemption, the fiduciary cannot be a plan administrator or employer, unless all profits earned by these parties are returned to the plan. The conditions of the exemption require that a plan fiduciary independent of the investment advice fiduciary receive certain disclosures and authorize the transaction. In addition, the independent fiduciary must receive confirmations and an annual “portfolio turnover ratio” demonstrating the amount of turnover in the account during that year. These conditions are not presently applicable to transactions involving IRAs.

The Department is proposing to amend PTE 86-128 to require all fiduciaries relying on the exemption to adhere to the same impartial conduct standards required in the **Best Interest** Contract PTE. At the same time, the proposed amendment would not allow investment advice fiduciaries to IRA owners to claim the exemption; instead they would be required to

³¹ Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers, 51 FR 41686 (Nov. 18, 1986), amended at 67 FR 64137 (Oct. 17, 2002).

Comment [A60]: Do we mean security not stock?

Comment [A61]: EBSA response to this edit: Same comment as above.

Comment [A62]: This doesn't seem to be adding anything beyond the below, right?

EBSA response: Comment accepted.

Deleted: The proposed exemption contains conditions that investment advice fiduciaries must satisfy in order to take advantage of the relief, including safeguards on pricing, and limits the type of debt securities that may be purchased or sold.

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Comment [A63]: EBSA response to this edit: The principal transactions PTE does not include all the requirements of the **Best Interest** Contract PTE. It does include all of the requirements related to the contract but it doesn't have the same web disclosure or data retention, among other things. So we could revise this sentence to read: "The Principal Transaction PTE would include all of the contract requirements of the **Best Interest** Contract PTE."

Deleted: require that the advice provider (including the firm and the individual adviser) contractually commit to adhere to the impartial conduct standards, and the firm would further be required to warrant that it has adopted policies and procedures designed to mitigate the impact of conflicts of interest and ensure that the individual advisers adhere to the impartial conduct standards. Additionally, the exemption would not apply if the contract contains exculpatory provisions disclaiming or otherwise limiting liability of the adviser or financial institution for violation of the contract's terms. While the contract would be permitted to require the parties to arbitrate individual claims, it would not be permitted to limit the rights of the plan, participant, beneficiary, or IRA owner to bring or participate in a class action against the adviser or financial institution. ¶ The proposed Principal Transaction PTE would also have

Comment [A64]: Is a contract also required? If so, would say so.

EBSA response: The contract is not required in this exemption.

Comment [A65]: EBSA response: Why is this deleted?

Comment [A66]: EBSA response: Not sure "claim the exemption" is accurate. Can we say "rely?"

COI EBSA PASS BACK
DRAFT – 4/08/2015

rely on the Best Interest Contract PTE for an exemption for such compensation. In the Department's view, investment advice transactions involving IRAs in the current marketplace generally should occur under the conditions of the Best Interest Contract Exemption, particularly in light of the fact that IRA owners do not have the benefit of a separate fiduciary, such as a plan sponsor, looking out for their interests. Investment advice fiduciaries to plans would remain eligible for relief under the exemption, as would investment managers to plans and IRA owners, but they would be required to comply with all the protective conditions, described above. Finally, the Department is proposing that PTE 86-128 extend to a new covered transaction, for fiduciaries who sell mutual fund shares out of their own inventory (i.e. acting as principals, rather than agents) to plans and IRAs and to receive commissions for doing so. This transaction is currently the subject of another exemption, PTE 75-1, Part II(2) (discussed below).

- Several changes are proposed with respect to PTE 75-1, a multi-part exemption for securities transactions involving broker dealers and banks, and plans and IRAs.³² Part I(b) and (c) currently provide relief for certain non-fiduciary services to plans and IRAs. The Department is proposing to revoke these provisions, and require persons seeking to engage in such transactions to rely instead on the existing statutory exemptions provided in ERISA section 408(b)(2) and Code section 4975(d)(2), and the Department's implementing regulations at 29 C.F.R. 2550.408b-2. The Department believes the conditions of the statutory exemptions are more appropriate for the provision of these services.

PTE 75-1, Part II(2), currently provides relief for fiduciaries selling mutual fund shares to plans and IRAs in a principal transaction to receive commissions. PTE 75-1, Part II(2) currently provides relief for fiduciaries to receive commissions for selling mutual fund shares to plans and IRAs in a principal transaction. As described above, the Department is proposing to provide relief for these types of transactions in PTE 86-128, and so is proposing to revoke PTE 75-1, Part II(2), in its entirety. As discussed in more detail in the notice of proposed amendment/revocation, the Department believes the conditions of PTE 86-128 are more appropriate for these transactions.

PTE 75-1, Part V, currently permits broker-dealers to extend credit to a plan or IRA in connection with the purchase or sale of securities. The exemption does not permit broker-dealers that are fiduciaries to receive compensation when doing so. The Department is proposing to amend PTE 75-1, Part V, to permit investment advice fiduciaries to receive compensation for lending money or otherwise extending credit, but only for the limited purpose of avoiding a failed securities transaction.

Comment [A67]: What's an investment manager to an IRA and how is this different from an investment advice fiduciary to an IRA?

EBSA response: An investment manager has full investment discretion over the investment of the plan/IRA assets. We could add a clause to that effect: "as would investment managers with full investment discretion over the investments of plans and IRA owners, but they would be required..."

Comment [A68]: Would say briefly why are making these changes.

EBSA response: See inserted sentence: "In the Department's view, investment advice transactions involving IRAs in the current marketplace generally should occur under the conditions of the Best Interest Contract Exemption, particularly in light of the fact that IRA owners do not have the benefit of a separate fiduciary, such as a plan sponsor, looking out for their interests."

Comment [A69]: Would say briefly why are making the changes listed below.

EBSA response: See added sentence

Comment [A70]: Missing some words?

EBSA response: Can re-write – see revised sentence.

Comment [A71]: How is this an exemption if it doesn't allow them to receive any compensation?

EBSA response: It is a separate prohibited transaction to extend credit, so an exemption is needed for that.

³² Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 40 FR 50845 (Oct. 31, 1975), as amended at 71 FR 5883 (Feb. 3, 2006).

COI EBSA PASS BACK
DRAFT – 4/08/2015

- PTE 84-24³³ covers transactions involving mutual fund shares, or insurance or annuity contracts, sold to plans or IRA investors by pension consultants, insurance agents, brokers, and mutual fund principal underwriters who are fiduciaries as a result of advice they give in connection with these transactions. The exemption allows these investment advice fiduciaries to receive a sales commission with respect to products purchased by plans or IRA investors. The exemption is limited to sales commissions that are reasonable under the circumstances. The investment advice fiduciary must provide disclosure of the amount of the commission and other terms of the transaction to an independent fiduciary of the plan or IRA, and obtain approval for the transaction. To use this exemption, the investment advice fiduciary may not have certain roles with respect to the plan or IRA such as trustee, plan administrator, fiduciary with written authorization to manage the plan's assets and employers. However it is available to investment advice fiduciaries regardless of whether they expressly acknowledge their fiduciary status or are simply functional or "inadvertent" fiduciaries that have not expressly agreed to act as fiduciary advisers, provided there is no written authorization granting them discretion to acquire or dispose of the assets of the plan or IRA.

The Department is proposing to amend PTE 84-24 to require all fiduciaries relying on the exemption to adhere to the same impartial conduct standards required in the Best Interest Contract Exemption and the principal transactions exemption. At the same time, the proposed amendment would eliminate relief for investment advice fiduciaries to IRA owners, who would instead be required to rely on the Best Interest Contract Exemption for an exemption for such compensation. The Department believes that investment advice transactions involving IRAs in the current marketplace generally should occur under the conditions of the Best Interest Contract Exemption, particularly in light of the fact that IRA owners do not have the benefit of a separate fiduciary, such as a plan sponsor, looking out for their interests. Investment advice fiduciaries to plans would remain eligible for relief under the exemption, but they would be required to comply with all the protective conditions described above.

Additionally, the Department is proposing to revoke the relief in PTE 84-24 that permits the parties relying on the exemption – the pension consultants, insurance agents, insurance brokers, and mutual fund principal underwriters – to provide the service of executing the recommended mutual fund or insurance transactions for the plans. To the extent these parties are parties in interest to plans, they are prohibited by ERISA section 406(a)(1)(C) from performing services for the plans unless they comply with an exemption. The Department believes that parties desiring relief for the service of executing the mutual fund and insurance transactions described in PTE 84-24 should comply with the statutory exemption and the Department's implementing regulations at 29 C.F.R. 2550.408b-2.

Comment [A72]: EBSA. Language added to explain IRA exclusion from existing exemptions.

³³ Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, Investment Companies and Investment Company Principal Underwriters, 49 FR 13208 (Apr. 3, 1984), amended at 71 FR 5887 (Feb. 3, 2006).

COI EBSA PASS BACK
DRAFT – 4/08/2015

Finally, the Department is proposing amendments to certain other existing class exemptions to require adherence to the impartial conduct standards required in the **Best Interest Contract PTE**. Specifically, PTEs 75-1, Part III, 75-1, Part IV, 77-4, 80-83, and 83-1, would be amended. These existing class exemptions will otherwise remain in place, affording flexibility to fiduciaries who currently use the exemptions or who wish to use the exemptions in the future.

Comment [A73]: EBSA response: Why deleted?

The proposed dates on which the new exemptions and amendments to existing exemptions would be effective are summarized below:

G. The Provision of Professional Services Other Than Investment Advice

Several commenters asserted that it was unclear whether investment advice under the scope of the 2010 Proposal would include the provision of information and plan services that traditionally have been performed in a non-fiduciary capacity. For example, they requested that the proposal be revised to make clear that actuaries, accountants, and attorneys, who have historically not been treated as ERISA fiduciaries for plan clients, would not become fiduciary investment advisers by reason of providing actuarial, accounting and legal services. They said that if individuals providing these services were classified as fiduciaries, the associated costs would almost certainly increase because of the need to account for their new potential fiduciary liability. This was not the intent of the 2010 proposal.

The new proposal clarifies that attorneys, accountants, and actuaries would not be treated as fiduciaries merely because they provide such professional assistance in connection with a particular investment transaction. Only when these professionals act outside their normal roles and recommend specific investments or render valuation opinions in connection with particular investment transactions, would they be subject to the proposed fiduciary definition.

Similarly, the new proposal does not alter the principle articulated in ERISA Interpretive Bulletin 75-8, D-2 at 29 CFR 2509.75-8 (1975). Under the bulletin, the plan sponsor's HR personnel or plan service providers who have no power to make decisions as to plan policy, interpretations, practices or procedures, but who perform purely administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, are not fiduciaries with respect to the plan.

H. Effective Date; Applicability Date

Final Rule

Commenters on the 2010 Proposal asked the Department to provide sufficient time for orderly and efficient compliance, and to make it clear that the final rule would not apply in connection with advice provided before the effective date of the final rule. Many commenters also expressed concern with the provision in the Department's 2010 Proposal that the final regulation and class exemptions would be effective 90 days after their publication in the Federal Register. Commenters suggested that these effective dates should be extended to as much as 12 months or

Comment [A74]: Need to update with new approach.
EBSA Response: Text revised.

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COI EBSA PASS BACK
DRAFT – 4/08/2015

longer following publication of the new rule to allow service providers sufficient time to make necessary changes in business practices, recordkeeping, communication materials, sales processes, compensation arrangements, and related agreements, as well as the time necessary to obtain and adjust to any additional individual or class exemptions. Several said that applicability of any changes in the 1975 regulation should be no earlier than two years after the promulgation of a final regulation.

In response to these concerns, the Department has revised the date by which the final rule will apply. Specifically, although the final rule will be effective 60 days after publication in the **Federal Register**, the requirements of the final rule will become applicable after December 31, 2016. This modification is intended to accommodate concerns raised by commenters as to the cost and burden associated with transitioning current and future contracts or arrangements to satisfy the requirements of the final rule and any accompanying prohibited transaction exemptions.

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Administrative Prohibited Transaction Exemptions

The Department proposes to make the Best Interest Contract Exemption, if granted, available on the final rule's applicability date described above. Further, the Department is proposing to revoke relief for transactions involving IRAs from two existing exemptions, PTEs 86-128 and 84-24, as of the final rule's applicability date.³⁴ As a result, fiduciary investment advisers, including those newly defined as such under the final rule, will generally have to comply with the Best Interest Contract Exemption to receive many common forms of compensation in transactions involving IRAs. The Department recognizes that compliance with all the conditions of the Best Interest Contract Exemption within the above timeframes may represent a significant adjustment for many fiduciary investment advisers, particularly with respect to IRA owners. Although the Department does not believe that a general delay in the applicability of the exemption's conditions in the IRA marketplace is warranted, it recognizes that a short-term delay in the application of certain conditions might not compromise the overall protections created under the exemption and may be appropriate. The Department therefore is soliciting comments on whether to delay the application of certain conditions of the Best Interest Contract Exemption, for example, certain data collection requirements. A detailed discussion of this solicitation for comment is contained in the Notice proposing the Best Interest Contract Exemption published elsewhere in this issue of the Federal Register.

Comment [A75]: Housekeeping
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I. Public Hearing

The Department plans to hold an administrative hearing within 30 days of the close of the comment period. As with the 2010 Proposal, the Department will ensure ample opportunity for public comment by reopening the record following the hearing and publication of the hearing transcript. Specific information regarding the date, location and submission of requests to testify will be published in a notice in the Federal Register.

³⁴ See the notices with respect to these proposals, published elsewhere in this issue of the Federal Register.

J. Regulatory Impact Analysis

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

The Department’s complete Regulatory Impact Analysis is available at { HYPERLINK “http://www.dol.gov/ebsa/xxxxxxxxxxx” }. It is summarized below.

Tax-preferred retirement savings, in the form of private-sector, employer-sponsored retirement plans, such as 401(k) plans (“plans”), and Individual Retirement Accounts (“IRAs”), are critical to the retirement security of most U.S. workers. Investment professionals play a major role in guiding their investment decisions. However, these professional advisers often are compensated in ways that create conflicts of interest, which can bias the investment advice they render and erode plan and IRA investment results. In order to limit or mitigate conflicts of interest and thereby improve retirement security, the Department of Labor (“the Department”) is proposing to attach fiduciary status to more of the advice rendered to plan officials, participants, and beneficiaries (plan investors) and IRA investors.

Since the Department issued its 1975 rule, the retirement savings market has changed profoundly. Financial products are increasingly varied and complex. Individuals, rather than large employers, are increasingly responsible for their investment decisions as IRAs and 401(k)-type defined contribution plans have supplanted defined benefit pensions as the primary means of providing retirement security. Plan and IRA investors often lack investment expertise and must rely on experts – but are unable to assess the quality of the expert’s advice or police its conflicts of interest. Most have no idea how “advisers” are compensated for selling them products. Many are bewildered by complex choices that require substantial financial literacy and welcome “free” advice. The risks are growing as baby boomers retire and move money from plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs, where both good and bad investment choices are myriad and most advice is conflicted. These “rollovers” are expected to approach \$2.5 trillion over the next 5

Comment [A76]: Have not re-upped prior suggestions per this statement.

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COI EBSA PASS BACK
DRAFT – 4/08/2015

years.³⁵ These rollovers, which will be one-time and not “on a regular basis” and thus not covered by the 1975 standard, will be the most important financial decisions that many consumers make in their lifetime. An ERISA plan investor who rolls her retirement savings into an IRA could lose 12 to 24 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial advisor.³⁶ Timely regulatory action to redress advisers’ conflicts is warranted to avert such losses.

In the retail IRA marketplace, growing consumer demand for personalized advice, together with competition from online discount brokerage firms, has pushed brokers to offer more comprehensive guidance services rather than just transaction support. Unfortunately, their traditional compensation sources – such as brokerage commissions, revenue shared by mutual funds and funds’ asset managers, and mark-ups on bonds sold from their own inventory – can introduce acute conflicts of interest. Brokers and others advising IRA investors are often able to calibrate their business practices to steer around the narrow 1975 rule and thereby avoid fiduciary status and prohibited transactions for accepting conflict-laden compensation. Many brokers market retirement investment services in ways that clearly suggest the provision of tailored or individualized advice, while at the same time relying on the 1975 rule to disclaim any fiduciary responsibility in the fine print of contracts and marketing materials. Thus, at the same time that marketing materials may characterize the financial adviser’s relationship with the customer as one-on-one, personalized, and based on the client’s best interest, footnotes and legal boilerplate disclaim the requisite mutual agreement, arrangement, or understanding that the advice is individualized or should serve as a primary basis for investment decisions. What is presented to an IRA investor as trusted advice is often paid for by a financial product vendor in the form of a sales commission or shelf-space fee, without adequate counter-balancing consumer protections that are designed to ensure that the advice is in the investor’s best interest. Another variant of the same problem is when brokers and others provide apparently tailored advice to a customer that is erroneously labeled as general education to avoid triggering the fiduciary status.

Likewise in the plan market, pension consultants and advisers that plan sponsors rely on to guide their decisions often avoid fiduciary status under the five-part test and are conflicted. For example, if a plan hires an investment professional or appraiser on a one-time basis for an investment recommendation on a large, complex investment, the adviser has no fiduciary obligation to the plan under ERISA. Even if the plan official, who lacks the specialized expertise necessary to evaluate the complex transaction on his or her own, invests all or substantially all of the plan’s assets in reliance on the consultant’s professional judgment, the consultant is not a

³⁵ Cerulli Associates, “Retirement Markets 2014: Sizing Opportunities in Private and Public Retirement Plans,” 2014.

³⁶ For example, an ERISA plan investor who rolls \$200,000 into an IRA, earns a 6% nominal rate of return with 3% inflation, and aims to spend down her savings in 30 years, would be able to consume \$10,204 per year for the 30 year period. A similar investor whose assets underperform by 1 or 2 percentage points per year would only be able to consume \$8,930 or \$7,750 per year, respectively, in each of the 30 years. The 1 to 2 percentage point underperformance comes from a careful review of a large and growing body of literature which consistently points to a substantial failure of the market for retirement advice. The literature is discussed in the Department’s complete Regulatory Impact Analysis (available at {HYPERLINK “http://www.dol.gov/ebsa/xxxxxxx”}),³⁷ DOL Advisory Opinion 2005-23A (Dec. 7, 2005).

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COI EBSA PASS BACK
DRAFT – 4/08/2015

fiduciary because he or she does not advise the plan on a “regular basis” and therefore may stand to profit from the plan’s investment due to a conflict of interest that could affect their best judgment. Too much has changed since 1975, and too many investment decisions are made as one-time decisions and not advice on a regular basis for the five-part test to be a meaningful safeguard any longer.

The proposed definition of fiduciary investment advice included in this NPRM generally covers specific recommendations on investments, investment management, the selection of persons to provide investment advice or management, and appraisals in connection with investment decisions. Persons who provide such advice would fall within the proposed regulation’s ambit if they either (a) represent that they are acting as an ERISA fiduciary or (b) make investment recommendations pursuant to an agreement, arrangement, or understanding that the advice is individualized or specifically directed to the recipient for consideration in making investment or investment management decisions regarding plan or IRA assets.

The current proposal specifically includes as fiduciary investment advice recommendations concerning the investment of assets that are rolled over or otherwise distributed from a plan. This would supersede guidance the Department provided in a 2005 advisory opinion,³⁷ which concluded that such recommendations did not constitute fiduciary advice. However, the current proposal provides that an adviser does not act as a fiduciary merely by providing plan investors with information about plan distribution options, including the tax consequences associated with the available types of benefit distributions.

The current proposal adopts what the Department intends to be a balanced approach to prohibited transaction exemptions. The proposal narrows and attaches new protective conditions to some existing PTEs. At the same time it includes some new PTEs with broad but targeted combined scope and strong protective conditions. These elements of the proposal reflect the Department’s effort to ensure that advice is impartial while avoiding larger and costlier than necessary disruptions to existing business arrangements or constraints on future innovation.

In developing the current proposal, the Department conducted an in-depth economic assessment of current market conditions and the likely effects of reform. As further discussed below, the Department found that conflicted advice is widespread, causing serious harm to plan and IRA investors, and that disclosing conflicts alone would fail to adequately mitigate the conflicts or remedy the harm. By extending fiduciary status to more advice and providing broad but targeted and protective PTEs, the current proposal will mitigate conflicts, support consumer choice, and deliver substantial gains for retirement investors and economic benefits that more than justify its costs.

Advisers’ conflicts take a variety of forms and can bias their advice in a variety of ways. For example, advisers often are paid more for selling some mutual funds than others, and to execute larger and more frequent trades of mutual fund shares or other securities. Broker-dealers reap price spreads from principal transactions, so advisers may be encouraged to recommend larger

³⁷ DOL Advisory Opinion 2005-23A (Dec. 7, 2005).

COI EBSA PASS BACK
DRAFT – 4/08/2015

and more frequent trades. These and other adviser compensation arrangements introduce direct and serious conflicts of interest between advisers and retirement investors. Advisers often are paid a great deal more if they recommend investments and transactions that are highly profitable to the financial industry, even if they are not in investors' best interests. These financial incentives can and do bias the advisers' recommendations.

Following such biased advice can inflict losses on investors in several ways. They may choose more expensive and/or poorer performing investments. They may trade too much and thereby incur excessive transaction costs, and may incur more costly timing errors, which are a common consequence of chasing returns.

A wide body of economic evidence, reviewed in the Department's full Regulatory Impact Analysis (available at { HYPERLINK "http://www.dol.gov/ebsa/xxxxxxxxx" }), supports a finding that the impact of these conflicts of interest on investment outcomes is large and negative. The supporting evidence includes, among other things, statistical analyses of conflicted investment channels, experimental studies, government reports documenting abuse, and economic theory on the dangers posed by conflicts of interest and by the asymmetries of information and expertise that characterize interactions between ordinary retirement investors and conflicted advisers. A careful review of this data, which consistently points to a substantial failure of the market for retirement advice, suggests that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 100 basis points per year over the next 20 years. The underperformance associated with conflicts of interest – in the mutual funds segment alone – could cost IRA investors more than \$210 billion over the next 10 years and nearly \$500 over the next 20 years. Some studies suggest that the underperformance of broker-sold mutual funds may be even higher than 100 basis points. If the true underperformance of broker-sold funds is 200 basis points, IRA mutual fund holders could suffer from underperformance amounting to \$430 billion over 10 years and nearly \$1 trillion across the next 20 years. While the estimates based on the mutual fund market are large, the total market impact could be much larger. Insurance products, Exchange Traded Funds (ETFs), individual stocks and bonds, and other products are all sold by brokers with conflicts of interest.

Disclosure alone has proven ineffective to mitigate conflicts in advice. Extensive research has demonstrated that most investors have little understanding of their advisers' conflict, and little awareness of what they are paying via indirect channels for the conflicted advice. Even if they understand the scope of the advisers' conflicts, most consumers generally cannot distinguish good advice, or even good investment results, from bad. The same gap in expertise that makes investment advice necessary frequently also prevents investors from recognizing bad advice or understanding advisers' disclosures. Recent research suggests that even if disclosure about conflicts could be made simple and clear, it would be ineffective – or even harmful.³⁸

Excessive fees and substandard investment performance in DC plans or IRAs, which can result when advisers' conflicts bias their advice, erode benefit security. This proposal aims to ensure that advice is impartial, thereby rooting out excessive fees and substandard performance

³⁸ See Loewenstein *et al.*, (2011) for a summary of some relevant literature.

COI EBSA PASS BACK
DRAFT – 4/08/2015

otherwise attributable to advisers' conflicts, producing gains for retirement investors. Delivering these gains will entail some compliance cost – namely, the cost incurred by new fiduciary advisers to avoid PTs and/or satisfy relevant PTE conditions. Investor gains are expected to be very large relative to compliance costs, and the Department therefore believes this proposal is economically justified and sound.

The proposal is expected to deliver large gains for retirement investors. Because of data constraints, only some of these gains can be quantified with confidence. Cautiously focusing only on how load shares paid to brokers affect the size of loads IRA investors holding load funds pay and the returns they achieve, the proposal will deliver to IRA investors gains of between \$40 billion and \$44 billion over 10 years and between \$88 and \$100 billion over 20 years. These estimates assume that the rule will eliminate (rather than just reduce) underperformance associated with the practice of incentivizing broker recommendations through variable front-end-load sharing; if the rule's effectiveness in this area is substantially below 100 percent, these estimates may overstate these particular gains to investors in the front-load mutual fund segment of the IRA market.

This very cautious approach to the economic analysis accounts for only a fraction of potential conflicts, associated losses, and affected retirement assets. The total gains to IRA investors attributable to the rule may be much higher than these quantified gains alone. The proposal is expected to yield large, additional gains for IRA investors, including potential reductions in excessive trading and associated transaction costs and timing errors (such as might be associated with return chasing), and improvements in the performance of IRA investments other than front-load mutual funds. As noted above, under current rules, adviser conflicts could cost IRA investors as much as \$410 billion over 10 years and \$1 trillion over 20 years, so the potential additional gains to IRA investors from this proposal could be very large.

Just as with IRAs, there is evidence that conflicts of interest in the investment advice market also erode plan assets. For example, the U.S. Government Accountability Office (GAO) found that defined benefit pension plans using consultants with undisclosed conflicts of interest earned 1.3 percentage points per year less than other plans.³⁹ Other GAO reports point out how adviser conflicts may cause plan participants to roll plan assets into IRAs that charge high fees or 401(k) plan officials to include expensive or underperforming funds in investment menus.⁴⁰ A number of academic studies find that 401(k) plan investment options underperform the market,⁴¹ and at least one study attributes such underperformance to excessive reliance on funds that are proprietary to plan service providers who may be providing investment advice to plan officials that choose the investment options.⁴²

The current proposal's positive effects are expected to extend well beyond improved investment results for retirement investors. The IRA and plan markets for fiduciary advice and other

³⁹ GAO Report, Publication No. GAO-09-503T, 2009.

⁴⁰ GAO Report, Publication No. GAO-11-119, 2011.

⁴¹ See e.g. Elton *et al.* (2013).

⁴² See Pool *et al.* (2014).

COI EBSA PASS BACK
DRAFT – 4/08/2015

services may become more efficient as a result of more transparent pricing and greater certainty about the fiduciary status of advisers and about the impartiality of their advice. There may be benefits from the increased flexibility that the current proposal's PTEs will provide with respect to fiduciary investment advice currently falling within the ambit of the 1975 rule. The current proposal's defined boundaries between fiduciary advice, education, and sales activity directed at large plans, may bring greater clarity to the IRA and plan services markets. Innovation in new advice business models, including technology-driven models, may be accelerated, and nudged away from conflicts and toward transparency, thereby promoting healthy competition in the fiduciary advice market.

A major expected positive effect of the current proposal in the plan advice market is improved compliance and associated improved security of plan assets and benefits. Clarity about advisers' fiduciary status will strengthen EBSA's enforcement activities resulting in fuller and faster correction, and stronger deterrence, of ERISA violations.

The Department estimates that the compliance cost associated with the proposal will total between \$2.5 billion and \$5.7 billion over 10 years, mostly reflecting the cost incurred by new fiduciary advisers to satisfy relevant PTE conditions.

In conclusion, the current proposal will mitigate adviser conflicts and thereby improve plan and IRA investment results, while avoiding greater than necessary disruption of existing business practices and will deliver large gains to retirement investors and a variety of other economic benefits, which will more than justify its costs.

K. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Department's IRFA of the proposed rule is provided below.

The Department believes that amending the current regulation by broadening the scope of service providers, regardless of size, that would be considered fiduciaries would enhance the Department's ability to redress service provider abuses that currently exist in the plan service provider market, such as undisclosed fees, misrepresentation of compensation arrangements, and biased appraisals of the value of employer securities and other plan investments.

The Department's complete Initial Regulatory Flexibility Analysis is available at { HYPERLINK "http://www.dol.gov/ebsa/xxxxxxxxxx" }. It is summarized below.

The proposal will provide benefits to small plans and their related small employers and IRA holders, and impose costs on small service providers providing investment advice to ERISA

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COI EBSA PASS BACK
DRAFT – 4/08/2015

plans, ERISA plan participants and IRA holders. Small service providers affected by this rule are defined to include broker-dealers, registered investment advisers, consultants, appraisers, and others providing investment advice to small ERISA plans and IRA that have less than \$38.5 million in revenue.

The Department anticipates that broker-dealers will experience the largest impact from the proposed rule and associated proposed exemptions. Registered investment advisers and other ERISA plan service providers will experience less of a burden from the rule. The Department assumes that firms will utilize whichever PTEs will be most cost effective for their business models. Regardless of which PTEs they use, small affected entities will incur costs associated with developing and implementing new compliance policies and procedures to minimize conflicts of interest; creating and distributing new disclosures; maintaining additional compliance records; familiarizing and training staff on new requirements; and obtaining additional liability insurance.

As discussed previously, the Department estimated the costs of implementing new compliance policies and procedures, training staff, and creating disclosures for small broker-dealers. The Department estimates that small broker-dealers could expend on average approximately \$53,000 in the first year and \$21,000 in subsequent years; small registered investment advisers will spend approximately \$5,300 in the first year and \$500 in subsequent years; and small service providers will spend approximately \$5,300 in the first year and \$500 in subsequent years. The estimated cost for small broker-dealers is believed to be an overestimate, especially for the smallest firms as they are believed to have on average simpler arrangements and they may have relationships with larger firms that help with compliance, thus lowering their costs. Additionally, broker-dealers and service providers will incur an expense of about \$300 in additional liability insurance premiums for each representative or other individual who will now be considered a fiduciary. Of this expense, \$150 is estimated to be paid to the insuring firms and the other \$150 is estimated to be paid out as compensation to those harmed, which is counted as a transfer. Any disclosures produced by affected entities will cost, on average, about \$1.56 in the first year and about \$1.14 in subsequent years. These per-representative and per-disclosure costs are not expected to disproportionately affect small entities.

Although the PTEs allow firms to maintain their existing business models, some small affected entities may determine that it is more cost effective to shift business models. In this scenario, some BDs might incur the costs of switching to becoming RIAs, including training, testing, and licensing costs, at a cost of approximately \$5,600 per representative.

It is unlikely that some small service providers may find that the increased costs associated with ERISA fiduciary status outweigh the benefit of continuing to service the ERISA plan market or the IRA market. The Department does not believe that this outcome will be widespread or that it will result in a diminution of the amount or quality of advice available to small or other retirement savers. It is also possible that the economic impact of the rule on small entities would not be as significant as it would be for large entities, because anecdotal evidence indicates that small entities do not have as many business arrangements that give rise to conflicts of interest. Therefore, they would not be confronted with the same costs to restructure transactions that would be faced by large entities.

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L. Paperwork Reduction Act

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

Currently, the Department is soliciting comments concerning the proposed information collection requests (ICRs) included in the Limitations – Investment Advice section of its proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan becomes an ERISA fiduciary. A copy of the ICRs may be obtained by contacting the PRA addressee shown below or at <http://www.RegInfo.gov>.

The Department has submitted a copy of the Counterparty Exception Disclosure Requirements to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

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

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

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N-5718, Washington, DC 20210. Telephone (202) 693-8410; Fax: (202) 219-5333. These are not toll-free numbers. ICRs submitted to OMB also are available at <http://www.RegInfo.gov>.

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

The Department's complete Regulatory Impact Analysis is available at { HYPERLINK "http://www.dol.gov/ebsa/xxxxxxxxx" }. It is summarized below.¶

Tax-preferred retirement savings, in the form of private-sector, job-based retirement plans, such as 401(k) plans ("plans"), and Individual Retirement Accounts ("IRAs"), are critical to the retirement security of most US workers. Because plan and IRA investors often lack financial expertise, investment professionals play a major role in guiding their investment decisions. However, these professional advisers often are compensated in ways that create conflicts of interest, which can bias the investment advice they render and erode plan and IRA investment returns. In order to limit or mitigate conflicts of interest and thereby improve retirement security, the Department is proposing to attach fiduciary status to more of the advice rendered to plan and IRA investors. ¶

Financial products are increasingly varied and complex. Individuals, rather than large employers, are increasingly responsible for their investment decisions as IRAs and 401(k)-type defined contribution plans have supplanted defined benefit pensions as the primary means of providing retirement security. Plan and IRA investors often lack investment expertise and must rely on experts – but are unable to assess the quality of the expert's advice or police its conflicts of interest. This is especially true of small retail investors who typically do not have financial expertise and can ill-afford the loss of the hard-earned savings amassed for their retirement. The risks are growing as baby boomers retire and move money from plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs, where both good and bad investment choices are myriad and advice is often conflicted. Such "rollovers" will total more than \$2 trillion over the next 5 years.¶

... [2]

COIEBSA PASS BACK
DRAFT – 4/08/2015

As discussed in detail above, Paragraph (b)(1)(i) of the proposed regulation provides a limitation to the general definition for advice provided in connection with an arm's length sale, purchase, loan, or bilateral contract between a sophisticated plan investor, which has 100 or more plan participants, and the adviser. It also applies in connection with an offer to enter into such a transaction or when the person providing the advice is acting as an [investment intermediary,] agent or appraiser for the plan's counterparty ("counterparty limitation"). In order to rely on the limitation, the person must provide advice to a plan fiduciary who is independent of such person and who exercises authority or control respecting the management or disposition of the plan's assets, with respect to an arm's length sale, purchase, loan or bilateral contract between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract.

The counterparty limitation applies if certain conditions are met. Among these conditions are the following: the adviser must obtain a written representation from the plan fiduciary that (1) the plan fiduciary is a fiduciary who exercises authority or control respecting the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act), (2) that the employee benefit plan has 100 or more participants covered under the plan, and that (3) the fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity.

Paragraph (b)(3) of the proposed regulation provides a limitation making clear that persons who merely market and make available, securities or other property through a platform or similar mechanism to an employee benefit plan without regard to the individualized needs of the plan, its participants, or beneficiaries do not act as investment advice fiduciaries. The platform provider limitation applies if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

Paragraph (b)(6) of the proposal makes clear that furnishing and providing certain specified investment educational information and materials (including certain investment allocation models and interactive plan materials) to a plan, plan fiduciary, participant, beneficiary or IRA owner will not constitute the rendering of investment advice if certain conditions are met. One of the conditions is that the asset allocation models or interactive materials must explain all material facts and assumptions on which the models and materials are based and include a statement indicating that, in applying particular asset allocation models to their individual situations, participants, beneficiaries, or IRA owners should consider their other assets, income, and investments in addition to their interests in the plan or IRA to the extent they are not taken into account in the model or estimate.

The counterparty limitation written representation, platform provider limitation disclosure, and the education limitation disclosures for asset allocation models and interactive investment materials are information collection requests (ICRs) subject to the Paperwork Reduction Act. The Department has made the following assumptions in order to establish a reasonable estimate of the paperwork burden associated with these ICRs:

• ~~Approximately 43,000 plans will utilize the counterparty limitation;~~

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COI EBSA PASS BACK
DRAFT – 4/08/2015

• Approximately 1,800 service providers will utilize the platform provider limitation;

• Approximately 2,800 financial institutions will utilize the education limitation;

- Plans and advisers using the counterparty limitation are sophisticated entities and will distribute substantially all of the disclosures electronically via means already used in their normal course of business and the costs arising from electronic distribution will be negligible;
- Service providers using the platform provider limitation already maintain contracts with their customers as a regular and customary business practice and the materials costs arising from inserting the platform provider disclosure into the existing contracts will be negligible;
- Materials costs arising from inserting the required education limitation disclosure into existing models and interactive materials will be negligible;
- Advisers will use existing in-house resources to prepare the disclosures; and
- The tasks associated with the ICRs will be performed by clerical personnel at an hourly rate of \$29.14 and legal professionals at an hourly rate of \$126.07.

The Department estimates that each plan will require one hour of legal professional time and 30 minutes of clerical time to produce the counterparty limitation representation. Therefore, the counterparty limitation representation will result in approximately 43,000 hours of legal time at an equivalent cost of approximately \$5.4 million. They will also result in approximately 21,000 hours of clerical time at an equivalent cost of approximately \$635,000. In total, the burden associated with the counterparty limitation representation is approximately 64,000 hours at an equivalent cost of \$6.1 million.

The Department estimates that each service provider using the platform provider limitation will require ten minutes of legal professional time to draft the platform provider limitation disclosure. Therefore, the platform provider limitation disclosure will result in approximately 300 hours of legal time at an equivalent cost of approximately \$38,000.

The Department estimates that each financial institution using the education limitation will require twenty minutes of legal professional time to draft the disclosure. Therefore, the education limitation disclosure will result in approximately 900 hours of legal time at an equivalent cost of approximately \$118,000.

In total, the hour burden for the representation and disclosures required by the limitations is approximately 66,000 hours at an equivalent cost of \$6.2 million.

Because the Department assumes that all disclosures will be distributed electronically or require small amounts of space to include in existing materials, the Department has not associated any cost burden with these ICRs.

These paperwork burden estimates are summarized as follows:

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Comment [A77]: Curious what the denominator is.

RESPONSE: The 43,000 plan estimate for the counterparty limitation usage represents approximately 50 percent of plans with 100 or more participants. The 1,800 service provider estimate for the platform provider limitation usage represents approximately 100 percent of recordkeepers operating in the plan/IRA space. The 2,800 financial institution estimate for the education limitation usage represents 100 percent of broker-dealers operating in the plan/IRA space plus a small uncertainty factor to account for other type of financial institutions that might have a need to use the limitation.

Comment [A78]: On education, do you mean 100% of those providing education or 100% of all BDs because they all offer education?

COI EBSA PASS BACK
DRAFT – 4/08/2015

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

Agency: Employee Benefits Security Administration, Department of
Labor.

Title: Counterparty Limitation Disclosure.

OMB Control Number: 1210-NEW.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 48,000.

Estimated Number of Annual Responses: 48,000.

Frequency of Response: When engaging in excepted transaction.

Estimated Total Annual Burden Hours: 66,000 hours.

Estimated Total Annual Burden Cost: \$0.

M. Congressional Review Act

The proposed rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and, if finalized, will be transmitted to Congress and the Comptroller General for review. The proposed rule is a “major rule” as that term is defined in 5 U.S.C. 804, because it is likely to result in an annual effect on the economy of \$100 million or more.

N. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. Such a mandate is deemed to be a “significant regulatory action.” The current proposal is expected to have such an impact on the private sector, and the Department therefore hereby provides such an assessment.

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COIEBSA PASS BACK
DRAFT – 4/08/2015

The Department is issuing the current proposal under ERISA section 3(21)(A)(ii) (29 U.S.C. 1002(21)(a)(ii)).⁴⁵ The Department is charged with interpreting the ERISA and IRC provisions that attach fiduciary status to anyone who is paid to provide investment advice to plan or IRA investors. The current proposal will update and supersede the 1975 rule⁴⁶ that currently interprets these statutory provisions.

The Department assessed the anticipated benefits and costs of the current proposal pursuant to Executive Order 12866 in the Regulatory Impact Analysis for the current proposal [add citation to the RIA] and concluded that its benefits will justify its costs. To summarize, the current proposals' material benefits and costs generally will be confined to the private sector, where plans and IRA investors will benefit on net, partly at the expense of their fiduciary advisers and upstream financial service and product producers. The Department itself will benefit from increased efficiency in its enforcement activity. The public and overall US economy will benefit from increased compliance with ERISA and the Code and confidence in advisers, as well as from more efficient allocation of investment capital, and transfers from financial professionals and firms to investors, who are likely to have higher marginal utilities of income.

The current proposal is not expected to have any material economic impacts on State, local or tribal governments, or on health, safety, or the natural environment. The North American Securities Administrators Association commented in support of the Department's 2010 proposal.⁴⁷

O. Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of 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. This proposed rule does not have 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. 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 requirements implemented in the proposed rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

⁴⁵ Under section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), the authority of the Secretary of the Treasury to interpret section 4975 of the Code has been transferred, with exceptions not relevant here, to the Secretary of Labor.

⁴⁶ 29 CFR 2510.3-21(e).

⁴⁷ Last accessed at <http://www.dol.gov/ebsa/pdf/1210-AB32-PH007.pdf>.

Statutory Authority

This regulation is proposed pursuant to the authority in section 505 of ERISA (Pub. L. 93-406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR 1978 Comp. 332, and under Secretary of Labor's Order No. 1-2003, 68 FR 5374 (Feb. 3, 2003).

Withdrawal of Proposed Regulation

Paragraph (c) of the proposed regulation relating to the definition of fiduciary (proposed 29 CFR 2510.3(21)) that was published in the **Federal Register** on October 20, 2010 (75 FR 65263) is hereby withdrawn.

List of Subjects in 29 CFR Parts 2509 and 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions, Plan assets.

For the reasons set forth in the preamble, the Department is proposing to amend parts 2509 and 2510 of subchapters A and B of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

SUBCHAPTER A—GENERAL

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. The authority citation for part 2509 continues to read as follows:

AUTHORITY: 29 U.S.C. 1135. Secretary of Labor's Order 1-2003, 68 FR 5374 (Feb. 3, 2003). Sections 2509.75-10 and 2509.75-2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75-5 also issued under 29 U.S.C. 1002. Sec. 2509.95-1 also issued under sec. 625, Pub. L. 109-280, 120 Stat. 780.

2. §2509.96-1 [Removed]

Remove §2509.96-1.

SUBCHAPTER B—DEFINITIONS AND COVERAGE UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

3. The authority citation for part 2510 is revised to read as follows:

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COI EBSA PASS BACK
DRAFT – 4/08/2015

AUTHORITY: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor’s Order 1-2011, 77 FR 1088; Secs. 2510.3-21, 2510.3-101 and 2510.3-102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237. Section 2510.3-38 also issued under Pub. L. 105-72, Sec. 1(b), 111 Stat. 1457 (1997).

4. Revise § 2510.3-21 to read as follows:

§ 2510.3-21 Definition of “Fiduciary.”

(a) Investment Advice. For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (Act) and section 4975(e)(3)(B) of the Internal Revenue Code (Code), except as provided in paragraph (b) of this section, a person renders investment advice with respect to moneys or other property of a plan or IRA described in paragraph (f)(2) of this section if—

(1) Such person provides, directly to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner the following types of advice in exchange for a fee or other compensation, whether direct or indirect:

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

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

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

(iv) A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (i) through (iii); and

(2) Such person, either directly or indirectly (e.g., through or together with any affiliate),—

(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to the advice described in paragraph (a)(1) of this section; or

(ii) Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to,

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Comment [A79]: Makes it sound like (i) to (iii) don't require the adviser to have received compensation.

RESPONSE: See above comment. Furthermore, it is necessary to keep this here. This paragraph captures a recommendation of another person to provide fiduciary investment advice or fiduciary management services. Without “for a fee or other compensation” in this paragraph – which refers to fee/compensation received by the *other* person – this would capture a person’s recommendation of a non fiduciary adviser.

Comment [A80]: See note above.
EBSA Response: This text needs to remain. We revised to try to make the point clearer.

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COI EBSA PASS BACK
DRAFT – 4/08/2015

the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

(b) **Carve-outs** – Investment Advice. Except for persons described in paragraph (a)(2)(i) of this section, the rendering of advice or other communications in conformance with a **carve-out** set forth in paragraph (b)(1) through (6) of this section shall not cause the person who renders the advice to be treated as a fiduciary under paragraph (a).

(1) Counterparties to the plan.

(i) Counterparty transaction with sophisticated plan fiduciary.

(A) In such person's capacity as a counterparty (or representative of a counterparty) to an employee benefit plan (as described in section 3(3) of the Act), the person provides advice to a plan fiduciary who is independent of such person and who exercises authority or control respecting the management or disposition of the plan's assets, with respect to an arm's length sale, purchase, loan or bilateral contract between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract, if, prior to providing any recommendation with respect to the transaction, such person satisfies the requirements of either (b)(1)(i)(B) or (b)(1)(i)(C) below.

(B) Such person—

(1) obtains a written representation from the independent plan fiduciary that the independent fiduciary exercises authority or control respecting the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act), that the employee benefit plan has 100 or more participants covered under the plan, and that the independent fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity;

(2) fairly informs the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction;

(3) does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction; and

(4) knows or reasonably believes that the independent plan fiduciary has sufficient expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan participants (the person may rely on written representations from the plan or the plan fiduciary to satisfy this subsection (b)(1)(i)(B)(4)).

(C) Such person

(1) knows or reasonably believes that the independent plan fiduciary has responsibility for managing at least \$100 million in employee benefit plan assets (for purposes of this

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Comment [A81]: See note above for why I think this matters.
EBSA Response: OK

COIEBSA PASS BACK
DRAFT – 4/08/2015

subsection (b)(1)(i)(C), when dealing with an individual employee benefit plan, a person may rely on the information on the most recent Form 5500 Annual Return/Report filed for the plan to determine the value and, in the case of an independent fiduciary acting as an asset manager for multiple employee benefit plans, a person may rely on representations from the independent plan fiduciary regarding the value of employee benefit plan assets under management);

(2) fairly informs the independent plan fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity; and

(3) does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction.

(ii) Swap and security-based swap transactions. The person is a counterparty to an employee benefit plan (as described in section 3(3) of the Act) in connection with a swap or security-based swap, as defined in section 4s(h) of the Commodity Exchange Act (7 U.S.C. 6s(h) and section 15F(h) of the Securities Exchange Act (15 U.S.C. 78o-10(h)), if—

(A) the plan is represented by a fiduciary independent of the person;

(B) the person is a swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant;

(C) the person (if a swap dealer or security-based swap dealer), is not acting as an advisor to the plan (within the meaning of section 4s(h) of the Commodity Exchange Act or section 15F(h) of the Securities Exchange Act of 1934) in connection with the transaction; and

(D) in advance of providing any recommendations with respect to the transaction, the person obtains a written representation from the independent plan fiduciary, that the fiduciary will not rely on recommendations provided by the person.

(2) Employees. In his or her capacity as an employee of any employer or employee organization sponsoring the employee benefit plan (as described in section 3(3) of the Act), the person provides the advice to a plan fiduciary, and he or she receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee's normal compensation for work performed for the employer or employee organization.

(3) Platform Providers. The person merely markets and makes available to an employee benefit plan (as described in section 3(3) of the Act), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

COIEBSA PASS BACK
DRAFT – 4/08/2015

(4) Selection and Monitoring Assistance. In connection with the activities described in paragraph (b)(3) of this section with respect to an employee benefit plan (as described in section 3(3) of the Act), the person –

(i) merely identifies investment alternatives that meet objective criteria specified by the plan fiduciary (e.g., stated parameters concerning expense ratios, size of fund, type of asset, credit quality); or

(ii) merely provides objective financial data and comparisons with independent benchmarks to the plan fiduciary.

(5) Financial Reports and Valuations. The person provides an appraisal, fairness opinion, or statement of value to –

(i) an employee stock ownership plan (as defined in section 407(d)(6) of the Act) regarding employer securities (as defined section 407(d)(5) of the Act);

(ii) an investment fund, such as a collective investment fund or pooled separate account, in which more than one unaffiliated plan has an investment, or which holds plan assets of more than one unaffiliated plan under 29 C.F.R. § 2510.3-101 (1986); or

(iii) a plan, a plan fiduciary, a plan participant or beneficiary, an IRA or IRA owner solely for purposes of compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation.

(6) Investment Education. The person furnishes or makes available any of the following categories of investment-related information and materials described in paragraphs (b)(6)(i) through (iv) to a plan, plan fiduciary, participant or beneficiary, IRA or IRA owner irrespective of who provides or makes available the information and materials (e.g., plan sponsor, fiduciary or service provider), the frequency with which the information and materials are provided, the form in which the information and materials are provided (e.g., on an individual or group basis, in writing or orally, or via call center, video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of information and materials identified in paragraphs (b)(6)(i) through (iv) of this section, provided that the information and materials do not include (standing alone or in combination with other materials) recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations on investment, management, or value of a particular security or securities, or other property.

(i) Plan Information. Information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option for the plan or IRA, or a particular participant or beneficiary or IRA owner, describe the terms or operation of the plan or IRA, inform a plan fiduciary, participant, beneficiary, or IRA owner about the benefits of plan or IRA participation, the benefits of increasing plan or IRA

COIEBSA PASS BACK
DRAFT – 4/08/2015

contributions, the impact of preretirement withdrawals on retirement income, retirement income needs, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (e.g., immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of investment alternatives under the plan or IRA.

(ii) General Financial, Investment and Retirement Information. Information and materials on financial, investment and retirement matters that do not address specific investment products, specific plan or IRA alternatives or distribution options available to the plan or IRA or to participants, beneficiaries and IRA owners, or specific alternatives or services offered outside the plan or IRA, and inform the plan fiduciary, participant or beneficiary, or IRA owner about —

(A) general financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment;

(B) historic differences in rates of return between different asset classes (e.g., equities, bonds, or cash) based on standard market indices;

(C) effects of inflation;

(D) estimating future retirement income needs;

(E) determining investment time horizons;

(F) assessing risk tolerance;

(G) retirement-related risks (e.g., longevity risks, market/interest rates, inflation, health care and other expenses); and

(H) general methods and strategies for managing assets in retirement (e.g., systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA.

(iii) Asset Allocation Models. Information and materials (e.g., pie charts, graphs, or case studies) that provide a plan fiduciary, participant or beneficiary, or IRA owner with models of asset allocation portfolios of hypothetical individuals with different time horizons (which may extend beyond an individual's retirement date) and risk profiles, where —

(A) such models are based on generally accepted investments theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time;

COIEBSA PASS BACK
DRAFT – 4/08/2015

(B) all material facts and assumptions on which such models are based (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) accompany the models;

(C) such models do not include or identify any specific investment product or specific alternative available under the plan or IRA; and

(D) the asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, participants, beneficiaries, or IRA owners should consider their other assets, income, and investments (e.g., equity in a home, Social Security benefits, individual retirement plan investments, savings accounts and interests in other qualified and non-qualified plans) in addition to their interests in the plan or IRA, to the extent those items are not taken into account in the model or estimate.

(iv) Interactive Investment Materials. Questionnaires, worksheets, software, and similar materials which provide a plan fiduciary, participant or beneficiary, or IRA owners the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income; questionnaires, worksheets, software and similar materials which allow a plan fiduciary, participant or beneficiary, or IRA owners to evaluate distribution options, products or vehicles by providing information under paragraphs (i) and (ii) above; questionnaires, worksheets, software, and similar materials that provide a plan fiduciary, participant or beneficiary, or IRA owner the means to estimate a retirement income stream that could be generated by an actual or hypothetical account balance, where —

(A) such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time;

(B) there is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(C) there is an objective correlation between the income stream generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(D) all material facts and assumptions (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, rates of return and other features and rates specific to income annuities or systematic withdrawal plan) that may affect a participant's, beneficiary's or IRA owner's assessment of the different asset allocations or different income streams accompany the materials or are specified by the participant, beneficiary or IRA owner;

(E) the materials do not include or identify any specific investment alternative available or distribution option available under the plan or IRA, unless such alternative or option is specified by the participant, beneficiary or IRA owner; and

COIEBSA PASS BACK
DRAFT – 4/08/2015

(F) the materials either take into account other assets, income and investments (e.g., equity in a home, Social Security benefits, individual retirement account/ annuity investments, savings accounts, and interests in other qualified and non-qualified plans) or are accompanied by a statement indicating that, in applying particular asset allocations to their individual situations, or in assessing the adequacy of an estimated income stream, participants, beneficiaries or IRA owners should consider their other assets, income, and investments in addition to their interests in the plan or IRA.

(v) The information and materials described in paragraphs (b)(6)(i) through (iv) above represent examples of the type of information and materials that may be furnished to participants, beneficiaries and IRA owners without such information and materials constituting investment advice. Determinations as to whether the provision of any information, materials or educational services not described herein constitutes the rendering of investment advice must be made by reference to the criteria set forth in paragraph (a) of this section.

(c) Scope of Fiduciary Duty – Investment Advice. A person who is a fiduciary with respect to an employee benefit plan or IRA by reason of rendering investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, direct or indirect, with respect to any securities or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(1) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(2) Exclude such person from the definition of the term “party in interest” (as set forth in section 3(14)(B) of the Act or “disqualified person” as set forth in section 4975(e)(2) of the Code) with respect to a plan.

(d) Execution of Securities Transactions.

(1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code, with respect to an employee benefit plan or IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:

{ PAGE * MERGEFORMAT }

COIEBSA PASS BACK
DRAFT – 4/08/2015

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank;
and

(ii) The instructions specify (A) the security to be purchased or sold, (B) a price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, *et seq.*), a price which is determined in accordance with Rule 22c1 under the Investment Company Act of 1940 (17 CFR 270.22c1), (C) a time span during which such security may be purchased or sold (not to exceed five business days), and (D) the minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to an employee benefit plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA, or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to: (i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or (ii) Exclude such broker-dealer, reporting dealer, or bank from the definition of the term party in interest (as set forth in section 3(14)(B) of the Act) or disqualified person 4975(e)(2) of the Code with respect to any assets of the plan or IRA.

(e) Internal Revenue Code. Section 4975(e)(3) of the Code contains provisions parallel to section 3(21)(A) of the Act which define the term “fiduciary” for purposes of the prohibited transaction provisions in Code section 4975. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 214 (2000 ed.) transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. All references herein to section 3(21)(A) of the Act should be read to include reference to the parallel provisions of section 4975(e)(3) of the Code. Furthermore, the provisions of this section shall apply for purposes of the application of Code section 4975 with respect to any plan described in Code section 4975(e)(1).

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(f) Definitions. For purposes of this section—

(1) “Recommendation” means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.

(2)(i) “Plan” means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code, and

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

(3) “Plan participant” means for a plan described in section 3(3) of the Act, a person described in section 3(7) of the Act.

(4) “IRA owner” means with respect to an IRA either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) “Plan fiduciary” means a person described in section (3)(21) of the Act and 4975(e)(3) of the Code.

(6) “Fee or other compensation, direct or indirect” for purposes of this section and section 3(21)(A)(ii) of the Act, means any fee or compensation for the advice received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. The term fee or other compensation includes, for example, brokerage fees, mutual fund and insurance sales commissions.

(7) “Affiliate” includes: any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and any corporation or partnership of which such person is an officer, director or partner.

(8) “Control” for purposes of paragraph (f)(7) means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed at Washington, DC, this [date] day of [month], 2015.

Phyllis C. Borzi,
Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

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Exhibit 7

4/8/15

Treasury Comments 3/21/15
No Comments from OMB or SEC

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Application Number D-11820

Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1

ZRIN 1210-ZA25

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

ACTION: Notice of Proposed Amendments to Class Exemptions.

SUMMARY: This document contains a notice of pendency before the Department of Labor of proposed amendments to prohibited transaction exemptions (PTEs) 75-1, 77-4, 80-83 and 83-1. Generally, the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code) prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing, including using their authority, control or responsibility to affect or increase their own compensation. These existing exemptions generally permit fiduciaries to receive compensation or other benefits as a result of the use of their fiduciary authority, control or responsibility in connection with investment transactions involving plans or IRAs. The proposed amendments would require the fiduciaries to satisfy uniform Impartial Conduct Standards in order to obtain the relief available under each exemption. The proposed amendments would affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

COMMENT PERIOD: Written comments must be received by the Department on or before [INSERT DATE THAT IS 75 DAYS AFTER PUBLICATION OF THIS PROPOSED EXEMPTION IN THE FEDERAL REGISTER].

APPLICABILITY DATE: The Department proposes to make these amendments applicable after December 31, 2016.

ADDRESSES: All written comments concerning the proposed amendments to the class exemptions should be sent to the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210-ZA25

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

Email to: { HYPERLINK "mailto:e-OED@dol.gov" }

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Comment [A1]: EBSA: References to PTE 84-24 removed from the "mass amendments" document because of new separate proposed amendment to PTE 84-24.

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Comment [A2]: Treasury: This appears to define IRA as limited to a 408(a) IRA for purposes of the preamble. The amendment to each exemption also defines IRA as an individual account described in 408(a). Is the omission of 408(b) intended? Should the term also include MSAs, HSAs, Coverdell, etc.?

EBSA response: We have revised our definitions to cover all plans identified in Code section 4975(e)(1)(B)-(F), consistent with the COI reg and other exemptions.

4/8/15

Fax to: (202) 693-8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D-11820), U.S. Department of Labor, 200 Constitution Avenue, NW, Suite 400, Washington DC 20210.

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D-11820), U.S. Department of Labor, 122 C St. NW, Suite 400, Washington DC 20001.

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

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

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

SUPPLEMENTARY INFORMATION¹

Executive Summary

Purpose of Regulatory Action

The Department is proposing these amendments to existing class exemptions in connection with its proposed regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B)(Proposed Regulation), published elsewhere in this issue of the FEDERAL REGISTER. The Proposed Regulation specifies when an entity is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. If adopted, the Proposed Regulation would replace an existing regulation that was adopted in 1975. The Proposed Regulation is intended to take into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment

¹ The Department is proposing the amendments to the class exemptions on its own motion, pursuant to ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637 (October 27, 2011)).

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practices and relationships, the Proposed Regulation would update existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

This notice proposes that new “Impartial Conduct Standards” be made conditions of the following exemptions: PTEs 75-1, Part III, 75-1, Part IV, 77-4, 80-83, and 83-1. Fiduciaries would be required to act in accordance with these standards in transactions permitted by the exemptions. The standards will be uniformly imposed in multiple class exemptions, including new proposed exemptions published elsewhere in this issue of the FEDERAL REGISTER, to ensure that fiduciaries relying on the exemptions are held to a uniform set of standards and that these standards are applicable to transactions involving both plans and IRAs. The proposed amendments, if granted, would apply prospectively to fiduciaries relying on the exemptions.

Section 408(a) of ERISA specifically authorizes the Secretary of Labor to grant administrative exemptions from ERISA’s prohibited transaction provisions.² Regulations at 29 CFR section 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. Before granting an exemption, 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 such plans and IRA owners. Interested parties are permitted to submit comments to the Department on this proposed exemption, through **[INSERT DATE THAT IS 75 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER OF THIS PROPOSED EXEMPTION]**.

Summary of the Major Provisions

The proposal would amend prohibited transaction exemptions 75-1, Part III, 75-1, Part IV, 77-4, 80-83, and 83-1. Each proposed amendment would apply the same Impartial Conduct Standards. The amendments would require a fiduciary that satisfies ERISA section 3(21)(A)(i) or (ii), or the corresponding provisions of Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the investment transaction, to meet the standards with respect to the investment transactions described in the applicable exemption.

Regulatory Impact Analysis

Executive Order 12866 and 13563 Statement

Under Executive Orders 12866 and 13563, the Department must determine whether a regulatory action is “significant” and therefore subject to the requirements of the Executive Order and

² Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. References in this document to sections of ERISA should be read to refer also to the corresponding sections of the Code. These proposed amendments to the class exemptions would apply to relief from the indicated prohibited transaction provisions of both ERISA and the Code.

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Comment [A3]: EBSA: This was a Treasury comment on the Contract Exemption, slightly edited.

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4/8/15

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

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

Background

Proposed Regulation

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

³ ERISA section 404(a).

posed by the fiduciaries' conflicts of interest with respect to the transactions.⁴ When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.⁵ In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

~~The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs.~~ Although ERISA's general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs, these fiduciaries are subject to the prohibited transaction rules. In this context, fiduciaries engaging in the illegal transactions are subject to an excise tax enforced by the Internal Revenue Service. Unlike participants in plans covered by Title I of ERISA, under the Code, IRA owners cannot bring suit against fiduciaries under ERISA for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct. Elsewhere in this issue of the FEDERAL REGISTER, however, the Department is proposing two new class exemptions that would create contractual obligations for the adviser to adhere to certain standards (the Impartial Conduct Standards). IRA owners would have a right to enforce these new contractual rights.

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

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

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

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

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Comment [A4]: Treasury: The Code doesn't "protect" anyone, so would avoid saying it like this. Perhaps something like: "The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs."

EBSA response: comment accepted.

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Comment [A5]: EBSA: This was a Treasury comment on the Contract Exemption.

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investment decisions. The statutory definition, prohibitions on conflicts of interest, and core fiduciary obligations of prudence and loyalty, all reflect Congress' recognition in 1974 of the fundamental importance of such advice. In the years since then, the significance of financial advice has become still greater with increased reliance on participant-directed plans and IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 C.F.R. section 2510.3-21(c) defining the circumstances under which a person is treated as providing "investment advice" to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA (the "1975 regulation").⁶ The regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the regulation, for advice to constitute "investment advice," an adviser who -does not have discretionary authority or control with respect to the purchase or sale of securities or other property of the plan must – (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue. A 1976 Department of Labor Advisory Opinion further limited the application

⁶ The 1975 regulation provides in relevant part:

- (c)(1) Investment advice. (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act) and this paragraph, only if:
- (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
 - (ii) Such person either directly or indirectly (e.g., through or together with any affiliate)—
 - (A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or
 - (B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

40 FR 50842 (Oct. 31, 1975). The Department of Treasury issued a virtually identical regulation, at 26 CFR 54.4975-9(c), which interprets Code section 4975(e)(3). 40 FR 50840 (Oct. 31, 1975).

of the statutory definition of “investment advice” by stating that valuations of employer securities in connection with employee stock ownership plan (ESOP) purchases would not be considered fiduciary advice.⁷

As the marketplace for financial services has developed in the years since 1975, the five-part test may now undermine, rather than promote, the statutes’ text and purposes. The narrowness of the 1975 regulation allows professional advisers, consultants and valuation firms to play a central role in shaping plan investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility when it enacted ERISA and the related Code provisions. Even when plan sponsors, participants, beneficiaries and IRA owners clearly rely on paid consultants for impartial guidance, the regulation allows consultants to avoid fiduciary status and disregard ERISA’s fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest, give imprudent advice, and engage in transactions that would otherwise be categorically prohibited by ERISA and Code, without any liability under ERISA or the Code. In the Proposed Regulation, the Department seeks to replace the existing regulation with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which plans and IRAs currently operate.⁸ The Proposed Regulation describes the types of advice that constitute “investment advice” with respect to plan or IRA assets for purposes of the definition of a fiduciary at ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). The proposal provides, subject to certain carve-outs, that a person renders investment advice with respect to a plan or IRA if, among other things, the person provides, directly to a plan, a plan fiduciary, a plan participant or beneficiary, or IRA owner one of the following types of advice:

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

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

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

⁷Advisory Opinion 76-65A (June 7, 1976).

⁸ The Department initially proposed an amendment to its regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) on October 22, 2010, at 75 FR 65263. It subsequently announced its intention to withdraw the proposal and propose a new rule, consistent with the President's Executive Orders 12866 and 13563, in order to give the public a full opportunity to evaluate and comment on the new proposal and updated economic analysis.

Comment [A6]: EBSA: Footnote revised to reflect the fact that we are just now withdrawing the 2010 rule.

Comment [A7]: EBSA: Changing references from “limitations” to “carve-outs” throughout.

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(4) A recommendation of a person to provide any of the types of advice described in paragraphs (1) through (3), above for a fee or other compensation.

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

For advisers who do not represent that they are acting as ERISA (or Code) fiduciaries, the Proposed Regulation provides that advice rendered in conformance with certain carve-outs will not cause the adviser to be treated as a fiduciary under ERISA or the Code. For example, under the seller's carve-out, counterparties in arm's-length transactions with plans may make investment recommendations without acting as fiduciaries if certain conditions are met.⁹ Similarly, the proposal contains a carve-out from fiduciary status for persons who provide appraisals, fairness opinions, or statements of value in specified contexts (e.g., with respect to ESOP transactions). The proposal additionally carves out from fiduciary status, the marketing of investment alternative platforms, certain assistance in selecting investment alternatives and other activities. Finally, the Proposed Regulation contains a carve-out from fiduciary status for the provision of investment education.

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Prohibited Transactions

Fiduciaries under ERISA and the Code are subject to certain prohibited transaction restrictions. ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his own interest or his own account. ERISA section 406(b)(2) provides that a fiduciary with respect to an employee benefit plan shall not “in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.”¹⁰ ERISA section 406(b)(3) and Code section 4975(c)(1)(F) prohibit a fiduciary from receiving any consideration for his own personal account from any party dealing with the plan or IRA in connection with a transaction involving the plan or IRA. Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries a duty not to act on conflicts of interest that may affect the fiduciary's best judgment on behalf of the plan or IRA.¹¹

Comment [A8]: EBSA: This was a Treasury comment to PTE 86-128.

Prohibited Transaction Exemptions

⁹ Although the preamble adopts the phrase “seller's carve-out” as a shorthand way of referring to the carve-out and its terms, the regulatory carve-out is not limited to sellers but rather applies more broadly to counterparties in arm's length transactions with sophisticated plan fiduciaries.

¹⁰ The Code does not contain a parallel provision.

¹¹ See 29 CFR section 2550.408b-2(e); 26 CFR section 54.4975-6(a)(5).

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

Over the years, the Department has granted several conditional administrative class exemptions from the prohibited transactions provisions of ERISA and the Code pursuant to which fiduciaries may receive compensation or other benefits in connection with investment transactions by plans and IRAs, under circumstances that would otherwise violate ERISA section 406(b) and Code section 4975(c)(1)(E) and (F). The exemptions focus on specific types of transactions or specific types of compensation arrangements. Reliance on these exemptions is subject to certain conditions that the Department has found necessary to protect the interests of plans and IRAs.

In connection with the development of the Department's proposed definition of fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), the Department has considered public input indicating the need for additional prohibited transaction relief for the wide variety of compensation structures that exist today in the marketplace for investment transactions. After consideration of the issue, the Department determined to propose, elsewhere in this issue of the FEDERAL REGISTER, two new class exemptions as well as amendments to two other existing class exemptions. These new and amended class exemptions provide relief for a fiduciary's receipt of compensation or other benefit resulting from its provision of investment advice to plans and IRAs in the context of many different types of investment transactions.

While each of the proposed new and amended class exemptions sets forth conditions that are tailored to their respective transactions, each also conditions relief on a fiduciary's compliance with certain Impartial Conduct Standards. The Department has determined that the Impartial Conduct Standards comprise important baseline safeguards that should be required of fiduciaries relying on other existing exemptions providing relief for plan and IRA investment transactions. Accordingly, this notice proposes that the Impartial Conduct Standards be made conditions of the following existing exemptions: PTEs 75-1, Part III, 75-1, Part IV, 77-4, 80-83 and 83-1.

Under the amendments, fiduciaries would be required to act in accordance with the Impartial Conduct Standards in transactions governed by the exemptions. This will result in additional protections for all plans, but most particularly for IRA owners. ~~That is because fiduciaries' dealings with IRAs are governed by the Code, not by ERISA,¹² and the Code, unlike ERISA, does not directly impose responsibilities of prudence and loyalty on fiduciaries. The amendments to the exemptions would condition relief under the exemptions on the satisfaction of these responsibilities. For purposes of these amendments, the term IRA means any trust,~~

¹² See ERISA section 404.

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Comment [A9]: Treasury: This seems to fly in the face of the logic for the current amendments made earlier – that these amendments are necessary to reflect Congressional intent, which is being undermined by the current rules that are not reflective of current market practices.

EBSA response: We think there's a difference here between the regulation and the exemptions. The purpose of the regulation expanding the definition of "fiduciary" is to reflect Congressional intent. However, the purpose of this exemption is to say that if you're a fiduciary under the Code (and Congressional intent), and want to receive variable compensation, then you have to comply with these conduct standards, even if they are not independently imposed by Congress.

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Comment [A10]: Treasury: There are too many synonymous terms are being used here: obligations, standards, requirements, responsibilities. It will be easier to follow if the language is more consistent. "Responsibilities", "duties", "standards" are all fine.

EBSA response: Comment accepted.

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account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.¹³ The impartial conduct standards will work across multiple class exemptions to ensure that these fiduciaries are held to a single set of standards and that these standards are applicable to both plans and IRAs. The proposed amendments, if granted, will apply prospectively to fiduciaries relying on the exemptions.

Description of the Proposal

The proposal would amend prohibited transaction exemptions 75-1, Part III, 75-1, Part IV, 77-4, 80-83 and 83-1. Specifically, these exemptions provide the following relief:

- PTE 75-1, Part III¹⁴ permits a fiduciary to cause a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary, when the fiduciary is also a member of the syndicate;
- PTE 75-1, Part IV¹⁵ permits a plan or IRA to purchase securities in a principal transaction from a fiduciary that is a market maker with respect to such securities;
- PTE 77-4¹⁶ provides relief for a plan's or IRA's purchase or sale of open-end investment company shares where the investment adviser for the open-end investment company is also a fiduciary to the plan or IRA;
- PTE 80-83¹⁷ provides relief for a fiduciary causing a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary or an affiliate; and

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¹³ The Department notes that PTE 2002-13 amended PTEs 80-83 and 83-1 so that the terms "employee benefit plan" and "plan" refer to an employee benefit plan described in ERISA section 3(3) and/or a plan described in section 4975(e)(1) of the Code. See 67 FR 9483 (March 1, 2002). At the same time, in the preamble to PTE 2002-13, the Department explained that it had determined, after consulting with the Internal Revenue Service, that plans described in 4975(e)(1) of the Code are included within the scope of relief provided by PTEs 75-1 and 77-4, because they were issued jointly by the Department and the Service. For simplicity and consistency with the other new proposed exemptions and proposed amendments to existing exemptions published elsewhere in this issue of the FEDERAL REGISTER, the Department has proposed this specific definition of IRA.

¹⁴ Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 40 FR 50845 (Oct. 31, 1975), as amended at 71 FR 5883 (Feb. 3, 2006).

¹⁵ Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 40 FR 50845 (Oct. 31, 1975), as amended at 71 FR 5883 (Feb. 3, 2006).

¹⁶ Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans, 42 FR 18732 (Apr. 8, 1977).

- PTE 83-1¹⁸ provides relief for the sale of certificates in an initial issuance of certificates, by the sponsor of a mortgage pool to a plan or IRA, when the sponsor, trustee or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

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This proposal sets forth an amendment to each of these exemptions. Each of the amendments is tailored to the structure and language of the applicable exemption. Therefore, the terminology and numbering varies from amendment to amendment. Despite such variation, each amendment would apply the same Impartial Conduct Standards uniformly across each exemption.

Deleted: <#>PTE 84-24¹⁹ provides relief for insurance agents/pension consultants and mutual fund principal underwriters to receive a commission in connection with the sale of an insurance or annuity contract or mutual fund shares to a plan or IRA. ¶

More specifically, the amendments would require a fiduciary that satisfies ERISA section 3(21)(A)(i) or (ii), or the corresponding provisions of Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the investment transaction, to meet the Impartial Conduct Standards described in the applicable exemption. Under the proposed amendments' first conduct standard, the fiduciary must act in the best interest of the plan or IRA. Best interest is defined to mean acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and the needs of the plan or IRA when providing investment advice to the plan or IRA or managing the plan's or IRA's assets. Further, under the best interest standard, the fiduciary must act without regard to the financial or other interests of the fiduciary or its affiliates or any other party. Under this standard, the fiduciary may not subordinate the interests of the plan or IRA to its own financial interests or those of any affiliate or other party.

Comment [A11]: EBSA: We are using lower case for the term best interest throughout the preambles.

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Comment [A12]: EBSA: Best Interest standard revised per Treasury comment on Contract.

In this regard, the Department notes that while fiduciaries of plans covered by ERISA are subject to the ERISA section 404 standards of prudence and loyalty, the Code contains no provisions that hold IRA fiduciaries to those standards. However, as a condition of relief under the proposed exemption, both IRA and plan fiduciaries would have to agree to, and uphold, the best interest requirement. The best interest standard is defined to effectively mirror the ERISA section 404 duties of prudence and loyalty, as applied in the context of fiduciary investment advice. Failure to satisfy the best interest standard would render the exemption unavailable to the fiduciary with respect to compensation received in connection with the transaction.

Comment [A13]: Two questions: (1) shouldn't this be "its own financial interests or those of any affiliate or other person in whom it has an interest"? (2) should this standard be even broader, to include the financial interests of any other person or entity (i.e., even if the fiduciary has no financial interest in a third party, it should not subordinate the plan's or IRA's interests to the interests of that third party (subject perhaps only to a narrow exception for public policy)? Wouldn't this broader approach be more consistent with the exclusive benefit/solely in the interest standard?

EBSA response: Comments accepted.

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Comment [A14]: EBSA: Adding language from other preambles for consistency.

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The second conduct standard requires that all compensation received by the fiduciary and its affiliates in connection with the applicable transaction be reasonable in relation to the total services they provide to the plan or IRA. The third conduct standard requires that statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA's investment decisions, not be misleading. The Department notes in this regard that a fiduciary's failure to disclose a material conflict of interest may be considered a

¹⁷ Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties in Interest, 45 FR 73189 (Nov. 4, 1980), as amended at 67 FR 9483 (March 1, 2002).

¹⁸ Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, 48 FR 895 (Jan. 7, 1983), as amended at 67 FR 9483 (March 1, 2002).

4/8/15

misleading statement. Transactions that violate these requirements are not likely to be in the interests of plans, their participants and beneficiaries, or IRA owners, or protective of their rights.

Comment [A15]: EBSA: Language added per Treasury comment in operative text.

Unlike the new exemption proposals published elsewhere in the FEDERAL REGISTER, these proposed amendments do not require fiduciaries to contractually warrant compliance with applicable federal and state laws. However, the Department notes that significant violations of applicable federal or state law could also amount to violations of the Impartial Conduct Standards, such as the best interest standard, in which case these exemptions, as amended, would be deemed unavailable for transactions occurring in connection with such violations.

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Applicability Date

The Department is proposing that compliance with the final regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) will begin after December 31, 2016 (Applicability Date). The Department proposes to make these amendments, if granted, applicable on the Applicability Date. This Applicability Date will minimize the need for systems to change midyear for those on a calendar year tax cycle.

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

(2) Before an exemption may be granted under ERISA section 408(a) and Code section 4975(e)(2), the Department must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of plans' participants and beneficiaries and IRA owners;

(3) If granted, an exemption will be applicable to a particular transactions only if the transactions satisfy the conditions specified in the amendments; and

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

{ PAGE * MERGEFORMAT }

PROPOSED AMENDMENTS TO CLASS EXEMPTIONS

I. Prohibited Transaction Exemption 75-1, Part III

The Department proposes to amend Prohibited Transaction Exemption 75-1, Part III, under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, October 27, 2011).

A. A new section III(f) is inserted to read as follows:

(f) Standards of Impartial Conduct. If the fiduciary is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A) or (B), with respect to the assets of a plan or IRA involved in the transaction, the fiduciary must comply with the following conditions with respect to the transaction:

(1) The fiduciary acts in the Best Interest of the plan or IRA.

(2) All compensation received by the fiduciary in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA's investment decisions, are not misleading. A "material conflict of interest" exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA. For this purpose, a fiduciary's failure to disclose a material conflict of interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the "Best Interest" of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary or any other party. Also for the purposes of this section, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

B. Sections III(f) and III(g) are redesignated, respectively, as sections III(g) and III(h).

II. Prohibited Transaction Exemption 75-1, Part IV

The Department proposes to amend Prohibited Transaction Exemption 75-1, Part IV, under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, October 27, 2011).

A. A new section IV(e) is inserted to read as follows:

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Comment [A16]: All of the comments in this section I are intended to apply also, mutatis mutandis, to sections II through VI, below.

EBSA response: We have incorporated the comments.

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Comment [A17]: Isn't this standard too narrow? The no-misleading-statements standard should apply not only if a fiduciary is making statements "about" material conflicts of interest, but also if it has material conflicts of interest about which it makes no statements and no disclosure.

EBSA response: Comment accepted.

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Comment [A18]: Would something like this added sentence be necessary or advisable? If so, would it be overbroad as currently drafted?

EBSA response: Comment accepted.

Comment [A19]: Two questions: (1) shouldn't this be supplemented with "or those of any affiliate or other person in whom it has an interest"? (2) should this standard be even broader, to include the financial interests of any other person or entity (i.e., even if the fiduciary has no financial interest in a third party, it should not subordinate the plan's or IRA's interests to the interests of that third party (subject perhaps only to a narrow exception for public policy)? Wouldn't this broader approach be more consistent with the exclusive benefit/solely in the interest standard? Or is the intent to have a somewhat narrower standard than section 404's standard? But if so, is this the way in which it is intended to be narrower?

EBSA response: Comments accepted.

Deleted: and the fiduciary does not subordinate the interests of the plan or IRA to the financial

Deleted: person in whom it has an interest that would affect the fiduciary's best judgment

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Comment [A20]: Is this the correct definition? Should the definition instead be consistent with Code section 7701(a)(37) (so that 408(b) individual retirement annuity arrangements are included) or something broader like the definition in the amendment to 86-128?

EBSA response: We have replaced this definition with the one from the Contract PTE.

Deleted: an individual retirement account described in Code section 408(a)

(e) Standards of Impartial Conduct. If the fiduciary is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A), or (B), with respect to the assets of a plan or IRA involved in the transaction, the fiduciary must comply with the following conditions with respect to the transaction:

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(1) The fiduciary acts in the Best Interest of the plan or IRA.

(2) All compensation received by the fiduciary in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA's investment decisions, are not misleading. A "material conflict of interest" exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA. For this purpose, a fiduciary's failure to disclose a material conflict of interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA's investment decisions is deemed to be a misleading statement.

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For purposes of this section, a fiduciary acts in the "Best Interest" of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary or any other party. Also for the purposes of this section, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code,

Comment [A21]: Note: (1) the term "fiduciary" is defined in PTE 75-1 Part IV to include "any affiliates of such fiduciary."

Deleted: and the fiduciary does not subordinate the interests of the plan or IRA to the financial

Deleted: person in whom it has an interest that would affect the fiduciary's best judgment

Deleted: an individual retirement account described in Code section 408(a)

B. Sections IV(e) and IV(f) are redesignated, respectively, as sections IV(f) and IV(g).

III. Prohibited Transaction Exemption 77-4

The Department proposes to amend Prohibited Transaction Exemption 77-4 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, October 27, 2011).

A new section II(g) is inserted to read as follows:

(g) Standards of Impartial Conduct. If the fiduciary is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A), or (B), with respect to the assets of a plan or IRA involved in the transaction, the fiduciary must comply with the following conditions with respect to the transaction:

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(1) The fiduciary acts in the Best Interest of the plan or IRA.

(2) All compensation received by the fiduciary and its affiliates in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA's investment decisions, are not misleading. A "material conflict of interest" exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA. For this purpose, a fiduciary's failure to disclose a material conflict of interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA's investment decisions is deemed to be a misleading statement.

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For purposes of this section, a fiduciary acts in the "Best Interest" of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate, or other party. Also for the purposes of this section, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code,

Comment [A22]: Please see comment in Contract Exemption on this definition of Best Interest.
OED response: Comment accepted. (PTE 77-4 does not define fiduciary to include its affiliate so we have added that here.)

IV. Prohibited Transaction Exemption 80-83

The Department proposes to amend Prohibited Transaction Exemption 80-83 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, October 27, 2011).

Deleted: and the fiduciary does not subordinate the interests of the plan or IRA to the financial

A. A new section II(A)(2) is inserted to read as follows:

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(2) Standards of Impartial Conduct. If the fiduciary is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(c)(3)(A), or (B), with respect to the assets of a plan or IRA involved in the transaction, the fiduciary must comply with the following conditions with respect to the transaction:

Deleted: person in whom the fiduciary has an interest that would affect the fiduciary's best judgment

(a) The fiduciary acts in the Best Interest of the plan or IRA.

Deleted: an individual retirement account described in Code section 408(a)

(b) All compensation received by the fiduciary and its affiliates in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

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(c) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA's investment decisions, are not misleading. A "material conflict of interest" exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA. For this purpose, a fiduciary's failure to disclose a material conflict of interest relevant to

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the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the "Best Interest" of the employee benefit plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the employee benefit plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate, or other party. Also for the purposes of this section, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code,

B. Section II(A)(2) is redesignated as section II(A)(3).

V. Prohibited Transaction Exemption 83-1

The Department proposes to amend Prohibited Transaction Exemption 83-1 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, October 27, 2011).

A new section II(B) is inserted to read as follows:

(B) Standards of Impartial Conduct. Solely with respect to the relief provided under section I(B), if the sponsor, trustee or insurer of such pool who is a fiduciary is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A), or (B), with respect to the assets of a plan or IRA involved in the transaction, the fiduciary must comply with the following conditions with respect to the transaction:

- (1) The fiduciary acts in the Best Interest of the plan or IRA.
- (2) All compensation received by the fiduciary and its affiliates in connection with the transaction is reasonable in relation to the total services the fiduciary and its affiliates provide to the plan or IRA.
- (3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA's investment decisions, are not misleading. A "material conflict of interest" exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA. For this purpose, a fiduciary's failure to disclose a material conflict of interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the "Best Interest" of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk

Comment [A23]: This exemption does not define fiduciary to include its affiliate, so we have added that here.

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Deleted: person in whom the fiduciary has an interest that would affect the fiduciary's best judgment

Deleted: an individual retirement account described in Code section 408(a)

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tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the plan or IRA to the financial interests of the fiduciary, any affiliate, or other party. Also for the purposes of this section, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

Signed at Washington DC this ____ day of _____, 2015

Comment [A24]: This exemption does not define fiduciary to include its affiliate, so we have added that here.

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Deleted: an individual retirement account described in Code section 408(a)

Comment [A25]: Same as prior comment

Deleted: VI. Prohibited Transaction Exemption 84-24

The Department proposes to amend Prohibited Transaction Exemption 84-24 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, October 27, 2011).

A. A new section V(e) is inserted to read as follows:

(e) Standards of Impartial Conduct. If the insurance agent or broker, pension consultant, insurance company or investment company principal underwriter is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A), or (B), with respect to the assets involved in the transaction, the fiduciary must comply with the following conditions with respect to such transaction:

(1) The fiduciary acts in the Best Interest of the plan or IRA.

(2) All compensation received by the fiduciary and its affiliates in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA's investment decisions, are not misleading. A "material conflict of interest" occurs when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA.

For purposes of this section, a fiduciary acts in the "Best Interest" of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, and the fiduciary does not subordinate the interests of the plan or IRA to the financial interests of the fiduciary. Also for the purposes of this section, the term IRA means an individual retirement account described in Code section 408(a).

Exhibit 8

To: Brian Deese [REDACTED]; Adam Wang-Levine [REDACTED]; B. Harris [REDACTED]; Felton Booker [REDACTED]@treasury.gov; Kugler, Adriana D - OSEC [REDACTED]@dol.gov; Piacentini, Joseph - EBSA [REDACTED]@dol.gov; Cosby, Chris - EBSA [REDACTED]@dol.gov; Decressin, Anja - EBSA [REDACTED]@dol.gov; Matt Kozora [REDACTED]@sec.gov; Marietta-Westberg, Jennifer [REDACTED]@sec.gov
From: Epstein, Zachary A. - OSEC
Sent: Tue 10/25/2011 7:30:07 PM
Importance: Normal
Subject: Follow Up: Economic Analysis of the Fiduciary Rule
[Fischel+Kendall Comment.pdf](#)
[Wyman for SEC \(10.27.10\)\[1\].pdf](#)
[Wyman for DOL \(April 12, 2011\).pdf](#)

Good afternoon:

Thank you for attending last week's meeting regarding the regulatory impact analysis (RIA) for the Department of Labor's re-proposal of the fiduciary regulations. We appreciate your valuable insights and willingness to help us refine our analysis.

Please find attached two studies on the RIA for the proposed rule that we promised to circulate. The first was authored by Daniel R. Fischel and Todd D. Kendall of Compass Lexecon, a consulting firm that specializes in the application of economics to a variety of legal and regulatory issues. They were commissioned by Primerica to consider: (i) the consequences of the proposed rule if commission-based brokers that receive third-party compensation from providing financial products in connection with individual retirement accounts (IRAs) are determined to be fiduciaries for the first time; and (ii) any significant costs or benefits associated with the proposed rule other than those presented in the Department's RIA. The second attachment is a study by Oliver Wyman who was commissioned by Davis and Hartman LLP on behalf of a group of 12 financial services firms that offer investment services to retail investors to evaluate the proposed rule's potential impact on small, retail IRA investors.

As we discussed at the meeting, we face several significant challenges in completing the RIA for the re-proposal. First, on the benefits side, we need to determine whether the available literature, our work with RAND, and any other data we have not yet identified can be woven together to demonstrate that there is a market failure and to monetize the potential benefits of fixing it. In accessing the potential benefits of the rule, we need to determine whether it is possible that: (i) any observed underperformance in the broker distribution channels actually reflect "fair" compensation willing provided to brokers by customers for intangible benefits; and (ii) any observed underperformance in broker channels relative to direct channels is an artifact of investors' self-selection

On the cost side, we need to determine whether broker-dealers would have to operate under a fee-based registered investment adviser model if they were deemed to be fiduciaries under the rule. The industry maintains that the shift from a commission-based to fee-based model is a significant cost driver that would result in the following adverse consequences: (i) increased account minimums because asset-based fees on small accounts are not sufficient to compensate brokers for the upfront costs of opening and maintaining small account balances; (ii)

increased fees for investors who would be required to receive services from fee-based firms; and (iii) increased costs for brokers to receive the Series 65 license required to operate as a fee-based registered investment adviser. We look forward to working with the SEC to confront this critical issue.

We currently have scheduled a follow-up meeting for this Thursday at 1. We look forward to seeing you then.

Exhibit 9

To: Brian Deese @ [REDACTED];
[REDACTED]; Matt Kozora - SEC [REDACTED]@sec.gov]; Marietta-Westberg,
Jennifer [REDACTED]@sec.gov]
Cc: Kugler, Adriana D - OSEC [REDACTED]@dol.gov];
Joseph Piacentini [REDACTED]@dol.gov]; Decressin, Anja -
EBSA [REDACTED]@dol.gov]; Epstein, Zachary A. - OSEC [REDACTED]@dol.gov]
From: Cosby, Chris - EBSA
Sent: Wed 11/2/2011 5:47:04 PM
Importance: Normal
Subject: RE: Follow Up: Economic Analysis of the Fiduciary Rule
[Primerica Comment Letter.pdf](#)
[GAO 401\(K\)plans Improved Regulation.pdf](#)

Good afternoon:

Thanks for participating in this morning's meeting. As promised, I am circulating Primerica's comment letter and a recent GAO report finding that improved regulation could protect 401(k) plan participants from conflicts of interest. As I mentioned at the meeting, Primerica has been one of the most vocal critics of the proposal. Their letter provides an explanation of their business model and describes the costs that revenue sharing payments are used to defray at the bottom of page 3.

As I also stated today, the GAO report is supportive, at least qualitatively, in building the case for why the rule is necessary and will help rebut the industry's claim that the GAO studies DOL cited in the analysis for the 2010 NPRM did not analyze defined contribution plans. The 2011 GAO report focuses on 401(k) plans, and also discusses higher fees that are incurred by plan participants when they rollover their account balance into IRAs. Although the 2011 GAO report does not provide any empirical data regarding conflicts nor assess the prevalence of conflicts and the degree of harm that results from them, there are several supportive statements we can weave into the RIA for the re-proposal. For example, on page 30 of the report, GAO echoes DOL's fundamental premise underlying the rule by stating that "[i]f not addressed, conflicts of interest could lead to 401(k) plans offering investment funds with higher fees or mediocre performance, which can substantially reduce the amount of savings available for retirement. A service provider with a conflict of interest may steer plan sponsors toward investment funds that increase the service provider's compensation even if other funds with better performance are available at equal or lower costs."

Thanks again for your thoughtful comments and insights.

Best,

Chris

Exhibit 10

To: Deese, Brian C. [Redacted] [Redacted];
Adriana Kugler - DOL [Redacted] @dol.gov; Langan, Andrew -
OSEC [Redacted] @dol.gov; Wang-Levine, Adam [Redacted] [Redacted];
Felton Booker - Treasury [Redacted] @treasury.gov; Harris,
Benjamin [Redacted] [Redacted]; Amromin, Gene [Redacted] [Redacted];
Adam Lavier - Treasury [Redacted] @treasury.gov; Marietta-Westberg, Jennife [Redacted] @sec.gov];
Sokobin, Jonathar [Redacted] @sec.gov; Westbrook, Harvey B [Redacted] @sec.gov]
From: Schumer, Jessica E.
Sent: Wed 10/12/2011 7:46:25 PM
Importance: Normal
Subject: Economic Analysis of the Fiduciary Rule

Hello,

Brian Deese and Adriana Kugler would like to convene this group next week on October 20 at 2pm to discuss the economic analysis of the Fiduciary regulation that DOL's Employee Benefits Security Administration is working on. If this time doesn't work for you please let me know at [Redacted]. If you are coming from outside the EOP please send the following clearance information by COB Friday.

WAVES:

Full Name (including middle)
DOB
SSN
Gender
Country of Birth
Country of Citizenship
Current City and State of Residence

- Jessica

Jessica Schumer
Deputy Chief of Staff
National Economic Council

[Redacted]
[Redacted]
[Redacted]

Exhibit 11

To: Kozora, Matthew [REDACTED]
From: Marietta-Westberg, Jennifer
Sent on behalf of: Schumer, Jessica E.
Sent: Tue 10/25/2011 12:15:13 PM
Importance: Normal
Subject: FW: [HOLD] Follow Up: Economic Analysis of the Fiduciary Rule

When: Thursday, October 27, 2011 1:00 PM-2:00 PM (GMT-05:00) Eastern Time (US & Canada).
Where: TBD

Note: The GMT offset above does not reflect daylight saving time adjustments.

~~*~*~*~*~*~*~*~*

-----Original Appointment-----

From: Schumer, Jessica E. [REDACTED]
Sent: Tuesday, October 25, 2011 12:27 PM
To: Schumer, Jessica E.; Deese, Brian C.; [Adriana Kugler @dol.gov](mailto:Adriana.Kugler@dol.gov); Langan, Andrew - OSEC; Wang-Levine, Adam; [REDACTED]@treasury.gov; Harris, Benjamin; Amromin, Gene;
[Adam Lavier @treasury.gov](mailto:Adam.Lavier@treasury.gov); Marietta-Westberg, Jennifer; Sokobin, Jonathan; Westbrook, Harvey B.; Kuruvilla, Jason - OSEC; Decressin, Anja - EBSA; Piacentini, Joseph - EBSA; Sackner-Bernstein, Sonya (Intern)
Subject: [HOLD] Follow Up: Economic Analysis of the Fiduciary Rule
When: Thursday, October 27, 2011 1:00 PM-2:00 PM (GMT-05:00) Eastern Time (US & Canada).
Where: TBD