DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12094]

ZRIN 1210–ZA34

Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128

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

ACTION: Amendments to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128.

SUMMARY: This document contains a notice of amendments to Prohibited Transaction Exemptions (PTEs) 75–1, 77–4, 80–83, 83–1, and 86–128, which are class exemptions from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The amendments (collectively, the Mass Amendment) affect participants and beneficiaries of plans, individual retirement account (IRA) owners, and certain fiduciaries of plans and IRAs.

DATES: The Mass Amendment is effective September 23, 2024.

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

SUPPLEMENTARY INFORMATION:

Background

As described elsewhere in this edition of the **Federal Register**, the Department of Labor (Department) is amending the regulation defining when a person renders ''investment advice for a fee or other compensation, direct or indirect'' with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a ''fiduciary'' in section ERISA 3(21)(A)(ii) of ERISA and in Code section 4975(e)(3)(B) (the ''Regulation''). The Department also is amending PTE 2020–02 to provide additional clarity for advice fiduciaries and protections for retirement investors and PTE 84–24 to address specific issues that insurance companies face in complying with the conditions of PTE 2020–02 when distributing annuities through independent agents, elsewhere in this edition of the **Federal Register**.

On October 31, 2023, the Department released the proposed amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 described below and invited all interested persons to submit written comments.[1] The Department received written comments on the proposed amendments, and on December 12 and 13, 2023, held a public hearing at which witnesses presented testimony. After careful consideration of the comments and testimony on the proposed amendments, the Department is granting the Mass Amendment with the modifications discussed herein.

The amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 remove relief in those exemptions for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

After this amendment is effective, investment advice fiduciaries must meet the conditions of PTE 2020–02 or PTE 84–24 for administrative relief when they receive otherwise prohibited compensation as a result of their provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder to Retirement Investors (defined as plans, plan participants or beneficiaries, IRAs, IRA owners and beneficiaries, plan fiduciaries within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciaries within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA).

As described in more detail below, the Department also is amending PTE 75–1 by: (1) expanding the extension of credit provision in Part V; and (2) adding a definition of the term ''IRA'' in Part V. The Department also is amending PTE 86–128 by: (1) revising the exemption's ''Recapture of Profits'' exception; and (2) making certain technical corrections and editorial changes.

The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and IRAs from engaging in self-dealing in connection with transactions involving plans and IRAs. The Department is granting these amendments pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2).[2]

Other Advice Exemptions

As discussed elsewhere in this edition of the **Federal Register**, the Department is amending investment advice exemptions to ensure consistent and protective standards apply to investment advice. After considering the comments it received, the Department made significant changes to both PTEs 2020–02 and 84–24 to ensure that there is an investment advice exemption available that applies to an appropriately wide range of situations. Many comments raised issues, or discussed concerns, with the Department's proposed amendments collectively (rather than proposal by proposal). In this same vein, the Department considered these comments holistically. For example, one commenter expressed concern that it would no longer be able to rely on PTE 77–4 for investment advice if the proposed amendments were finalized and was also concerned about whether it could use PTE 2020–02. After consideration of the comments, the Department determined it would make changes to PTE 2020–02 to revise certain conditions and broaden its scope rather than make changes to the Mass Amendment proposal. Although the changes to PTEs 2020–02[3] and 84–24[4] are discussed more completely in the respective documents, the changes in the three exemption documents reflect the full scope of comments received. The conditions to those exemptions, as finalized, emphasize long-standing principles of loyalty and prudence, require careful management of conflicts of interest, and are workable across different compensation structures and business models related to the provision

[1] The proposed amendments were released on October 31, 2023, and were published in the **Federal Register** on November 3, 2023. 88 FR 76032.

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

[3] PTE 2020–02 requires financial institutions and investment professionals relying on the exemption to: (i) acknowledge their fiduciary status in writing; (ii) disclose their services and material conflicts of interest; and adhere to impartial conduct standards; (iii) adopt policies and procedures prudently designed to ensure compliance with the impartial conduct standards and mitigate conflicts of interest that could otherwise cause violations of those standards; (iv) document and disclose the specific reasons that any rollover recommendations from Title I plans to IRAs are in the retirement investor's best interest; (v) and conduct an annual retrospective compliance review.

[4] PTE 84–24 covers transactions with independent insurance agents, and requires them to comply with conditions similar to the amended PTE 2020–02.

of investment advice to Retirement Investors.

The Department has concluded that PTE 2020–02 and PTE 84–24 provide a uniform and workable framework for the definition of fiduciary under ERISA with respect to the provision of investment advice, and that the protections now afforded by those exemptions should be available to Retirement Investors generally when they receive recommendations from trusted advisers. For all the reasons described in the preambles to the amendments to PTE 84–24 and PTE 2020–02, published elsewhere today in this edition of the **Federal Register**, as well as the associated Regulatory Impact Analysis, the Department has determined to condition relief from the prohibited transaction rules for fiduciary advice on the terms of PTE 84–24 and PTE 2020–02. Retirement Investors will be best served by a uniform protective standard focused on the Impartial Conduct Standards, and associated policies and procedures, as set forth in the preambles and text of those exemptions. In the Department's judgment, there is no reason in law or policy to deprive Retirement Investors who receive advice that was formerly covered by the exemptions affected by these Mass Amendment of the protections now provided to all Retirement Investors under PTE 84–24 and PTE 2020–02.

Summary of Proposed Amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128

The proposed Mass Amendment was primarily aimed to ensure that all parties relying on the exemptive relief for the provision of investment advice are held to level standards and consistent criteria. In order to accomplish this goal, the Department proposed to amend PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86–128 by removing exemptive relief for the provision of fiduciary investment advice. Specifically, the proposal would have added the following statement to each exemption: ''*Exception.* No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.''

This proposed amendment was intended to ensure that retirement investors would receive consistent and appropriate protections when receiving fiduciary investment advice. The Department proposed to accomplish this by removing relief for fiduciary investment advice from class exemptions except for PTE 2020–02 and PTE 84–24. The proposed amendment was intended to ensure that Retirement Investors received fiduciary investment advice that reflected an appropriate level of care and loyalty and financial professionals could rely on a single framework regardless of the business model or the compensation structure. The Department's intention was to create a level regulatory playing field that would apply to all of the investment products that fiduciary investment providers may recommend to Retirement Investors. Under the proposed amendments, retirement investors could expect to receive substantially the same strong protections with respect to fiduciary investment recommendations, irrespective of the type of investment product that was recommended, and advice providers would compete for retirement investor's business under a common standard focused on the investor's best interest.

Discussion of the Comments to the Mass Amendment in General

Commenters stated that the Regulation and all the proposed amendments, taken together, have internal contradictions. These commenters were concerned with perceived inconsistencies, costly conditions, and inefficient duplication (including with respect to remedies). According to these commenters, the Department's proposed changes would result in uncertainties, unintended consequences, counterproductive effects, and needless litigation. Commenters also expressed concern about the comment period and the proposed effective date. These general comments, and comments about the interaction between the Department's proposals are discussed both here and in other final amendments, published elsewhere in today's edition of the **Federal Register**.

Those commenters who focused on the proposed Mass Amendment tied their concerns to PTE 2020–02, and what they characterized as the Department's approach of requiring all fiduciary investment advice relief into PTE 2020–02. In particular, one commenter focused on certain transactions that would have been permitted by the class exemptions affected by the Mass Amendment, but which would have been excluded from PTE 2020–02, as proposed.[5] At least one commenter stated that the preamble to the proposal failed to identify the transactions being excluded from relief or explain the Department's rationale for excluding such transactions, some of which fiduciaries have been permitted to engage in since ERISA was passed. One of these commenters further opined that the Department's cost analysis in these regards was insufficient, and that the Administrative Procedure Act (the APA) and Executive Orders 12866 and 13563 preclude this kind of ''sleight-of-hand rulemaking.'' Other commenters cited the APA as well, and some also stated that the Mass Amendment exceeds the Department's authority, including under ERISA Section 408(a).[6]

Commenters expressed concern regarding the proposed Mass Amendment in light of the decision by the U.S. Court of Appeals for the Fifth Circuit, vacating the Department's 2016 rulemaking with respect to fiduciary advice.[7] Other commenters stated the proposed Mass Amendment would constitute improper regulation of IRAs.

Many of the commenters on the proposed Mass Amendment criticized the Department's approach as costly and said the Department had not adequately accounted for the costs to affected parties. For example, one commenter stated that, in their view, the majority of the changes proposed by the Department will be disruptive and unhelpful. Another commenter stated that the costs to the industry of changing their reliance on all of these

[5] One commenter stated that all of the following investments could not be traded in the dealer market under PTE 2020–02 as it currently exists: equities (U.S. and foreign), asset-backed trusts, U.S. bonds of entities other than corporations, certain structured notes issued by U.S. corporations and subject to registration requirements under the Securities Act of 1933, currency, foreign corporate bonds, foreign government bonds, Rule 144A securities, privately issued real estate securities, closed-end funds, equity IPOs, and debt IPOs. As noted elsewhere, the amended exemptions are not intended to limit the scope of the current exemptions except with respect to the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. In addition, as discussed in the preamble to today's amendments to PTE 2020–02, and in its text, PTE 2020–02 has been broadly amended to encompass compensation for advice irrespective of the product recommended.

[6] ERISA section 408(a) and Code section 4975(c)(2), expressly permit the Department (through the Reorganization Plan No. 4 of 1978) to grant ''a conditional or unconditional exemption'' as long as the exemption is ''(A) administratively feasible, (B) in the interests of the plan and of its participants and beneficiaries, and (C) protective of the rights of participants and beneficiaries of the plan.''

[7] *See generally Chamber of Commerce* v. *U.S. Dep't of Lab.,* 885 F.3d 360 (5th Cir. 2018).

exemptions would be high and was insufficiently unanalyzed by the Department. According to these commenters, financial institutions have established their policies, procedures, compliance routines, risk assessments, training and supervision structures to accommodate the exemptions each has chosen to use and requiring all of those institutions to revamp their systems and processes will be expensive and time consuming. This commenter was concerned that these costs were not fully reflected in the Department's cost assessment or effective date of the exemption. This commenter raised threats of litigation and cautioned that to the extent these changes are ultimately invalidated, the industry and the plans they serve will suffer unnecessary costs and investment in ultimately vacated rules. In the view of this commenter, low and middle-income families would be disproportionately harmed by these changes, because it is the commenter's view that some firms and financial professionals would no longer provide fiduciary investment advice to low and middle-income families. One commenter disagreed that any changes were appropriate because the Department did not identify any harm. Other commenters called the proposed amendment ''arbitrary and capricious.''

Some of the commenters on these amendments focused specifically on concerns about an anticipated loss of efficiency. These commenters described PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 as designed to cover specific types of transactions that financial services firms commonly undertake for plan or IRA investors. The conditions built into those class exemptions were specifically tailored to protect investors, while allowing for efficient conduct of ordinary and necessary plan transactions. If the proposed Mass Amendment is granted, these commenters argued that the efficiencies associated with the affected class exemptions would be lost, resulting in higher costs and fewer benefits to investors, and perhaps other unintended consequences. Another commenter stated that the insurance industry's suitability standards far exceed any other regulatory agency protections for protecting retirement accounts.

Other commenters focused specifically on the amendment to PTE 77–4. One commenter stated that eliminating the availability of PTE 77–4 for fiduciary investment advice would be highly disruptive and would create material new costs which would ultimately be borne by plans and participants. According to the commenter, PTE 77–4 already provides robust protections for plans and participants and these changes would lead to increased costs that the Department has failed to properly identify, analyze, and account for, and the costs of the disruption alone far outweigh any theoretical benefit to plans and participants. The commenter stated that the outsized burden of complying with the disclosure, documentation, reporting, and recordkeeping requirements of PTE 2020–02 may be too great for it to be viewed as a viable alternative to PTE 77–4 in many cases. The commenter added that the potential result of this is that financial firms are likely to no longer offer certain services to plans if doing so would require them to rely on PTE 2020–02.

Another commenter offered similar views, adding that for over 45 years financial institutions have relied on PTE 77–4 for both investment advice and discretionary programs. According to the commenter, the proposed amendment would require firms to fully inventory every product and service to identify every use of PTE 77–4 and determine whether the exemption can continue to be used and, if not, whether there are any viable alternatives. Other commenters expressed concern that the proposed amendments would result in increased compliance costs, including by having to rely on two class exemptions when previously only one was relied on. For example, a fiduciary would have to comply with PTE 2020–02 to recommend a particular program but would have to comply with PTE 77–4 to manage those assets.

One commenter cited several of the reasons above to support the view that the Mass Amendment is impermissible under ERISA Section 408(a), adding that many plans and participants would be harmed by the Mass Amendment.

Commenters focused on the impact of removing investment advice from PTE 86–128. According to one commenter, the proposed changes do not address situations where an adviser may have limited discretion over the purchase and sale of certain securities within an advisory account, such as mutual funds and exchange-traded funds (ETFs), but acts on a non-discretionary basis with respect to other securities within that same account, such as fee-based variable annuities or private placements. The commenter urged the Department to look more closely at the conditions of the exemption in light of the fact that PTE 86–128 deals only with agency transactions in securities, a field that the commenter characterized as fully regulated by the SEC that requires substantial transaction-based reporting. Other commenters stated that costs to retirement investors would increase if the proposal is adopted, because the material cost savings PTE 86–128 provides for investors would be lost if its relief is transferred to PTE 2020–02. One of these commenters stated that, in its members' view, PTE 86–128 provided a significant economic benefit to retirement investors when it is used, because the investor effectively receives two investment services for the price of one.

At least one commenter cited the difficulty small businesses face in complying with complex regulations, and one of these commenters stated that the Department's class exemptions appear in ''piecemeal'' form on its website. The commenter recommended that the Department update its class exemptions on its website to facilitate the review of the current exemption text (*i.e.,* with all amendments incorporated).

Numerous commenters expressed strong support for the proposed Mass Amendment, and the Department's proposal to move coverage of fiduciary investment advice to PTEs 2020–02 and 84–24 to ensure consistency for all types and forms of fiduciary investment advice. One commenter argued that the proposed changes were important and would provide vulnerable retirement investors with needed protection against bad actors. Another commenter emphasized the importance of a baseline of protection for American workers against predatory practices. One commenter raised concerns with the lack of transparency in the current system and indicated that a single set of standards would help increase accountability for financial advisors and would be an important step for restoring public trust in the work that financial advisors do. This same commenter also stated that the care and loyalty obligations proposed by the Department in PTE 2020–02 and PTE 84–24 were essential to ensure that investment advice fiduciaries were acting in the best interest of their clients and not for their own financial gain. According to this commenter, it would be problematic for the Department to offer exemptions that didn't have these same requirements.

Another commenter expressed surprise that investment advisers did not already have a uniform fiduciary responsibility to put the interests of their clients first and expressed approval of the Department's proposal. A commenter stated the ''the best interest of the client should be the advisor's sole concern, with no secondary concern even coming into deliberation.'' Another commenter discussed how investment funds are vital to consumers, that the investment funds deserve appropriate fiduciary restrictions, and that such restrictions were present in the Department's proposed changes. One commenter viewed it as the government's responsibility to take steps to ensure that people who need money in their ''old age'' could trust their adviser. This commenter emphasized that the government should take action to ensure investment advisers worked to help retirement investors save money on fees while allowing savings to keep pace with inflation. Another commenter argued that it was imperative that financial advisers have a fiduciary duty to the retirement investor and no one else. In the commenter's view, this was accomplished through the Department's proposal. One commenter asked that the proposals be finalized as proposed, *i.e.,* setting up PTEs 2020–02 and 84–24 for all fiduciary investment advice, stating that it would provide increased protection for investors and would result in advisers providing honest information to retirement investors.

One commenter stated that retirement investors should receive fair, unbiased financial recommendations and that the recommendations should not be influenced by how much the adviser stands to make on the recommendation. This commenter also noted that, in their view, requiring advisers to satisfy a fiduciary obligation to their clients should be the baseline minimum requirement. This same commenter expressed approval of the disclosure and recordkeeping requirements in PTEs 2020–02 and PTE 84–24, stating that these requirements allow the recommendations to be audited and verified after the fact. In the view of this commenter, this is necessary to ensure that advisers can be held accountable for irresponsible and illegal advice.

After reviewing the comments, the Department has determined to finalize its proposal to remove fiduciary investment advice as covered transactions from the exemptions herein. Following consideration of the different issues raised by commenters, the Department continues to believe that fiduciary investment advice is best covered through a single set of standards, as set forth in PTEs 2020–02 and 84–24. The Department agrees with those commenters who raised concerns that certain transactions would have been unable to rely on PTE 2020–02 as originally proposed. As described more fully in the preamble to the final amendment to PTE 2020–02, the Department is making changes to broaden the scope of that exemption in response to the commenters.

The Department agrees with those commenters who emphasized the importance of consistent standards and practices for all investment advice for Retirement Investors. The Department also agrees with those commenters who argued in favor of imposing consistent care and loyalty obligations on all fiduciary investment advisers, regardless of the advice given or the compensation received. In the Department's view, this is best accomplished by reliance on a single set of standards for all fiduciary investment advice. As discussed in greater detail in the preambles to the amendments to PTE 2020–02 and PTE 84–24, published elsewhere today in this edition of the **Federal Register**, the Department has worked to ensure that this single set of standards works for a wide range of business practices. Additionally, this set of standards was specifically crafted to build upon long-standing principles found throughout ERISA and trust law. The care obligation and loyalty obligation, along with the required disclosures, policies and procedures, and retrospective review will ensure that Retirement Investors are appropriately protected.

It remains the Department's intent, however, to exclude from these amended exemptions only the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. After reviewing comments that indicated its intent was unclear, the Department has revised the final amendment to reflect this intent more clearly. Therefore, this final amendment clarifies that relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is not available for the receipt of compensation as the result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Regarding comments that the proposed transactions are already the subject of different regulatory schemes, the Department notes that this has been the case since the passage of ERISA. The fact that regulators with responsibility for other state or Federal statutes and who have different areas of authority have imposed different conditions on the entities subject to the amended class exemptions does not foreclose the Department from meeting its responsibility to ensure that the interest of plans and Retirement Investors are protected as required under ERISA section 408(a) and Code section 4975(c)(2).

In addition, the Department has revised its cost analysis for the prohibited transactions, particularly for PTE 2020–02 since more entities will be relying on that exemption. Costs associated with the proposed Mass Amendment are discussed below. After reviewing the entire record, the Department maintains its position that the enhanced protections afforded to plans and IRAs, and the uniformity of the regulatory environment, will provide stability and savings to plans and IRAs that outweighs the cost concerns raised by commenters. The Department also believes that the imposition of a common set of protective standards for a wide range of advice transactions in PTE 84–24 and PTE 2020–02 promotes efficiency and clarity, inasmuch as one need only look to the terms of these two exemptions, which are materially similar, for relief from advice transactions, rather than a complex patchwork of exemptions covering different transactions.

Regarding comments expressing concern about the Mass Amendment in light of the decision by the U.S. Court of Appeals for the Fifth Circuit referenced above, the Department does not create new causes of actions, mandate enforceable contractual commitments, or expand upon the remedial provisions of ERISA or the Code. Regarding comments expressing concern that the Mass Amendment constitute improper regulation of IRAs, the Department notes this rulemaking does not alter the existing framework for bringing suits under State law against IRA fiduciaries and does not aim to do so.

With respect to the comments above regarding inconsistencies, alleged duplicities, uncertainties, and contradictions the Department has strived herein and in the amendments published elsewhere in today's edition of the **Federal Register** to address the concerns and issues raised by commenters. The Department encourages parties to contact the Department's Office of Exemption Determinations should any further issues of ambiguity remain.

Regarding comments about the Mass Amendment's comment period and effective date, the robust comment period is described above and in the preamble to the Regulation, and the effective date of the Mass Amendment is now 150 days following publication of the Mass Amendment in the **Federal Register**.

Regarding comments expressing concern that the Department has not made its findings under ERISA Section 408(a), after considering the entire record, the Department has determined that the Mass Amendment will provide important benefits that are in the interest of affected plans and IRAs. The Mass Amendment's protective conditions support a finding that the Mass Amendment is protective of affected plans and IRAs. The Department believes that Mass Amendment's conditions also support a finding that the Mass Amendment is administratively feasible. For a detailed discussion of the rationale, reasons, and responses to comments about the application of the exemption to advice transactions, the Department refers readers to the preambles to the amendments to PTE 84–24 and PTE 2020–02, published elsewhere today in this edition of the **Federal Register**.

The Department appreciates the comment regarding its class exemption website, and will strive to ensure its exemptions, including amendments thereto, are easily accessible.

Summary of Additional Proposed Amendments to PTE 75–1 [8]

Proposed Amendments to PTE 75–1, Part I, paragraphs (b) and (c): The Department proposed to revoke PTE 75–1, Part I, paragraphs (b) and (c), which has provided exemptive relief for certain non-fiduciary services provided by broker-dealers in securities transactions. As noted in the proposal, the Department proposed to revoke the relief provided in Parts I(b) and I(c) of PTE 75–1, because it duplicates the relief available under the statutory exemptions under Code section 4975(d)(2) and ERISA section 408(b)(2) and regulations thereunder.

Proposed Revocation of Part II(2) of PTE 75–1: The Department proposed to revoke Part II(2) of PTE 75–1 and requested comment regarding whether fiduciaries providing discretionary investment management services in connection with the purchase or sale of a mutual fund security in a principal transaction need the relief that is provided by PTE 75–1, Part II(2), and, if so, what conditions would be appropriate.

Proposed Amendment to PTE 75–1, Part II(f): The Department also proposed to revise the recordkeeping provisions of PTE 75–1, Part II(f) to place the responsibility for maintaining such records on the broker-dealer, reporting dealer, or bank engaging in the transaction with such plan or IRA rather than on the plan or IRA. The proposed amendment also would have required the broker-dealer to make the records reasonably available at their customary location for examination during normal business hours by: (A) Any duly authorized employee or representative of the Department or the Internal Revenue Service; (B) Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary; (C) Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or (D) Any participant or beneficiary of the plan or the authorized representative of such participant or beneficiary. In so doing, the proposal expanded the list of entities and persons eligible to receive these records, by adding the persons described in (B), the authorized representatives of the entities in (C), and the authorized representatives of the persons in (D).

None of the persons described in subparagraph (1)(B)–(D) above would have been authorized to examine privileged trade secrets or privileged commercial or financial information of such fiduciary, nor are they authorized to examine records regarding a plan or IRA other than the plan or IRA with which they are the fiduciary, contributing employer, employee organization, participant, beneficiary or IRA owner.[9]

Proposed Amendments to 75–1, Part V: The Department proposed to amend PTE 75–1, Part V, which permits a broker-dealer to extend credit to a plan or IRA in connection with the purchase or sale of securities. In the past, relief under PTE 75–1, Part V, has been limited in that the broker-dealer extending credit was not permitted to have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan or IRA assets involved in the transaction, nor render investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to those plan assets, unless no interest or other consideration was received by the broker-dealer or any affiliate of the broker-dealer in connection with the extension of credit.

The Department was informed that relief was needed for broker-dealers to extend credit to plans and IRAs to avoid failed securities transactions, and to receive compensation in return. For example, the Department understands that broker-dealers can be required, as part of their relationships with clearinghouses, to complete securities transactions entered into by the broker-dealer's customers, even if a particular customer does not perform on its obligations. If a broker-dealer is required to advance funds to settle a trade entered into by a plan or IRA, or purchase a security for delivery on behalf of a plan or IRA as a result of a failed security transaction, the result can potentially be viewed as a loan of money or other extension of credit to the plan or IRA. Further, in the event a broker-dealer steps into a plan's or IRA's shoes in any particular transaction, it may charge interest or other fees to the plan or IRA. These transactions potentially violate ERISA section 406(a)(1)(B) and Code section 4975(c)(1)(B) and (D).

In the Department's view, the extension of credit to avoid a failed securities transaction currently falls within the contours of the existing relief provided by PTE 75–1, Part V, for extensions of credit ''[i]n connection with the purchase or sale of securities.'' Accordingly, broker-dealers that are not investment advice fiduciaries, *e.g.,* those who execute transactions but do not provide advice, were permitted to receive compensation for extending credit to avoid a failed securities transaction under the exemption as originally granted. Under the proposed amendment, the Department would have extended such relief to investment advice fiduciaries.

Specifically, under the proposed amendment to PTE 75–1, Part V(c), an investment advice fiduciary could have received reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA. In conjunction with the expanded relief in the amended exemption, Proposed Section (c) would have imposed several conditions. First, the potential failure of the purchase or sale of the securities could not have been caused by the

[8] The Department made the Proposed Amendments to PTE 75–1 discussed below as part of its 2016 rulemaking that was overturned by the U.S. Court of Appeals for the Fifth Circuit. *See generally Chamber of Commerce* v. *U.S. Dep't of Lab.,* 885 F.3d 360 (5th Cir. 2018).

[9] The proposed amendment provided that if such plan fiduciary refused to disclose information on the basis that such information is exempt from disclosure, the plan fiduciary would have been required to provide a written notice by the close of the thirtieth (30th) day following the request advising the requestor of the reasons for the refusal and that the Department may request such information. Finally, the proposed amendment would have provided that failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It would not have affected the relief for other transactions.

broker-dealer or any affiliate. Additionally, the terms of the extension of credit would have to be at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties. Finally, the plan or IRA must have received written disclosure of certain terms before the extension of credit. This disclosure would not have needed to be made on a transaction by transaction basis, and could have been part of an account opening agreement or a master agreement. The disclosure would have been required to include the rate of interest or other fees that will be charged on such extension of credit, and the method of determining the balance upon which interest will be charged.

The plan or IRA must additionally have been provided with prior written disclosure of any changes to these terms. The required disclosures were intended to be consistent with the requirements of Securities and Exchange Act Rule 10b–16, which governs broker-dealers' disclosure of credit terms in margin transactions.[10]

The Department also proposed to make the same revisions to the recordkeeping provisions of PTE 75–1, Part V that were made to the recordkeeping provisions of PTE 75–1, Part II(f) that are described above. This included expanding the persons and entities eligible to receive certain documents from a broker-dealer in the same manner described above in the PTE 75–1, Part II(f) discussion.

Finally, the Department proposed to add a definition of the term ''IRA'' to PTE 75–1, Part V. Under the proposed definition the term IRA would have meant any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in Code section 408(a) and a health savings account described in Code section 223(d).

Discussion of Comments on Additional Proposed Amendments to PTE 75–1

Proposed Amendment to Part I(b) and (c). One commenter asserted that although Part I(b) and (c) transactions are covered by 408(b)(2), the industry still relies on Part I because: (1) it covers the actual transaction, as well as clearance, settlement or custodial functions incidental thereto; and (2) it provides clarification and relief regarding the provision of research, analysis, availability of securities and reports concerning issuers, industries, securities or other property economic factors or trends, portfolio strategy and performance ''under circumstances which do not make such party in interest or disqualified person a fiduciary with respect to such plan.''

After considering the comment, that Department has determined not to delete Part I(b) and (c) as was proposed.

Proposed Amendment to Part II. A commenter opposed the Department's proposed revocation of Part II(2), stating that the Department did not provide adequate grounds to revoke this exemption. According to this commenter, this exemption remains the bedrock of institutional dealer sales of securities and there would be significant cost and disruption if the Department did revoke this relief.

More than one commenter expressed concern that the proposed recordkeeping amendment, which would require broker-dealers, reporting dealers and/or banks to provide certain records to persons and entities that include beneficiaries and employee organizations, among others, may open the door to privacy concerns, fishing expeditions, abuse, and unnecessary risk.

After considering the comments, the Department has determined not to finalize the revocation of PTE 75–1, Part II(2) as was proposed. The Department also is not finalizing: (1) the proposed amendment that would have required the broker-dealer, reporting dealer, or bank engaging in the covered transaction to satisfy the recordkeeping requirement in Part II(e) of the exemption; nor (2) the proposed expansion of Part II(f) that would have permitted additional parties to review the records described in Part II(e). Therefore, only the parties that are entitled to examine the records described in Part II(e) of the current exemption may do so.

Proposed Amendment to Parts III and IV. The Department proposed to amend PTEs 75–1 Parts III and IV, by adding the following statement to each exemption: ''Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.''

One commenter stated that ''the very thing covered by these parts is not permitted at all under PTE 2020–02. Plans and retirement investors will lose opportunities and trading efficiencies they currently enjoy with no alternative avenue open to them. Amazingly, the cost analysis does not mention the cost to plans or the market.''

As described in the preamble to the final amendment to PTE 2020–02, the Department is expanding the scope of that exemption to cover recommendations of any investment product, as long as the recommendation meets the conditions of PTE 2020–02. Therefore, all recommendations will be subject to the same protective conditions. Accordingly, the Department is clarifying the language in the proposed amendment to provide that: ''No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.'' Fiduciary advice providers should look to amended PTE 2020–02 for relief.

Proposed Amendments to Part V. A commenter stated that it is appropriate to put the responsibility for recordkeeping on the financial firm. However, the commenter characterized the proposed condition in the extension of credit proposed amendment which would have provided that the failure of the purchase or sale of the securities was not caused by the fiduciary or its affiliate as a ''mistake.'' According to the commenter, generally, when there is a failure in the market, it is extremely hard to tell the exact cause, so the relief should not be conditioned on finger pointing, which could create unnecessary delays.

More than one commenter expressed concern that the proposed expansion of the recordkeeping amendment, which would have required broker-dealers to provide access to certain records for examination by more persons and entities than the current exemption may, among other consequences, open the door to privacy concerns, fishing expeditions, abuse, and unnecessary risk.

After considering the comments, the Department has determined not to finalize the proposed condition that would have required the investment advice fiduciary not to have caused the potential failure of the purchase or sale of the securities in the extension of credit amendment. The Department has determined that fiduciaries should be able to extend credit in order to avoid a failed securities transaction. The Department did not receive any

[10] The Department understands that it is the practice of many broker-dealers to provide such disclosures to all customers, regardless of whether the customer is presently opening a margin account. To the extent such disclosure is provided, the disclosure terms of the exemption are satisfied.

substantive comments on the IRA definition, which it is finalizing to read as follows: ''Individual Retirement Account'' or ''IRA'' means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F). This language is consistent with the IRA definition in PTE 2020–02. After considering the comments, the Department also is not amending the recordkeeping provision in PTE 75–1 Part V.

Summary of Additional Proposed Amendments to PTE 86–128

The Department proposed certain administrative changes to PTE 86–128, which are not directly related to the provision of fiduciary investment advice. The Department proposed to delete Section IV(a), which provides an exclusion from the conditions of the exemption for certain plans not covering employees, including IRAs, to increase the safeguards available to these Retirement Investors. Therefore, under the proposed amendment, fiduciaries that exercise full discretionary authority or control with respect to IRAs could have continued to rely on PTE 86–128 but would have had to meet the protective conditions of this exemption for IRAs as well as for Title I plans.

The Department also proposed certain technical changes to the exemption, including deleting subsection IV(b)(1), and redesignating remaining sections as needed. The language currently in Section IV(b)(1) excludes fiduciary investment advice providers; however, under the proposed amendment, fiduciary investment advice providers would have been excluded from the exemption as a whole; therefore, the exclusion does not need to be repeated in Section IV. As a result of the deletion of Section IV(a) and IV(b)(1), the Department proposed to redesignate subsections IV(b)(2) and (3) as subsections IV(a)(1) and (2), respectively, Section IV(c) as Section IV(b), and Section IV(d) as Section IV(c).

Redesignated Section IV(b) of the proposed amendment would have provided that certain conditions in Section III do not apply in any case where the person who is engaging in a covered transaction returns or credits to the plan all profits earned by that person and any related entity in connection with the securities transactions associated with the covered transaction. This provision is referred to as the ''Recapture of Profits'' exception. The Department provided an exception from the conditions in Section III for the recapture of profits due to the benefits plans and IRAs would derive from such arrangements.

Discretionary trustees were first permitted to rely on PTE 86–128 without meeting the Recapture of Profits provision pursuant to an amendment in 2002 (the 2002 Amendment). Before the 2002 Amendment, Section III(a) provided that ''[t]he person engaging in the covered transaction [may not be] a trustee (other than a nondiscretionary trustee), or an administrator of the plan, or an employer any of whose employees are covered by the plan.'' Under the 2002 Amendment, the reference to ''trustee (other than a nondiscretionary trustee)'' was deleted from Section III(a); therefore, discretionary trustees had to satisfy additional conditions set forth in Section III(h) and (i) to rely on the exemption.[11]

The Department understands that after the 2002 Amendment, practitioners questioned whether discretionary trustees were permitted to rely on the Recapture of Profits exception, which allows persons identified in Section III(a) to engage in the covered transactions if they return or credit to the plan or IRA all profits, as an alternative to complying with Sections III(h) and (i). By deleting the reference to discretionary trustees from Section III(a), the Department understands that the 2002 Amendment inadvertently may have prevented discretionary trustees of plans or IRAs from using the Recapture of Profits exception from the conditions imposed by Section III of the exemption, and instead, may have limited the relief provided in the exemption to discretionary trustees that satisfy that additional conditions in Section III(h) and (i). This result was not intended; therefore, the Department proposed to modify the exemption to permit all discretionary trustees to utilize the recapture of profits exception as they originally were permitted to before the 2002 Amendment.

In order to achieve this result, the Department proposed to amend redesignated section IV(b) to provide that Sections III(a), III(h), and III(i) do not apply in any case where the person engaging in the covered transaction returns or credits to the plan or IRA all profits earned by that person in connection with the securities transaction associated with the covered transaction. In addition, the Department proposed to reinsert a reference to trustees (other than nondiscretionary trustees) in Section III(a) along with the existing references to plan administrators and employers. Finally, the Department proposed to add a sentence to the end of Section III(a) stating that: ''Notwithstanding the foregoing, this condition does not apply to a trustee (other than a nondiscretionary trustee) that satisfies Section III(h) and (i), and to all persons identified in this paragraph that satisfy the Recapture of Profits exception in Section IV(b)).''

The purpose of these proposed amendments was to clarify that discretionary trustees may engage in covered transactions if they satisfy Section III(h) and (i) of the exemption. Moreover, the proposed amendment would have clarified that all parties identified in Section III(a)—discretionary trustees, plan administrators, or employers who have any employees covered by the plan—can engage in a transaction covered under PTE 86–128 if they satisfy the Recapture of Profits exception.

Lastly, the Department proposed to add a new Section VII to PTE 86–128 that would have required the fiduciary engaging in a covered transaction to maintain records necessary to enable certain persons (described in proposed Section VII(b)) to determine whether the conditions of this exemption have been met.

Discussion of Comments to Additional Proposed Amendments to PTE 86–128

Proposed Amendment to IV(a). At least one commenter stated that the Department did not consider the disruption that would be caused by eliminating the exclusion from the exemption conditions for covered transaction engaged in on behalf of IRAs. Another commenter stated that the Department did not explain how a retail investor would benefit from, or understand, complex and potentially confusing disclosures they would have been required to receive under the proposed amendment, which are intended for institutional, sophisticated plan fiduciaries. The commenter stated also that the proposed amendment does not provide any guidance on how persons engaging in covered transactions under the exemption can comply with the proposed amendment.

After considering these comments, the Department has determined not to eliminate the exclusion from the current exemption conditions of PTE 86–128 for covered transactions engaged in on behalf of IRAs. The Department's objective for amending PTE 86–128 and other affected exemptions is to ensure that consistent and protective standards apply to investment advice. The Department does not intend to impose

[11] Section III(h) provides that discretionary trustees may engage in the covered transactions only with plans or IRAs with total net assets of at least $50 million, and Section III(i) requires discretionary trustees to provide additional disclosures.

any additional obligations on entities relying on PTE 86–128 at this time. The Department notes, however, that it may revisit the scope and content of PTE 86–128 as part of future notice and comment rulemaking.

Proposed Amendment to Part VII. Some commenters raised concerns with the proposed new recordkeeping provision. One commenter stated that absent such explanation or public policy rationale, it is not necessary to make the fiduciary's records available to the participants and beneficiaries (and their authorized representatives). The commenter recommended that the Department delete the proposed language that would allow retirement investors and their authorized representatives direct access to the records of fiduciaries relying on PTE 86–128.

Another commenter also expressed concerns about the proposed recordkeeping condition. Among other things, the commenter objected to unions being allowed to have any record of the plan. The commenter asserted that this provision undermines the careful balance of labor relations in this country and argued that it is preempted by the National Labor Relations Act.

After consideration of the comments, the Department has deleted the proposed recordkeeping requirements applicable to Section VII of PTE 86–128. However, as with PTE 2020–02, the Department intends to monitor compliance with the exemption closely and may revisit whether expanding the recordkeeping requirement is appropriate in the future. Any future amendments would be preceded by notice and an opportunity for public comment.

Other Proposed Change to PTE 86–128. The Department did not receive comments on the proposed technical changes discussed above, or the proposed modification that permits discretionary trustees to utilize the Recapture of Profits exception in Section IV(d) of PTE 86–128 as was permitted when the Department originally issued PTE 86–128. Therefore, the Department has finalized these technical changes as proposed.

Executive Orders

Executive Orders 12866 [12] and 13563 [13] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[14] entitled ''Modernizing Regulatory Review,'' section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4)raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

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

Paperwork Reduction Act Statements

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection requirements (ICRs) included in the proposed rulemaking. The Department received comments that addressed the burden estimates used in the analysis of the proposed rulemaking. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

ICRs are available at *RegInfo.gov* (*https://www.reginfo.gov/public/do/PRAMain*). Requests for copies of the ICR or additional information can be sent to the PRA addressee:

By mail James Butikofer, Office of Research and Analysis, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210

By email ebsa.opr@dol.gov

Preliminary Assumptions

The Department assumes that several types of personnel will perform the tasks associated with information collection requests at an hourly wage rate of $65.99 for clerical personnel, $165.71 for a legal professional, $198.25 for a financial manager.[15]

In the proposal, the Department received several comments on the Department's labor cost estimate, particularly the cost for legal support, remarking that it was too low. The Department assumes that tasks involving legal professionals will be completed by a combination of legal professionals, likely consisting of attorneys, legal support staff, and other professionals and in-house and out-sourced individuals. The labor cost associated with these tasks is estimated to be $165.71, which is the Department's estimated labor cost for an in-house attorney. The Department understands that some may feel this estimate is comparatively low to their experience, especially when hiring an outside ERISA legal expert. However, the Department has chosen this cost estimate understanding that it is meant to be an average, blended, or typical rate from a verifiable and repeatable source.

Removal of Investment Advice and PTE 2020–02

The Department is amending PTE 77–4, PTE 75–1, PTE 80–83, PTE 83–1, and PTE 86–128, to remove relief in those exemptions for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section

[12] 58 FR 51735 (Oct. 4, 1993).

[13] 76 FR 3821 (Jan. 21, 2011).

[14] 88 FR 21879 (Apr. 6, 2023).

[15] Internal DOL calculation based on 2023 labor cost data and adjusted for inflation to reflect 2024 wages. For a description of the Department's methodology for calculating wage rates, *see:* Employee Benefits Security Administration, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations,* Employee Benefits Security Administration, *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

4975(e)(3)(B) and regulations thereunder. Investment advice providers will instead have to rely on the amended PTE 2020–02 or PTE 84–24 for exemptive relief covering investment advice transactions. For an estimate of the costs incurred by entities now reliant on PTE 2020–02, refer to the discussion of the amendments to PTE 2020–02 and PTE 84–24 published in this issue of today' **Federal Register**.

In the proposal, the Department received several comments that the Mass Amendments would be costly and disruptive. Some of the commenters expressed concern that the exemptions are tailored to specific types of transactions and moving all investment advice transactions to PTE 2020–02 and PTE 84–24 would be burdensome. Several commenters on the proposal expressed concern about the cost burden associated this change, with many stating that the Department had not considered the cost associated with moving to PTE 2020–02. In consideration of these comments, the Department has increased its cost estimates for entities newly relying on PTE 2020–02 and PTE 84–24. The increases include significant increases in the cost estimates to review and implement the rule and to establish policies and procedures. For a complete discussion of the cost estimates, refer to the Paperwork Reduction Act sections for PTE 2020–02 and PTE 84–24 or the regulatory impact analysis in Retirement Security Rule: Definition of an Investment Advice Fiduciary, also published in today's **Federal Register**.

Amendments to PTE 75–1

Affected Entities

Broker-dealers registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), reporting dealers, and banks are eligible to rely on the exemption. According to the SEC, approximately 3,490 broker-dealers were SEC-registered as of December 2022.[16] Not all broker-dealers perform services for employee benefit plans. In 2022, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[17] Assuming the percentage of broker-dealers providing advice to retirement plans is the same as the percent of investment advisers providing services to plans, the Department estimates 55 percent, or 1,919 broker-dealers, would be affected by PTE 75–1.

According to the Federal Deposit Insurance Corporation, there are 4,049 commercial banks as of September 30, 2023.[18] If one-half of these banks (about 2,025) and 55 percent of broker-dealers (about 1,919 broker-dealers) relied on this exemption, there would be approximately 3,944 respondents.[19]

Disclosure Requirements

Under Part V(c) of PTE 75–1, when a fiduciary extends credit to avoid a failed purchase or sale of securities, the plan or IRA must receive written disclosure of the rate of interest (or other fees) that will apply and the method of determining the balance upon which interest will be charged, as well as prior written disclosure of any changes to these terms. The plan or IRA must also be provided with prior written disclosure of any changes to these terms.

The Department believes that it is a usual and customary business practice to maintain records required to demonstrate compliance with disclosure distribution regulations mandated by the Securities and Exchange Commission (SEC). The Department believes that this new disclosure requirement is consistent with the disclosure requirement mandated by the SEC in 17 CFR 240.10b–16(1) for margin transactions. Therefore, the Department concludes that this requirement produces no additional burden to the public.

Recordkeeping Requirements

In the proposal, the Department proposed to amended PTE 75–1 Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRA owners to financial institutions. In the final rulemaking, the Department has decided to keep the recordkeeping requirement unchanged from the existing exemption.

The Department has assumed that financial service providers that transact with employee benefit plans will maintain these records on behalf of their client plans. Because of the sophisticated nature of financial service providers and the regulation of the securities industry by State and Federal government, and by self-regulatory organizations, the Department has assumed that the records required by this class exemption are the same records kept in the normal course of business, or in compliance with other requirements.

The Department has estimated that the time needed to maintain records for the financial institutions to be consistent with the exemption will be four hours per entity annually at a wage rate of $198.25 per hour.[20] Thus, the Department estimates it would take 15,778 hours at an equivalent cost of $3,127,949 to maintain the records and make the records available for inspection.[21]

TABLE 1—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH RECORDKEEPING

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Manager	15,778	$3,127,949	15,778	$3,127,949
Total	15,778	3,127,949	15,778	3,127,949

[16] Estimates based on SEC's FOCUS filings and SEC's Form ADV filings.

[17] Cerulli Associates, *U.S. RIA Marketplace 2023,* Exhibit 5.10, Part 1, The Cerulli Report.

[18] Federal Insurance Deposit Corporation, *Quarterly Banking Profile,* Statistics at a Glance- as of September 30, 2023, *https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023sep/industry.pdf.*

[19] Reporting dealers covered by the exemption are not accounted for separately because they are banks and security brokerages that trade in U.S. Government Securities; thus, reporting dealers are already accounted for in the number of broker-dealer firms and banks. The New York Federal Reserve Bank reported 21 primary dealers on March 21, 2013. *http://www.newyorkfed.org/markets/pridealers_current.html.*

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

[21] The burden is estimated as follows: 3,944 financial institutions × 4 hours = 15,778 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: (3,944 financial institutions × 4 hours) × $198.25 = $3,127,949.

Summary

In sum, the Department estimates the total burden for the amended PTE 1975–1 is 15,778 hours at a total equivalent burden cost of $3,127,949. The total cost burden is estimated to be de minimis. The Department assumes that required records are maintained by the relevant affected entities, the broker-dealers and banks. Thus, there are no additional tasks performed outside of those performed by the brokerage firms and banks.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Exemption 75–1 (Security Transactions with Broker-Dealers, Reporting Dealers and Banks).

OMB Control Number: 1210–0092.

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

Estimated Number of Respondents: 3,944.

Estimated Number of Annual Responses: 3,944.

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

Estimated Total Annual Burden Hours: 15,778 hours.

Estimated Total Annual Burden Cost: $0.

Amendments to PTE 86–128

Affected Entities

Using data from 2021 Form 5500, the Department estimates that 1,257 unique plans hired service providers denoting on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 also reported that they provided investment management services or received investment management fees paid directly or indirectly by the plan.[22] Based on these values, the Department estimates on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate.

In the proposal, a few commenters expressed concern that disruption would be caused by the amendments. One commenter expressed concern that the removal of investment advice would increase costs to retirement investors, as entities would need to comply with PTE 2020–02. The Department did not receive comments specifically addressing the Department's estimates of the number of entities that would continue to rely on PTE 86–128 under the proposed amendments and did not receive any which directly discussed plan reliance on PTE 86–128.

The Department estimates that of the estimated 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.[23] Based on these assumptions, the Department estimates that 75 plans would be affected by the proposed amendments to PTE 1986–128.[24]

The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption. For the purposes of this analysis, the Department believes that in trying to capture financial entities engaging in cross trades with discretionary control, the number of dual-registered broker-dealers that render services to retirement plans provides an accurate estimate. As of December 2022, there were approximately 456 broker-dealers registered as SEC- or state-registered investment advisers.[25] Consistent with the assumptions made about broker-dealers affected by the amendments to PTE 2020–02, the Department estimates that 55 percent, or 251 broker-dealers will be affected by the amendments.

The Department requested comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data. The Department did not receive any comments.

Written Authorizations, Evaluations, Forms, Reports, and Statements

Written Authorization From the Authorizing Fiduciary to the Broker-Dealer

Authorizing fiduciaries of new plans entering into a relationship with a transacting fiduciary are required to provide the transacting fiduciary with an advance written authorization to perform transactions for the plan. The Department estimates that there are approximately 75 plans that are new or that enter new arrangements each year.[26] Therefore, the Department estimates that approximately 75 authorizing fiduciaries are expected to send an advance written authorization. It is assumed that a legal professional will spend 15 minutes per plan reviewing the disclosures and preparing an authorization form. This results in a burden of 19 hours with an equivalent cost of $3,107.[27]

To produce and distribute the authorization, the Department assumes that 100 percent of plans will use traditional electronic methods at no additional burden. The Department assumes that clerical staff will spend five minutes preparing and sending the authorization, resulting in a burden of approximately 6 hours with an equivalent cost of $412.[28]

In total, the written authorization requirement is expected to result in a total burden of 25 hours with an equivalent cost of $3,520.

[22] Estimates based on 2021 Form 5500 data.

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

[24] The number of new plans is estimated as: 1,000 plans × 7.5 percent of plans are new ≈ 75 new plans.

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

[26] 75 plans that are new or that enter new arrangements each year.

[27] The burden is estimated as follows: 75 plans × (15 minutes per plan ÷ 60 minutes) ≈ 19 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [75 plans × (15 minutes per plan ÷ 60 minutes)] × $165.71 per hour ≈ $3,107.

[28] The burden is estimated as follows: 75 plans × (5 minutes per plan ÷ 60 minutes) ≈ 6 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [75 plans × (5 minutes per plan ÷ 60 minutes)] × $65.99 ≈ $412.

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN AUTHORIZATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	19	$3,107	19	$3,107
Clerical	6	412	6	412
Total	25	3,520	25	3,520

Note: The total value may not sum due to rounding.

Provision of Materials for Evaluation of Authorization of Transaction

Prior to a written authorization being made, the authorizing fiduciary must be provided by the financial institution with a copy of the exemption, a form for termination of authorization, a description of broker's placement practices, and any other reasonably available information. This information is assumed to be readily available.

To produce and distribute the materials, the Department assumes that 100 percent of financial institutions will use traditional electronic methods at no additional burden. The Department estimates that a clerical staff member will spend five minutes to prepare and distribute the required information to the authorizing fiduciary. This information will be sent to the 75 plans entering into an agreement with a financial institution, and based on the above, the Department estimates that this requirement results in a burden of 6 hours with an equivalent cost of $412.[29]

TABLE 3—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PROVISION OF MATERIALS FOR TRANSACTION AUTHORIZATION

Activity	Year 1		Subsequent Years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	6	$412	6	$412
Total	6	412	6	412

Provision of an Annual Termination Form

Each authorizing fiduciary must be supplied annually with a form expressly providing an election to terminate the written authorization. It is assumed that legal professionals with each of the 251 affected transacting fiduciaries will spend on average 15 minutes preparing the termination forms, which results in a burden of 63 hours with an equivalent cost of $10,390.[30]

To produce and distribute the termination form to the 1,000 plans, the Department assumes that 100 percent of financial institutions will use traditional electronic methods at no additional burden. The Department estimates that clerical staff will spend five minutes per plan preparing and distributing the termination forms resulting in a burden of 83 hours with an equivalent cost of $5,499.[31]

In total, providing the annual termination form is expected to impose a burden of 146 hours with an equivalent cost of $15,889.

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PROVISION OF THE ANNUAL TERMINATION FORM

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	63	$10,390	63	$10,390
Clerical	83	5,499	83	5,499
Total	146	15,889	146	15,889

Transaction Reporting

The transacting fiduciary engaging in a covered transaction must furnish the authorizing fiduciary with either a conformation slip for each securities transaction or a quarterly report containing specified information. As discussed above, the provision of the confirmation already is required under

[29] The burden is estimated as follows: 75 plans × (5 minutes per plan ÷ 60 minutes) ≈ 6 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [75 plans × (5 minutes per plan ÷ 60 minutes)] × $65.99 ≈ $412.

[30] The burden is estimated as follows: [251 transacting fiduciaries × (15 minutes per financial institution ÷ 60 minutes)] ≈ 63 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [251 transacting fiduciaries × (15 minutes per financial institution ÷ 60 minutes)] × $165.71 per hour ≈ $10,390.

[31] The burden is estimated as follows: 1,000 plans × (5 minutes per plan ÷ 60 minutes) ≈ 83 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [1,000 plans × (5 minutes per plan ÷ 60 minutes)] × $65.99 ≈ $5,499.

SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending conformation slips, no additional hour and cost burden will occur.

Annual Statement

In addition to the transaction reporting requirement, transacting fiduciaries are required to send an annual report to each of the 1,000 authorizing fiduciaries [32] containing the same information as the quarterly report and also containing all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio.

In addition, it is assumed that the information that must be sent annually could be sent together; therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement. Therefore, no additional hour or equivalent cost burden has been reported.

Report of Commissions Paid

A discretionary trustee must provide an authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis. The collecting and generation of the information for the quarterly report is reported as a cost burden. The clerical hour burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually.

A financial institution who is a discretionary trustee must provide each of the 1,000 authorizing fiduciaries with an annual report showing commissions paid to affiliated and non-affiliated brokers, on both a total dollar and a cents-per-share basis. As the report is sent annually, it is assumed that it could be sent with the transaction report. The Department estimates that 100 percent of financial institutions will use traditional electronic methods at no additional burden.

Financial institutions are required to report specific transaction fees and information to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. It is assumed that it costs the financial institution $3.30 per plan to track this information.[33] With approximately 1,000 affected plans, this results in a cost burden of approximately $3,300 annually.[34]

In total, providing the report is expected to impose a total cost burden of $3,300.

TABLE 5—HOUR BURDEN AND COST ASSOCIATED WITH REPORT OF COMMISSIONS PAID

Activity	Year 1		Subsequent years	
	Burden hours	Cost burden	Burden hours	Cost burden
Clerical	0	$3,300	0	$3,300
Total	0	3,300	0	3,300

Summary

In total, the conditions of this exemption will result in the production of 44,821 disclosures.[35] The Department assumes that 100 percent of plans and financial institutions will use electronic methods to distribute the required information, at de minimis burden. Production and distribution of disclosures will result in an overall hour burden of 177 hours with an equivalent cost of $19,821 and an overall cost burden of $3,300.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision to an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: PTE 86–128 (Securities Broker-Dealers).

OMB Control Number: 1210–0059.

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

Estimated Number of Respondents: 326.

Estimated Number of Annual Responses: 4,150.

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

Estimated Total Annual Burden Hours: 177 hours.

Estimated Total Annual Burden Cost: $3,300.

Amendments to PTE 77–4, 80–83 and PTE 83–1

The Department has determined that PTE 77–4 and PTE 80–83 do not have information collections impacted by the removal of advice from the exemption. There is no paperwork burden related to PTE 83–1.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [36] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[37] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [38] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year

[32] 1,000 plans.

[33] This estimate is based on information from a Request for Information and from industry sources.

[34] 1,000 plans × $3.30 = $3,300.

[35] The total number of disclosures is calculated in the following manner: (75 Written authorization disclosures) + (75 Provision of materials for evaluation of authorization of transaction) + (1,000 Annual termination form) + (1,000 Annual Statement) + (1,000 Report of Commissions Paid) + (1,000 Information and fee tracking) = 4,150 disclosures.

[36] 5 U.S.C. 601 *et seq.*

[37] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

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

by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, these amended exemptions do not include any Federal mandate that will result in such expenditures.

Federalism Statement

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

The Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and in the preamble to PTE 84–24, there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that ''ERISA leaves room for complementary or dual federal or state regulation'' of insurance.[39] The Department designed the final Regulation and exemptions to complement State insurance laws.[40]

The Department does not intend for these amendments to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe these amendments have federalism implications because they have 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.

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/or Code section 4975(c)(2) does not relieve a fiduciary, or other party in interest with respect to a plan or IRA, from certain other provisions of ERISA and the Code, including but not limited to any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge their duties respecting the plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirements of Code section 401(a), including that the plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries;

(2) In accordance with ERISA section 408(a) and Code section 4975(c)(2), and based on the entire record, the Department finds that this final amendment to class exemptions 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 the plan and IRA owners;

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

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

The Department is granting the following amendments to class exemptions on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[41]

Amendments to Class Exemptions

Prohibited Transaction Exemption 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

The Department amends Prohibited Transaction Exemption 75–1 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)).

I. Part III, *Underwritings,* is amended by inserting a new section III(h) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

II. Part IV, Market-making, is amended by inserting a new section IV(g) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

[39] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

[40] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to ''impair'' a State law is to hinder its operation or ''frustrate [a] goal of that law.'' *Humana Inc.* v. *Forsyth,* 525 U.S. 299, 308 (1999).

[41] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, subpart B (89 FR 4662 (January 24, 2024)).

III. Part V, Extension of Credit, is amended by adding new Section (c) as follows and redesignating Sections (c) and (d) as Sections (d) and (e), respectively:

(c) Notwithstanding section (a)(2), a fiduciary under ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) may receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if:

(1) The terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties;

(2) Prior to the extension of credit, the plan or IRA receives written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged, in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. This section (c)(2) will be considered satisfied if the plan or IRA receives the disclosure described in Securities Exchange Act Rule 10b–16;[42]

For purposes of this exemption, the terms ''party in interest,'' ''disqualified person'' and ''fiduciary'' shall include such party in interest, disqualified person, or fiduciary, and any affiliates thereof, and the term ''affiliate'' shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21 and 26 CFR 54.4975–9. Also, for the purposes of this exemption, the term ''IRA'' means any account or annuity described in Code section 4975(e)(1)(B) through (F).

Prohibited Transaction Exemption 77–4, Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans

The Department amends 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:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code 4975(e)(3)(B) and regulations thereunder.

Prohibited Transaction Exemption 80–83, Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds To Reduce or Retire Indebtedness to Parties in Interest

The Department amends 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)).

A new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Transaction Exemption 83–1, Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts

The Department amends 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 I.E. is inserted to read as follows:

Exception. No relief from the restrictions of ERISA 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Prohibited Transaction Exemption 86–128, Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers

The Department amends Prohibited Transaction Exemption 86–128 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)).

I. New sections II(d) is inserted as follows:

(d) *Exception.* No relief from the restrictions of ERISA 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

II. Section III(a) is amended to read as follows:

''The person engaging in the covered transaction is not a trustee (other than a nondiscretionary trustee) or an administrator of the plan, or an employer any of whose employees are covered by the plan. Notwithstanding the foregoing, this condition does not apply to a trustee (other than a nondiscretionary trustee) that satisfies Section III(h) and (i) of this exemption.''

III. Section IV(b)(1) is deleted, and Sections IV(b)(2) and (3) are redesignated as Sections IV(b)(1) and (2).

IV. Section IV(c) is amended to read as follows:

(c) Recapture of profits. Sections III(a), III(h), and III(i) of this exemption do not apply in any case where the person engaging in a covered transaction returns or credits to the plan all profits earned by that person in connection with the securities transactions associated with the covered transaction.

Signed at Washington, DC, this 10th day of April, 2024.

Lisa M. Gomez,

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

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[42] 17 CFR 240.10b–16.