

**SUPPORTING STATEMENT FOR
Improving Investment Advice for Workers & Retirees Prohibited Transaction Exemption**

OMB CONTROL NO. 1210-0163

This ICR seeks for an approval of a new collection of information under OMB Control Number 1210–0163.

A. Justification

- 1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.***

The Secretary of Labor may grant and amend administrative exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the Internal Revenue Code of 1986, as amended (the Code).¹ Before granting an exemption, the Department must find that the exemption is administratively feasible, in the interests of plans, their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of such plans and IRA owners.

This class exemption would exempt certain transactions from restrictions of ERISA and the Code. The prohibited transaction provisions of ERISA and the Code generally prohibit fiduciaries with respect to employee benefit plans (Plans) and individual retirement accounts and annuities (IRAs) from engaging in self-dealing and receiving compensation from third parties in connection with transactions involving the Plans and IRAs, and from purchasing and selling investments with the Plans and IRAs when the fiduciaries are acting on behalf of their own accounts (principal transactions). The exemption allows investment advice fiduciaries to receive compensation and engage in principal transactions that would otherwise violate the prohibited transaction provisions of ERISA and the Code. This includes compensation resulting from advice to roll over assets from a Plan to an IRA. The exemption applies to registered investment advisers (IAs), broker dealers (BDs), banks, insurance companies, and their employees, agents, and representatives that are investment advice fiduciaries. The exemption includes protective conditions designed to safeguard the interests of Plans, participants and beneficiaries, and IRA owners. The new class exemption affects participants and beneficiaries of Plans, IRA owners and fiduciaries with respect to such Plans and IRAs.

¹ Regulations at 29 CFR section 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption under ERISA. 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 issue administrative exemptions under Code section 4975 to the Secretary of Labor.

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Investment professionals typically receive compensation for services to retirement investors in the retail market through a variety of arrangements, which would typically violate the prohibited transaction rules applicable to plan fiduciaries. These include commissions paid by the plan, participant or beneficiary, or IRA, or commissions, sales loads, 12b-1 fees, revenue sharing and other payments from third parties that provide investment products. A fiduciary's receipt of such payments generally violates the prohibited transaction provisions of ERISA section 406(a)(1)(A), (D), 406(b) and Code section 4975(c)(1)(A), and (D), (E) and (F) because the amount of the fiduciary's compensation is affected by the use of its authority in providing investment advice, unless such payments meet the requirements of an exemption.

The information collection in Section II(b) of the exemption requires financial institutions to acknowledge, in writing, their status as fiduciaries under the ERISA and the Code. In addition, the institutions are required to furnish a written description of the services to be provided and the financial institution's and investment professional's material conflicts of interest that is accurate in all material respects. Financial institutions are generally required to provide the disclosure to each retirement investor once, but financial institutions may need to provide updated disclosures to ensure accuracy. Most IAs already disclose their status as a fiduciary and describe the types of services they offer in Form ADV. However, not all entities will decide to rely on the exemption. Some may instead rely on other existing exemptions that better align with their business models.

Section II(c)(1) of the PTE requires financial institutions to establish, maintain, and enforce written policies and procedures designed to ensure that they and their investment professionals comply with the Impartial Conduct Standards. Section II(c)(2) further requires institutions to design the policies and procedures to mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a financial institution or investment professional to place their interests ahead of the interest of the retirement investor.

Section II(c)(3) of the PTE requires financial institutions to document the specific reasons that any rollover recommendation is in the best interest of the retirement investor, and the disclosure must be provided to the retirement investor.

Under Section II(d) of the PTE, financial institutions are required to conduct an annual retrospective review that is reasonably designed to prevent violations of the PTE's Impartial Conduct Standards and the institution's own policies and procedures. The methodology and results of the retrospective review must be reduced to a written report that is provided to any of the following Senior Executive Officers: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the financial institution. The certifying officer is required to certify that (1) the officer has reviewed the report of the retrospective review, and (2) the financial institution has in place policies and procedures prudently designed to achieve compliance with the conditions of the PTE, and (3) the financial institution has a prudent

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process for modifying such policies and procedures. The process for modifying policies and procedures needs to be responsive to business, regulatory, and legislative changes and events, and the Senior Executive Officer in charge is required to periodically test their effectiveness. The review, report, and certification must be completed no later than six months following the end of the period covered by the review. The financial institution is required to retain the report, certification, and supporting data for a period of six years, and to make these items available to the Department within 10 business days of request.

Section II(e) of the PTE allows financial institutions to correct certain violations of the exemption. Under this section, a non-exempt prohibited transaction will not occur due to a violation of the exemption's conditions, provided: (1) either the violation did not result in investment losses to the retirement investor or the financial institution made the retirement investor whole for any resulting losses; (2) the financial institution corrects the violation and notifies the Department of the violation and the correction via email to IIAWR@dol.gov within 30 days of correction; (3) the correction occurs no later than 90 days after the financial institution learned of the violation or reasonably should have learned of the violation; and (4) the financial institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2).

Section IV of the exemption requires financial institutions to maintain records demonstrating compliance with the exemption for six years. The institutions are also required to make records available, to the extent permitted by law, to any authorized employee of the Department or the Department of the Treasury. Recordkeeping requirements in section IV are generally consistent with Securities and Exchange Commission (SEC) and Financial Institution Regulatory Authority (FINRA) requirements.² In addition, the recordkeeping requirements correspond to the six-year period in section 413 of ERISA. The Department understands that many firms already maintain records, as required in section IV, as part of their regular business practices.

2. *Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the collection.*

The information that investment advice fiduciaries are required to produce under the exemption creates protective conditions designed to safeguard the interest of Plans, participants, beneficiaries, and IRA owners. These requirements also provide plan participants with needed information to help them understand services offered and the related conflicts of interests associated with those conflicts.

² The SEC's Regulation Best Interest amended Rule 17a-4(e)(5) to require that BDs retain all records of the information collected from or provided to each retail customer pursuant to Regulation Best Interest for at least 6 years after the earlier of the date the account was closed or the date on which the information was last replaced or updated. FINRA Rule 4511 also requires its members preserve for a period of at least 6 years those FINRA books and records for which there is no specified period under the FINRA rules or applicable Exchange Act rules.

To qualify for the exemption, investment advice fiduciaries (i.e. registered IAs, BDs, banks, and insurance companies) are required to:

- (1) make disclosures to inform retirement investors of their fiduciary status, services offered, and material conflicts of interest;
 - (2) establish, maintain, and enforce written policies and procedures designed to ensure that they and their investment professionals comply with the Impartial Conduct Standards;
 - (3) document the specific reasons for any rollover recommendation and show that the rollover is in the best interest of the retirement investor and provide the documentation to the retirement investor;
 - (4) conduct an annual retrospective review that is reasonably designed to prevent violations of the PTE's Impartial Conduct Standards and the institution's own policies and procedures; and
 - (5) maintain records so that parties relying on an exemption can demonstrate, and the Department can verify, compliance with the conditions of the exemption.
3. ***Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration for using information technology to reduce burden.***

The exemption assumes that 92 percent of required disclosures will be sent electronically,³ which the Department assumes will be distributed through means already used by respondents in the normal course of business. Thus, the Department assumes that the costs arising from electronic distribution will be negligible.

4. ***Describe efforts to identify duplication. Show specifically why similar information already available cannot be used or modified for use for the purposes described in Item 2 above.***

The ERISA and Code rules governing advice on the investment of retirement assets overlap with SEC rules that govern the conduct of IAs and BDs who advise retail investors. The Department considered conduct standards set by other regulators, such as SEC, NAIC, and FINRA, in developing the exemption, with the goal of avoiding overlapping or duplicative requirements. To the extent the requirements overlap, compliance with the other disclosure or recordkeeping requirements can be used to satisfy the exemption conditions, provided the conditions are satisfied. In this regard, there is no duplicate requirements because entities are able to satisfy the requirements of both this exemption and of the other applicable laws.

³ The Department estimates approximately 56 percent of participants receive disclosures electronically under the 2002 electronic disclosure safe harbor, and additional 36 percent of participants receive them electronically under the Department's new electronic disclosure safe harbor.

5. ***If the collection of information impacts small businesses or other small entities, describe any methods used to minimize burden.***

It is necessary for the information collection to apply equally to large and small entities to ensure that participants and beneficiaries and IRA owners are protected when their plans and IRAs engage in transactions that otherwise would be prohibited under ERISA and the Code. However, because smaller entities generally have less complex business practices and arrangements than their larger counterparts, it likely will cost less for them to comply with the exemption.

6. ***Describe the consequence to federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.***

The disclosures, policies and procedures, annual review reports and certifications, and recordkeeping information collection requirements are necessary for the Department to conduct, because otherwise the Department could not ensure that the exemption conditions are protective of the rights of Plan participants and beneficiaries and IRA owners, as required by ERISA section 408(a) and Code section 4975(c)(2).

7. ***Explain any special circumstances that would cause an information collection to be conducted in a manner:***

- ***Requiring respondents to report information to the agency more often than quarterly;***
- ***Requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;***
- ***Requiring respondents to submit more than an original and two copies of any document;***
- ***Requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;***
- ***In connection with a statistical survey, that is not designed to produce valid and reliable result that can be generalized to the universe of study;***
- ***Requiring the use of a statistical data classification that has not been reviewed and approved by OMB;***
- ***That includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or***
- ***Requiring respondents to submit proprietary trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.***

Because this exemption is granted under section 408(a) of ERISA and section 4975(c)(2) of the Code, the exclusion from the three-year guideline for record retention set forth in 5 CFR 1320.5 is applicable. Furthermore, as a result of statutory recordkeeping requirements in ERISA, the Code, and other federal laws, financial institutions that rely

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on this exemption, for the most part, have adopted six-year recordkeeping as standard business practice in order to satisfy those separate recordkeeping requirements.

- 8. *If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.***

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years – even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

The notification of proposed class exemption provided the public with thirty days to comment on the information collections contained therein and was published notice on July 7, 2020 (85 FR 40834). In response to the proposed exemption, the Department held a virtual public hearing on September 4, 2020, and received 106 comment letters. These comment letters represented the views of, among others, financial institutions, employers, workers, and service providers to pension benefit plans. An extensive discussion of and the Departments' responses to those comments are contained in the preamble accompanying the final exemption. The comments can be found at: <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA29>.

The Department sought comments in the proposal on the costs associated with the required disclosures. In response, a commenter argued that the associated hourly wage of a legal professional used in the Department's cost estimate did not correspond to that of a compliance counselor. This commenter further asserted that the wage suggested the Department believed such compliance activities would be handled by junior attorneys, rather than more senior compliance counsel. In the proposal, the Department applied an hourly rate for compliance attorneys based on the U.S. Bureau of Labor Statistics' average attorney hourly rate.⁴ In response to this commenter, for the cost estimation in

⁴ In the proposal, the Department used \$138.41 as an attorney's hourly rate. For more details about the Department's methodologies, see *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculation*, Employee Benefits Security Administration (June 2019), www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.

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the final exemption, the Department increased its legal professional's hourly labor rate from \$138.41 to \$365.39 to reflect the typical compensation of those who provide such services to Financial Institutions.⁵ The Department made this adjustment to acknowledge it is important to take into account the level of experience and specialization of legal professionals in charge of compliance testing. Therefore, the Department's new cost burden analyses reflect the hourly wage of senior compliance attorneys in the financial services sector.⁶

Similarly, one commenter mentioned that Financial Institutions would likely revise their annual retrospective review reports to fully comply with the exemption, even if they already produce the reports to comply with other regulators or to voluntarily improve their compliance system. The Department accepted this comment too and incorporated it in its compliance cost estimates. Thus, the potential burden increases on *all* entities relying on this exemption, regardless of whether they already produce annual retrospective reviews reports.

One commenter stated that the Department's expectation that many financial institutions already document significant decisions, like rollovers, was not realistic. However, a report commissioned by this commenter found that slightly more than half (52 percent) of asset management firms implementing Regulation Best Interest established internal policies and procedures that require their financial service professionals to document rollover recommendations. About half require documentation on all recommendations, while 56 percent require documentation for specific product recommendations, such as mutual funds and variable annuities.⁷ Since Regulation Best Interest is now in effect, the Department expects that these financial institutions already are implementing these policies and procedures. Therefore, the Department assumes that 52 percent of financial institutions already require documentation for rollover recommendations, and thus will face no more than a nominal burden increase. The remaining 48 percent will face a larger burden increase to implement new documentation procedures for rollover recommendations.

⁵ For the cost estimation in the proposal the Department used an average attorney hourly rate based on the U.S. Bureau of Labor Statistics. For the cost estimation in the final exemption, the Department used an hourly rate estimate for an in-house compliance counsel, obtained from the SEC's Regulation Best Interest Release, 84 FR at 33455, footnote 1304: hour for in-house compliance counsel. Available at <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf>. For more details about the Department's methodologies, see *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculation*, Employee Benefits Security Administration (June 2019), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebssa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

⁶ In the final exemption, the Department used \$365.39 as an attorney's hourly rate. This is an hourly rate estimate for an in-house compliance counsel, obtained from the SEC's Regulation Best Interest Release, 84 FR at 33455, footnote 1304: hour for in-house compliance counsel. Available at www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf.

⁷ *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package*, Deloitte (Mar. 6, 2020). (This report is based on a survey given to 48 SIFMA member firms providing financial advice and related services to retail customers. The survey ended on December 2, 2019. Ninety percent of survey participant firms were dual registrants.)

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In addition, in the proposal, the Department invited comments about financial services professionals' practices related to documenting rollover recommendations, particularly whether financial services professionals often use a form with a list of common reasons for rollovers and how long, on average, it would take for a financial services professional to document a rollover recommendation. One commenter stated that the Department's estimated burden hour was ambitious but reasonable, particularly for firms using compliance software to automate this process. This commenter, however, pointed out that the Department did not take into account the cost associated with purchasing compliance software. According to this commenter, the Department's low cost estimate for documenting rollovers suggests that hasty and superficial analysis would satisfy this requirement. The Department disagrees with this claim. As explained in the proposal, the Department did not expect this requirement to create an undue burden for the following reasons: (1) financial services professionals generally seek and gather information on investor profiles in accordance with other regulators' rules; and (2) as a best practice, financial professionals often discuss the basis for their recommendations and associated risks with their clients.⁸ Because financial professionals already collect relevant information and discuss the basis for certain recommendations with clients, documenting such information with respect to rollover recommendations would add only incremental burden. Furthermore, a recent report indicated that approximately three out of four firms surveyed would change their technology in response to Regulation Best Interest before it became effective.⁹ This suggests that most financial institutions likely enhanced their technology recently to comply with other regulator's rule. Some financial institutions might have elected not to enhance their technologies in the wake of Regulation Best Interest because they recently updated their technology capabilities or decided to rely more on manual processes. This implies that most financial institutions are not likely to incur large technological costs, such as purchasing compliance software to comply with this exemption. Therefore, the Department assumes financial institutions that have not enhanced technology capabilities for another regulator's rule will adopt a mixed approach, combining current technology solutions with increased manual processes.¹⁰

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

No payments or gifts are provided to respondents.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.

None.

⁸ FINRA, Reg BI and Form CRS Firm Checklist.

⁹ *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package*, Deloitte (Mar. 6, 2020).

¹⁰ The Department estimates that documenting each rollover recommendation will require additional 30 minutes for a personal financial advisor whose firms currently do not require rollover documentations.

- 11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to person from whom the information is requested, and any steps to be taken to obtain their consent.**

There are no questions of a sensitive nature; therefore, no additional justification is necessary.

- 12. Provide estimates of the hour burden of the collection of information. The statement should:**

- Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of difference in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.**
- If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens.**
- Provide estimates of annualized cost to respondents for the hour burdens for collection of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here.**

The Department estimates that 11,782 financial institutions would rely on the exemption, including 1,957 BDs,¹¹ 6,729 SEC-registered investment advisers,¹² 2,710 state-registered

¹¹ The SEC estimated that there were 3,764 BDs as of December 2018 (see Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019)(Form CRS Relationship Summary Release). The IAA Compliance 2019 Survey estimates that 52 percent of IAs have a pension consulting business. The estimated number of BDs affected by this exemption is the product of the SEC's estimate of total BDs in 2018 and IAA's estimate of the percent of investment advisers with a pension consulting business.

¹² The SEC estimated that there were 12,940 SEC-registered investment advisers that were not dually registered as BDs as of December 2018 (see Form CRS Relationship Summary, *supra* note 11). The IAA Compliance 2019 Survey estimates that 52 percent of IAs have a pension consulting business. The estimated number of IAs affected by this exemption is the product of the SEC's estimate of SEC-registered IAs in 2018 and the IAA's estimate of the percent of IAs with a pension consulting business.

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IAs,¹³ and 386 insurers.¹⁴ As the Department believes that referrals by banks are not likely to constitute fiduciary investment advice within the meaning of the exemption, banks are not considered in this analysis. The Department assumes that financial institutions will use the exemption in conjunction with transactions involving nearly all of their clients that are defined benefits plans, defined contribution plans, and IRA holders.¹⁵

The Department also assumes that financial institutions use existing in-house resources to prepare the disclosures, policies and procedures, rollover documentation, and retrospective reviews and to maintain the recordkeeping systems necessary to meet the requirements of the exemption.

The Department estimates that 1,755,959 retirement investors have relationships with financial institutions and are likely to engage in transactions covered under this exemption.¹⁶ Therefore, these 1,755,959 retirement investors will likely receive 1 required disclosure from one of the 11,782 financial institutions, which results in an average of 149 disclosures per financial institution.¹⁷

Costs Associated with Disclosures

Section II(b) of the exemption would require financial institutions to furnish retirement investors with a disclosure before engaging in a covered transaction. Section II(b)(1) requires financial institutions to acknowledge in writing that the institution and its investment professionals are fiduciaries under ERISA and the Code, with respect to any investment advice provided to the retirement investors. Section II(b)(2) requires financial institutions to provide a written description of the services to be provided and the financial institution's and investment professional's material conflicts of interest. Section II(b)(3) of the exemption requires financial institution to document the specific reasons any recommendation to roll over assets from a Plan to another Plan or an IRA, from an IRA to a Plan, from an IRA to another IRA, or from one type of account to another (e.g., from a commission-based account to a fee-based account) is in the Best Interest of the Retirement Investor. Financial institutions are generally required to provide the disclosure to each retirement investor once, but financial institutions may need to provide updated disclosures to ensure accuracy.

¹³ The SEC estimated that there were 16,939 state-registered IAs that were not dually registered as BDs as of December 2018 (see Form CRS Relationship Summary, *supra* note 11). The NASAA 2019 estimates that 16 percent of state-registered IAs have a pension consulting business. The estimated number of state-registered IAs affected by this exemption is the product of the SEC's estimate of state-registered IAs in 2018 and NASAA's estimate of the percent of state-registered IAs with a pension consulting business.

¹⁴ NAIC estimates that the number of insurers directly writing annuities as of 2018 is 386.

¹⁵ For this analysis, "IRA holders" include rollovers from ERISA plans. The Department welcomes comments on this estimate.

¹⁶ For more detailed information about how the Department estimated the number of disclosures, see "Costs Associated with Disclosures" section below.

¹⁷ The number of responses per respondent (149) is calculated by dividing the number of disclosures (1,755,959) by the number of respondents (11,782).

While some financial institutions may choose to use other existing exemptions instead of this exemption, the Department assumes that all eligible entities rely on the exemption for the purposes of cost estimation. Therefore, each of the estimated 11,782 financial institutions is assumed to develop and distribute required disclosures.

The Department estimates that developing a disclosure indicating fiduciary status takes a legal professional between five and 30 minutes, depending on the nature of the business,¹⁸ resulting in an hour burden of 1,599.¹⁹ Assuming an hourly wage rate for a legal professional of \$365.39,²⁰ the estimated cost burden is \$584,130.²¹

Developing a disclosure identifying services provided and conflicts of interest takes a legal professional an estimated five minutes to five hours, depending on the nature of the business,²² resulting in an hour burden of 3,691.²³ Assuming an hourly wage rate for a legal professional of \$365.39,²⁴ the estimated cost burden is \$1,348,628.²⁵

The Department estimates that approximately 1.8 million retirement investors have relationships with financial institutions and are likely to engage in transactions covered under this exemption.²⁶ Of these 1.8 million retirement investors, it is assumed that 8.1

¹⁸ The Department assumes that it would take each retail broker dealer firm 15 minutes, each nonretail BD or insurance firm 30 minutes, and each registered IA 5 minutes to prepare a disclosure conveying fiduciary status.

¹⁹ Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it would take each firm to prepare the disclosure.

²⁰ The Department's 2018 hourly wage rate estimates include wages, benefits, and overhead, and are calculated as follows: mean wage data from the 2018 National Occupational Employment Survey (May 2018, https://www.bls.gov/news.release/archives/ocwage_03292019.pdf), wages as a percent of total compensation from the Employer Cost for Employee Compensation (December 2018, https://www.bls.gov/news.release/archives/ecec_03192019.pdf), and overhead cost corresponding to each 2-digit NAICS code from the Annual Survey of Manufacturers (December 2017, <https://www.census.gov/data/Tables/2016/econ/asm/2016-asm.html>) multiplied by the percent of each occupation within that NAICS industry code based on a matrix of detailed occupation employment for each NAICS industry from the BLS Office of Employment projections (2016, <https://www.bls.gov/emp/data/occupational-data.htm>).

²¹ The hourly cost burden is calculated by multiplying the burden hour of each firm associated with preparation of the disclosure by the hourly wage of a legal professional.

²² The Department assumes that it would take each retail BD or IA firm 5 minutes, each small nonretail BD or small insurer 60 minutes, and each large nonretail BDs or larger insurer 5 hours to prepare a disclosure conveying services provided and any conflicts of interest.

²³ Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it would take each firm to prepare the disclosure.

²⁴ The Department's 2018 hourly wage rate estimates include wages, benefits, and overhead, and are calculated as follows: mean wage data from the 2018 National Occupational Employment Survey (May 2018, https://www.bls.gov/news.release/archives/ocwage_03292019.pdf), wages as a percent of total compensation from the Employer Cost for Employee Compensation (December 2018, https://www.bls.gov/news.release/archives/ecec_03192019.pdf), and overhead cost corresponding to each 2-digit NAICS code from the Annual Survey of Manufacturers (December 2017, <https://www.census.gov/data/Tables/2016/econ/asm/2016-asm.html>) multiplied by the percent of each occupation within that NAICS industry code based on a matrix of detailed occupation employment for each NAICS industry from the BLS Office of Employment projections (2016, <https://www.bls.gov/emp/data/occupational-data.htm>).

²⁵ The hourly cost burden is calculated by multiplying the burden hour of each firm associated with preparation of the disclosure by the hourly wage of a legal professional.

percent²⁷, or 141,636 retirement investors, will receive paper disclosures. Distributing paper disclosures is estimated to take clerical personnel 1 minute per disclosure, resulting in an hourly burden of 2,361.²⁸ Assuming an hourly wage rate for clerical personnel of \$64.11,²⁹ the estimated cost burden is \$151,341.³⁰

Costs Associated with Written Policies and Procedures

Section II(c)(1) of the exemption requires financial institutions to establish, maintain, and enforce written policies and procedures designed to ensure that they and their investment professionals comply with the Impartial Conduct Standards. Section II(c)(2) further requires financial institutions to design their policies and procedures to mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a financial institution or investment professional to place their interests ahead of the interest of the retirement investor.

The Department estimates that establishing, maintaining, and enforcing written policies and procedures to ensure compliance with the Impartial Conduct Standards takes a legal professional, at each of the 11,782 financial institutions, between 15 minutes and 10

²⁶ The Department estimates the number of affected plans and IRAs be approximately equal to 49 percent of rollovers from defined contribution plans to IRAs. Cerulli has estimated the number of accounts in defined contribution plans rolled into IRAs to be 3,593,592 (see *U.S. Retirement-End Investor 2020: Helping Participants Navigating Uncertainty*, The Cerulli Report (2020)).

²⁷ According to data from the National Telecommunications and Information Agency (NTIA), 37.7 percent of individuals age 25 and over have access to the internet at work. According to a Greenwald & Associates survey, 84 percent of plan participants find it acceptable to make electronic delivery the default option, which is used as the proxy for the number of participants who will not opt-out of electronic disclosure if automatically enrolled (for a total of 31.7 percent receiving electronic disclosure at work). Additionally, the NTIA reports that 40.5 percent of individuals age 25 and over have access to the internet outside of work. According to a Pew Research Center survey, 61 percent of internet users use online banking, which is used as the proxy for the number of internet users who will affirmatively consent to receiving electronic disclosures (for a total of 24.7 percent receiving electronic disclosure outside of work). Combining the 31.7 percent who receive electronic disclosure at work with the 24.7 percent who receive electronic disclosure outside of work produces a total of 56.4 percent who will receive electronic disclosure overall. In light of the 2019 Electronic Disclosure Regulation, the Department estimates that 81.5 percent of the remaining 43.6 percent of individuals would receive the disclosures electronically. In total, 91.9 percent of plans are expected to receive the disclosure electronically.

²⁸ Burden hours are calculated by multiplying the estimated number of plans receiving the disclosures non-electronically by the estimated time it would take to prepare the physical disclosure.

²⁹ The Department's 2018 hourly wage rate estimates include wages, benefits, and overhead, and are calculated as follows: mean wage data from the 2018 National Occupational Employment Survey (May 2018, https://www.bls.gov/news.release/archives/ocwage_03292019.pdf), wages as a percent of total compensation from the Employer Cost for Employee Compensation (December 2018, https://www.bls.gov/news.release/archives/ecec_03192019.pdf), and overhead cost corresponding to each 2-digit NAICS code from the Annual Survey of Manufacturers (December 2017, <https://www.census.gov/data/Tables/2016/econ/asm/2016-asm.html>) multiplied by the percent of each occupation within that NAICS industry code based on a matrix of detailed occupation employment for each NAICS industry from the BLS Office of Employment projections (2016, <https://www.bls.gov/emp/data/occupational-data.htm>).

³⁰ The hourly cost burden is calculated as the burden hours associated with the physical preparation of each non-electronic disclosure by the hourly wage of a clerical professional.

hours, depending on the nature of the business.³¹ This results in an hour burden of 12,023.³² Assuming an hourly wage rate for a legal professional of \$365.39,³³ the estimated cost burden would be \$4,393,011.³⁴

Costs Associated with Rollover Documentation

Section II(c)(3) of the exemption requires financial institutions to document the specific reasons for any rollover recommendation and provide that the rollover is in the best interest of the retirement investor.

The Department estimates that 1.8 million defined contribution plan accounts³⁵ are rolled into IRAs in accordance with advice from a financial professional. Of those 1.8 million retirement plan accounts, the Department assumes that approximately two-thirds³⁶ of rollovers involve financial services professionals who act in a fiduciary capacity under the five-part test. Further, the Department estimates that documenting each rollover recommendation takes a personal financial adviser between 30 minutes and 5 minutes depending on their financial institutions' policies to comply with other regulators' rules,

³¹ The Department assumes that it would take each small retail BD 22.5 minutes, each large retail BD 45 minutes, each small nonretail BD 5 hours, each large nonretail BD ten hours, each small IA 15 minutes, each large IA 30 minutes, each small insurer 5 hours, and each large insurer 10 hours to meet the requirement.

³² Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it would take each firm to establish, maintain, and enforce written policies and procedures.

³³ The Department's 2018 hourly wage rate estimates include wages, benefits, and overhead, and are calculated as follows: mean wage data from the 2018 National Occupational Employment Survey (May 2018, https://www.bls.gov/news.release/archives/ocwage_03292019.pdf), wages as a percent of total compensation from the Employer Cost for Employee Compensation (December 2018, https://www.bls.gov/news.release/archives/ecec_03192019.pdf), and overhead cost corresponding to each 2-digit NAICS code from the Annual Survey of Manufacturers (December 2017, <https://www.census.gov/data/Tables/2016/econ/asm/2016-asm.html>) multiplied by the percent of each occupation within that NAICS industry code based on a matrix of detailed occupation employment for each NAICS industry from the BLS Office of Employment projections (2016, <https://www.bls.gov/emp/data/occupational-data.htm>).

³⁴ The hourly cost burden is calculated as the burden hour of each firm associated with meeting the written policies and procedures requirement multiplied by the hourly wage of a legal professional.

³⁵ Cerulli has estimated the number of plans rolled into IRAs to be 3,593,592 (see *U.S. Retirement-End Investor 2020: Helping Participants Navigating Uncertainty*, supra note 24). The Department estimates that 50 percent of these rollovers would be handled by a financial professional.

³⁶ In 2019, a survey was conducted of financial services professionals (including BDs and IAs) who hold more than 50 percent of their practice's assets under management in employer-sponsored retirement plans. In addition, 45 percent of those professionals indicated that they make a proactive effort to pursue IRA rollovers from their DC plan clients. According to this survey, approximately 32.6 percent responded that they function in a non-fiduciary capacity. Therefore, the Department assumes that approximately 67.4 percent of financial service professionals serve their Plan clients as fiduciaries. See *U.S. Defined Contribution 2019: Opportunities for Differentiation in a Competitive Landscape*, The Cerulli Report (2019).

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resulting in 335,330³⁷ burden hours. Assuming an hourly wage rate for a personal financial adviser of \$194.77,³⁸ the cost burden is estimated \$65,313,770.³⁹

Costs Associated with Annual Report of Retrospective Review

Under Section II(d) of the exemption, financial institutions are required to conduct an annual retrospective review that is reasonably designed to assist the financial institution in detecting and preventing violations of, and achieving compliance with the Impartial Conduct Standards and the institution's own policies and procedures governing compliance with the exemption. The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer.

The Department estimates that of the estimated 11,782 financial institutions affected by the exemption, only 794 do not currently meet the internal retrospective review requirement.

As per FINRA Rule 3110,⁴⁰ FINRA Rule 3120,⁴¹ and FINRA Rule 3130,⁴² BDs are likely already held to a standard similar to that of the retrospective review requirements of this exemption. Accordingly, in this analysis, the Department assumes that BDs incur minimal costs to meet this requirement. The Department assumes that one percent of affected BDs, or 20 BDs, would incur costs to meet the audit report requirement.

In 2018, the Investment Adviser Association estimated that 92 percent of SEC-registered IAs voluntarily provide an annual compliance program review report to senior management.⁴³ Therefore, the Department estimates that only eight percent, or 538,⁴⁴ of

³⁷ Burden hours are calculated by multiplying the estimated number of rollovers affected by this exemption by the estimated hours needed to document each recommendation.

³⁸ The Department's 2018 hourly wage rate estimates include wages, benefits, and overhead, and are calculated as follows: mean wage data from the 2018 National Occupational Employment Survey (May 2018, https://www.bls.gov/news.release/archives/ocwage_03292019.pdf), wages as a percent of total compensation from the Employer Cost for Employee Compensation (December 2018, https://www.bls.gov/news.release/archives/ecec_03192019.pdf), and overhead cost corresponding to each 2-digit NAICS code from the Annual Survey of Manufacturers (December 2017, <https://www.census.gov/data/Tables/2016/econ/asm/2016-asm.html>) multiplied by the percent of each occupation within that NAICS industry code based on a matrix of detailed occupation employment for each NAICS industry from the BLS Office of Employment projections (2016, <https://www.bls.gov/emp/data/occupational-data.htm>).

³⁹ The hourly cost burden is calculated as the burden hour of each firm associated with meeting the rollover documentation requirement multiplied by the hourly wage of a personal financial advisor.

⁴⁰ Rule 3110. Supervision, FINRA Manual, www.finra.org/rules-guidance/rulebooks/finra-rules/3110.

⁴¹ Rule 3120. Supervisory Control System, FINRA Manual, www.finra.org/rules-guidance/rulebooks/finra-rules/3120.

⁴² Rule 3130. Annual Certification of Compliance and Supervisory Processes, FINRA Manual, www.finra.org/rules-guidance/rulebooks/finra-rules/3130.

⁴³ 2018 Investment Management Compliance Testing Survey, Investment Adviser Association (Jun. 14, 2018), https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management-Compliance-Testing-Survey-Results-Webcast_pptx.pdf.

⁴⁴ The SEC estimated that there were 12,940 SEC-registered IAs that were not dually registered as BDs as of December 2018 (see Form CRS Relationship Summary, *supra* note 11). The IAA Compliance 2019 Survey

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SEC-registered IAs advising retirement plans incur costs associated with producing a retrospective review report. Due to lack of data, the Department assumes that state-registered IAs exhibit similar retrospective review patterns and estimates that eight percent, or 217,⁴⁵ of state-registered IAs also incur costs associated with producing a retrospective review report. The Department assumes that five percent of affected insurers or 20 incur costs associated with producing a retrospective review report.⁴⁶

As SEC-registered IAs are already subject to SEC Rule 206(4)-7 and insurers in many states are already subject to similar requirements,⁴⁷ the Department assumes these entities incur minimal costs to satisfy the conditions related to this requirement.

The Department estimates it takes a legal professional five hours for small firms and 10 hours for large firms to produce the reports. This results in an hour burden of 7,032⁴⁸ and an equivalent cost burden of \$2,569,337.⁴⁹

In addition to conducting the audit and producing a report, the Department estimates that of the 11,782 financial institutions affected by the exemption, 9,845⁵⁰ would incur costs to review the report and certify the exemption. This is estimated to take a financial

estimates that 52 percent of IAs have a pension consulting business. The IAA Investment Management Compliance Testing Survey estimates that 92 percent of SEC-registered IAs provide an annual compliance program review report to senior management. The estimated number of IAs affected by this exemption who do not meet the retrospective review requirement is the product of the SEC's estimate of SEC-registered IAs in 2018, the IAA's estimate of the percent of IAs with a pension consulting business, and IAA's estimate of the percent of IA's who do not provide an annual compliance program review report.

⁴⁵ The SEC estimated that there were 16,939 state-registered IAs that were not dually registered as BDs as of December 2018 (see Form CRS Relationship Summary, *supra* note 11). The NASAA 2019 estimates that 16 percent of state-registered IAs have a pension consulting business. The IAA Investment Management Compliance Testing Survey estimates that 92 percent of SEC-registered IAs provide an annual compliance program review report to senior management. The Department assumes state-registered IAs exhibit similar retrospective review patterns as SEC-registered IAs. The estimated number of state-registered IAs affected by this exemption is the product of the SEC's estimate of state-registered IAs in 2018, NASAA's estimate of the percent of state-registered IAs with a pension consulting business, and IAA's estimate of the percent of IA's who do not provide an annual compliance program review report.

⁴⁶ NAIC estimates that the number of insurers directly writing annuities as of 2018 is 386; the Department estimated five percent of these insurers would incur costs to meet the requirement. Many insurance companies are already subject to similar standards. For instance, the NAIC's Model Regulation contemplates that insurance companies establish a supervision system that is reasonably designed to comply with the Model Regulation and annually provide senior management with a written report that details findings and recommendations on the effectiveness of the supervision system.

⁴⁷ *Suitability in Annuity Transactions Model Regulation*, section 6 C(2)(i), National Association of Insurance Commissioners (spring 2020), www.naic.org/store/free/MDL-275.pdf. (The same requirement is found in the previous NAIC *Suitability in Annuity Transactions Model Regulation* (2010), section 6 F(1)(f).)

⁴⁸ Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it would take each firm to review the report and certify the exemption.

⁴⁹ The hourly cost burden is calculated by multiplying the burden hours for reviewing the report and certifying the exemption requirement by the hourly wage of a legal professional.

⁵⁰ The Department estimates that 11,782 financial institutions would be affected by the exemption, including 1,957 BDs. However, as BDs are already held to largely similar standards under FINRA, the Department assumes only one percent of the affected BDs would need to take additional action. All of the other affected entities would be expected to need to take additional action to meet the requirement.

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manager two hours for small firms and four hours for large firms, depending on the nature of the business. This results in an hour burden of 34,718⁵¹ and an equivalent cost burden of \$5,750,451. Further, the Department estimates that the 11,782 financial institutions affected by the exemption need to make additions or modifications to their reports to fully comply with the exemption. This is estimated to take a legal professional one hour for small firms and two hours for large firms. This results in an hour burden of 20,727⁵² and an equivalent cost burden of \$7,573,614.⁵³

Summary

As seen in the tables below, the Department estimates that the overall burden associated with this exemption would total 417,480 hours during the first year and 393,136 hours in subsequent years. The equivalent costs would total \$87.7 million during the first year and \$78.8 million in subsequent years.

| First Year Activity | Total Annual Burden Hours | Hourly Rate | Monetized Value of Respondent Time |
|--|----------------------------------|--------------------|---|
| Development of Disclosure of Fiduciary Status | 1,599 | \$365.39 | \$584,130 |
| Development of Disclosure of Services Provided | 3,691 | \$365.39 | \$1,348,628 |
| Preparation for Distribution of Disclosures | 2,361 | \$64.11 | \$151,341 |
| Development of Written Policies and Procedures | 12,023 | \$365.39 | \$4,393,011 |
| Rollover | 335,33 | \$194. | \$65,313,7 |

⁵¹ Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it takes each firm to review the report and certify the exemption.

⁵² Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it takes each firm to make modifications or additions to the report.

⁵³ The hourly cost burden is calculated by multiplying the burden hours for making modifications or additions to the report by the hourly wage of a legal professional.

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| | | | |
|---|----------------|----------|---------------------|
| Documentation | 0 | 77 | 70 |
| Review of Audit Report and Certification | 34,718 | \$165.63 | \$ 5,750,451 |
| Production of Audit Report | 7,032 | \$365.39 | \$2,569,337 |
| Modification and Correction of Audit Report | 20,727 | \$365.39 | \$7,573,614 |
| Totals for First Year | 417,480 | | \$87,684,281 |

| Subsequent Year Activity | Total Annual Burden Hours | Hourly Rate | Monetized Value of Respondent Time |
|---|----------------------------------|--------------------|---|
| Preparation for Distribution of Disclosures | 2,361 | \$64.11 | \$151,341 |
| Rollover Documentation | 335,330 | \$194.77 | \$65,313,770 |
| Review of Audit Report and Certification | 34,718 | \$165.63 | \$ 5,750,451 |
| Production of Audit Report | 7,032 | \$365.39 | \$2,569,337 |
| Modification and Correction of Audit Report | 20,727 | \$365.39 | \$7,573,614 |
| Totals for Subsequent Year | 393,136 | | \$78,789,176 |

Note: Totals in table may not sum precisely due to rounding.

13. Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 or 14).

The Department estimates that approximately 1.8 million retirement investors⁵⁴ have relationships with financial institutions and would be likely to engage in transactions covered under this PTE. Of these 1.8 million retirement investors, the Department assumes that 8.1 percent,⁵⁵ or 141,636 retirement investors, will receive paper

⁵⁴ The Department estimates the number of affected plans and IRAs be approximately equal to 49 percent of rollovers from defined contribution plans to IRAs. Cerulli has estimated the number of accounts in defined contribution plans rolled into IRAs to be 3,593,592 (see *U.S. Retirement-End Investor 2020: Helping Participants Navigating Uncertainty*, supra note 24).

⁵⁵ According to data from the National Telecommunications and Information Agency (NTIA), 37.7 percent of individuals age 25 and over have access to the internet at work. According to a Greenwald & Associates survey, 84 percent of plan participants find it acceptable to make electronic delivery the default option, which is used as the proxy for the number of participants who will not opt-out of electronic disclosure if automatically enrolled (for a total of 31.7 percent receiving electronic disclosure at work). Additionally, the NTIA reports that 40.5 percent of

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disclosures. Assuming the disclosures require two sheets of paper at a cost \$0.05 each, the estimated material cost for the paper disclosures is \$14,164. Postage for each paper disclosure is expected to cost \$0.55, resulting in a mailing cost of \$77,899.62. Thus, the total cost associated with printing and mailing is \$92,063.

In its analysis, the Department assumes that disclosures distributed electronically will be distributed through channels already used by respondents in the normal course of business.

- 14. Provide estimates of annualized cost to the federal government. Also, provide an description of the method used to estimate cost, which should include quantification of hours, operations expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items, 12, 13, and 14 in a single table.**

There are no ongoing costs to the Federal government.

- 15. Explain any reasons for any program changes or adjustments.**

This is a new information collection.

- 16. For collection of information whose results will be published, outline plans for tabulation, and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.**

This is not a collection of information for statistical use and there are no plans to publish the results of this collection.

- 17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.**

The collection of information will display a currently valid OMB control number.

- 18. Explain each exception to the certification statement.**

individuals age 25 and over have access to the internet outside of work. According to a Pew Research Center survey, 61 percent of internet users use online banking, which is used as the proxy for the number of internet users who will affirmatively consent to receiving electronic disclosures (for a total of 24.7 percent receiving electronic disclosure outside of work). Combining the 31.7 percent who receive electronic disclosure at work with the 24.7 percent who receive electronic disclosure outside of work produces a total of 56.4 percent who will receive electronic disclosure overall. In light of the Department's 2020 Electronic Disclosure Regulation, the Department estimates that 81.5 percent of the remaining 43.6 percent of individuals would receive the disclosures electronically. In total, 91.9 percent of plans are expected to receive the disclosure electronically.

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There are no exceptions to the certification statement.

B. Collection of Information Employing Statistical Methods.

Not applicable.