exemption only for the transaction or transactions for which records are missing or have not been maintained. It does not affect the relief for other transactions.

For purposes of this exemption, the terms ''broker-dealer,'' ''reporting dealer'' and ''bank'' shall include such persons 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(e) and 26 CFR 54.4975–9(e).

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

Phyllis C. Borzi,

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

[FR Doc. 2016–07929 Filed 4–6–16; 11:15 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11820]

ZRIN 1210–ZA25

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

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

ACTION: Adoption of Amendments to Class Exemptions.

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

DATES: *Issuance date:* These amendments are issued June 7, 2016.

Applicability date: These amendments are applicable to transactions occurring on or after April 10, 2017.

FOR FURTHER INFORMATION CONTACT: Brian Shiker, Linda Hamilton or Susan Wilker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8824 (this is not a toll-free number).

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

Executive Summary

Purpose of Regulatory Action

The Department grants these amendments to PTEs 75–1, 77–4, 80–83 and 83–1 in connection with its publication today, elsewhere in this issue of the **Federal Register**, of a final regulation defining who is a ''fiduciary'' of an employee benefit plan under ERISA as a result of giving investment advice to a plan or its participants or beneficiaries (Regulation). The Regulation also applies to the definition of a ''fiduciary'' of a plan (including an IRA) under the Code. The Regulation amends a prior regulation, dating to 1975, specifying when a person is a ''fiduciary'' under ERISA and the Code by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. The Regulation takes into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Regulation updates existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

In connection with the adoption of the Regulation, PTEs 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1 are amended to increase the safeguards of the exemptions. As amended, new ''Impartial Conduct Standards'' are made conditions of the exemptions. Fiduciaries are required to act in accordance with these standards in transactions permitted by the exemptions. The standards are incorporated in multiple class exemptions, including the exemptions that are the subject of this notice, other existing exemptions, and two new exemptions published elsewhere in this issue of the **Federal Register**, to ensure that fiduciaries relying on the exemptions are held to a uniform set of standards and that these standards are applicable to transactions involving both plans and IRAs. The amendments apply prospectively to fiduciaries relying on the exemptions.

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant and amend administrative exemptions from ERISA's prohibited transaction provisions.[1] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. In amending these exemptions, the Department has determined that the amended exemptions are administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRA owners.

Summary of the Major Provisions

This notice amends prohibited transaction exemptions 75–1, Part III,

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

75–1, Part IV, 77–4, 80–83 and 83–1. Each amendment incorporates the same Impartial Conduct Standards. Generally stated, the Impartial Conduct Standards require fiduciaries to: Act in the ''best interest'' of plans and IRAs; charge no more than reasonable compensation; and make no misleading statements to the plan or IRA, when engaging in the transactions that are the subject of these exemptions. The amendments require a fiduciary that satisfies ERISA section 3(21)(A)(i) or (ii), or the corresponding provisions of Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the investment transaction, to meet the standards with respect to the investment transactions described in the applicable exemption.

Executive Order 12866 and 13563 Statement

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

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

Background

Regulation Defining a Fiduciary

As explained more fully in the preamble to the Regulation, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in its imposition of fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[2] In addition, they must refrain from engaging in ''prohibited transactions,'' which ERISA does not permit because of the dangers posed by the fiduciaries' conflicts of interest with respect to the transactions.[3] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.[4] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

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

Under this statutory framework, the determination of who is a ''fiduciary'' is of central importance. Many of ERISA's and the Code's protections, duties, and liabilities hinge on fiduciary status. In relevant part, ERISA section 3(21)(A) and Code section 4975(e)(3) provide that a person is a fiduciary with respect to a plan or IRA to the extent he or she (1) exercises any discretionary authority or discretionary control with respect to management of such plan or IRA, or exercises any authority or control with respect to management or disposition of its assets; (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or has any authority or responsibility to do so; or, (3) has any discretionary authority or discretionary responsibility in the administration of such plan or IRA.

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

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c) defining the circumstances under which a person is treated as providing ''investment advice'' to an employee benefit plan within the meaning of ERISA section 3(21)(A)(ii) (the ''1975

[2] ERISA section 404(a).

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

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

regulation'').[5] The 1975 regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test for fiduciary advice. Under the 1975 regulation, for advice to constitute ''investment advice,'' an adviser must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The 1975 regulation provided that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue.

The market for retirement advice has changed dramatically since the Department first promulgated the 1975 regulation. Individuals, rather than large employers and professional money managers, have become increasingly responsible for managing retirement assets as IRAs and participant-directed plans, such as 401(k) plans, have supplanted defined benefit pensions. At the same time, the variety and complexity of financial products have increased, widening the information gap between advisers and their clients. Plan fiduciaries, plan participants and IRA investors must often rely on experts for advice, but are unable to assess the quality of the expert's advice or effectively guard against the adviser's conflicts of interest. This challenge is especially true of retail investors with smaller account balances who typically do not have financial expertise, and can ill-afford lower returns to their retirement savings caused by conflicts. The IRA accounts of these investors often account for all or the lion's share of their assets and can represent all of savings earned for a lifetime of work. Losses and reduced returns can be devastating to the investors who depend upon such savings for support in their old age. As baby boomers retire, they are increasingly moving money from ERISA-covered plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs where both good and bad investment choices are myriad and advice that is conflicted is commonplace. These rollovers are expected to approach $2.4 trillion cumulatively from 2016 through 2020.[6] These trends were not apparent when the Department promulgated the 1975 regulation. At that time, 401(k) plans did not yet exist and IRAs had only just been authorized.

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

In the Department's amendments to the 1975 regulation defining fiduciary advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (the ''Regulation'') which are also published in this issue of the **Federal Register**, the Department is replacing the existing regulation with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which IRAs and plans currently operate.[7]

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

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

(i) A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred or distributed from the plan or IRA; and

(ii) A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, types of investment account arrangements (brokerage versus advisory), or recommendations with respect to rollovers, transfers or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made.

In addition, in order to be treated as a fiduciary, such person, either directly or indirectly (*e.g.,* through or together with any affiliate), must: Represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA or the Code with respect to the advice described; represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA or the Code; render the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient; or direct the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or

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

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

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

other investment property of the plan or IRA.

The Regulation also provides that as a threshold matter in order to be fiduciary advice, the communication must be a ''recommendation'' as defined therein. The Regulation, as a matter of clarification, provides that a variety of other communications do not constitute ''recommendations,'' including non-fiduciary investment education; general communications; and specified communications by platform providers. These communications which do not rise to the level of ''recommendations'' under the Regulation are discussed more fully in the preamble to the final Regulation.

The Regulation also specifies certain circumstances where the Department has determined that a person will not be treated as an investment advice fiduciary even though the person's activities technically may satisfy the definition of investment advice. For example, the Regulation contains a provision excluding recommendations to independent fiduciaries with financial expertise that are acting on behalf of plans or IRAs in arm's length transactions, if certain conditions are met. The independent fiduciary must be a bank, insurance carrier qualified to do business in more than one state, investment adviser registered under the Investment Advisers Act of 1940 or by a state, broker-dealer registered under the Securities Exchange Act of 1934 (Exchange Act), or any other independent fiduciary that holds, or has under management or control, assets of at least $50 million, and: (1) The person making the recommendation must know or reasonably believe that the independent fiduciary of the plan or IRA is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies (the person may rely on written representations from the plan or independent fiduciary to satisfy this condition); (2) the person must fairly inform the independent fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and must fairly inform the independent fiduciary of the existence and nature of the person's financial interests in the transaction; (3) the person must know or reasonably believe that the independent fiduciary of the plan or IRA is a fiduciary under ERISA or the Code, or both, with respect to the transaction and is responsible for exercising independent judgment in evaluating the transaction (the person may rely on written representations from the plan or independent fiduciary to satisfy this condition); and (4) the person cannot receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner for the provision of investment advice (as opposed to other services) in connection with the transaction.

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

Prohibited Transactions

The Department anticipates that the Regulation will cover many investment professionals who did not previously consider themselves to be fiduciaries under ERISA or the Code. Under the Regulation, these entities will be subject to the prohibited transaction restrictions in ERISA and the Code that apply specifically to fiduciaries. ERISA section 406(a)(1)(A)–(D) and Code section 4975(c)(1)(A)–(D) prohibit certain transactions between plans or IRAs and ''parties in interest,'' as defined in ERISA section 3(14), or ''disqualified persons,'' as defined in Code section 4975(e)(2). Fiduciaries and other service providers are parties in interest and disqualified persons under ERISA and the Code. As a result, they are prohibited from engaging in (1) the sale, exchange or leasing of property with a plan or IRA, (2) the lending of money or other extension of credit to a plan or IRA, (3) the furnishing of goods, services or facilities to a plan or IRA and (4) the transfer to or use by or for the benefit of a party in interest of plan assets.

ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his or her own interest or his or her own account. ERISA section 406(b)(2), which does not apply to IRAs, provides that a fiduciary shall not ''in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.'' ERISA section 406(b)(3) and Code section 4975(c)(1)(F) prohibit a fiduciary from receiving any consideration for his own personal account from any party dealing with the plan or IRA in connection with a transaction involving assets of the plan or IRA.

Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries of plans and IRAs a duty not to act on conflicts of interest that may affect the fiduciary's best judgment on behalf of the plan or IRA.[8] The prohibitions extend to a fiduciary causing a plan or IRA to pay an additional fee to such fiduciary, or to a person in which such fiduciary has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary. Likewise, a fiduciary is prohibited from receiving compensation from third parties in connection with a transaction involving the plan or IRA.[9]

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

Prohibited Transaction Exemptions

As the prohibited transaction provisions demonstrate, ERISA and the Code strongly disfavor conflicts of interest. In appropriate cases, however,

[8] Subsequent to the issuance of these regulations, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. (2010), divided rulemaking and interpretive authority between the Secretaries of Labor and the Treasury. The Secretary of Labor was given interpretive and rulemaking authority regarding the definition of fiduciary under both Title I of ERISA and the Internal Revenue Code. *Id.* section 102(a) (''all authority of the Secretary of the Treasury to issue [regulations, rulings opinions, and exemptions under section 4975 of the Code] is hereby transferred to the Secretary of Labor'')

[9] 29 CFR 2550.408b–2(e); 26 CFR 54.4975–6(a)(5).

the statutes provide exemptions from their broad prohibitions on conflicts of interest. For example, ERISA section 408(b)(14) and Code section 4975(d)(17) specifically exempt transactions involving the provision of fiduciary investment advice to a participant or beneficiary of an individual account plan or IRA owner if the advice, resulting transaction, and the adviser's fees meet stringent conditions carefully designed to guard against conflicts of interest.

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

Pursuant to its exemption authority, the Department has previously granted several conditional administrative class exemptions that are available to fiduciary advisers in defined circumstances. As a general proposition, these exemptions focused on specific advice arrangements and provided relief for narrow categories of compensation. Reliance on these exemptions is subject to certain conditions that the Department has found necessary to protect the interests of plans and IRAs.

In connection with the development of the Department's Regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), the Department considered public input indicating the need for additional prohibited transaction relief for the wide variety of compensation structures that exist today in the marketplace for investment transactions. After consideration of the issue, the Department proposed two new class exemptions and proposed amendments to a number of existing exemptions. As part of this initiative, the Department proposed to incorporate the Impartial Conduct Standards, described in greater detail below, in the new and certain existing exemptions. In this regard, the Department proposed to incorporate the Impartial Conduct Standards in PTEs 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1. These exemptions provide relief for the following specific transactions:

- PTE 75–1, Part III [10] permits a fiduciary to cause a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary, when the fiduciary is also a member of the syndicate;
- PTE 75–1, Part IV [11] permits a plan or IRA to purchase securities in a principal transaction from a fiduciary that is a market maker with respect to such securities;
- PTE 77–4 [12] provides relief for a plan's or IRA's purchase or sale of open-end investment company shares where the investment adviser for the open-end investment company is also a fiduciary to the plan or IRA;
- PTE 80–83 [13] provides relief for a fiduciary causing a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary or an affiliate; and
- PTE 83–1 [14] provides relief for the sale of certificates in an initial issuance of certificates, by the sponsor of a mortgage pool to a plan or IRA, when the sponsor, trustee or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

The Department's intent in proposing the amendments was to provide additional protections for all plans, but most particularly for IRA owners. That is because fiduciaries' dealings with IRAs are governed by the Code, not by ERISA,[15] and the Code, unlike ERISA, does not directly impose responsibilities of prudence and loyalty on fiduciaries. The amendments to the exemptions condition relief on the satisfaction of these responsibilities. For purposes of these amendments, the term IRA means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.[16]

These amended exemptions follow a lengthy public notice and comment process, which gave interested persons an extensive opportunity to comment on the proposed Regulation and exemption proposals. The proposals initially provided for 75-day comment periods, ending on July 6, 2015, but the Department extended the comment periods to July 21, 2015. The Department then held four days of public hearings on the new regulatory package, including the proposed exemptions, in Washington, DC from August 10 to 13, 2015, at which over 75 speakers testified. The transcript of the hearing was made available on September 8, 2015, and the Department provided additional opportunity for interested persons to comment on the proposals or hearing transcript until September 24, 2015. A total of over 3000 comment letters were received on the new proposals. There were also over 300,000 submissions made as part of 30 separate petitions submitted on the proposal. These comments and petitions came from consumer groups, plan sponsors, financial services companies, academics, elected government officials, trade and industry associations, and others, both in support and in opposition to the rule.[17] The Department has reviewed all comments, and after careful consideration of the comments, has decided to grant the amendments to the exemptions.

Description of the Amendments

These amended exemptions require fiduciaries relying on the exemptions to comply with fundamental Impartial Conduct Standards. Generally stated, the Impartial Conduct Standards require that, in connection with the transactions

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

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

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

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

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

[15] *See* ERISA section 404.

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

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

covered by the exemptions, the fiduciary acts in the plan's or IRA's best interest, does not charge more than reasonable compensation, and does not make misleading statements to the plan or IRA about the recommended transactions. As defined in the amendments, a fiduciary acts in the best interest of a plan or IRA when it acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate [18] or other party.

The Impartial Conduct Standards represent fundamental obligations of fair dealing and fiduciary conduct. The concepts of prudence, undivided loyalty and reasonable compensation are all deeply rooted in ERISA and the common law of agency and trusts.[19] These longstanding concepts of law and equity were developed in significant part to deal with the issues that arise when agents and persons in a position of trust have conflicting loyalties, and accordingly, are well-suited to the problems posed by conflicted investment advice. The phrase ''without regard to'' is a concise expression of ERISA's duty of loyalty, as expressed in section 404(a)(1)(A) of ERISA and applied in the context of advice. It is consistent with the formulation stated in the common law, and it is consistent with the language used by Congress in Section 913(g)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act),[20] and cited in the Staff of U.S. Securities and Exchange Commission ''Study on Investment Advisers and Broker-Dealers, As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act'' (Jan. 2011) [21] (SEC staff Dodd-Frank Study). The Department notes, however, that the standard is not intended to outlaw investment advice fiduciaries' provision of advice from investment menus that are restricted on the basis of proprietary products or revenue sharing. Finally, the ''reasonable compensation'' obligation is already required under ERISA section 408(b)(2) and Code section 4975(d)(2) of service providers, including financial services providers, whether fiduciaries or not.[22]

Under the amendments, the Impartial Conduct Standards are conditions of the exemptions with respect to all plans and IRAs. Transactions that violate the requirements would not be in the interests of or protective of plans and their participants and beneficiaries and IRA owners. However, unlike some of the other exemptions finalized today in this issue of the **Federal Register**, there is no requirement under these exemptions that parties contractually commit to the Impartial Conduct Standards.[23]

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

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

Some commenters additionally took the position that Congress, in the Dodd-Frank Act, gave the SEC the authority to establish standards for broker-dealers and investment advisers and therefore, the Department did not have the authority to act in that area.

The Department disagrees that these amendments to the exemptions exceed its authority. The Department has clear authority under ERISA section 408(a) and the Reorganization Plan [24] to grant administrative exemptions from the prohibited transaction provisions of both ERISA and the Code. Congress gave the Department broad discretion to grant or deny exemptions and to craft conditions for those exemptions, subject only to the overarching requirement that the exemption be administratively feasible, in the interests of plans, plan participants and beneficiaries and IRA owners, and protective of their rights.[25] Nothing in ERISA or the Code suggests that the Department is forbidden to borrow from time-honored trust-law standards and principles developed by the courts to ensure proper fiduciary conduct.

The Impartial Conduct Standards represent, in the Department's view, baseline standards of fundamental fair dealing that must be present when fiduciaries make conflicted investment recommendations to retirement investors. After careful consideration, the Department determined that broad relief could be provided to investment advice fiduciaries receiving conflicted compensation only if such fiduciaries provided advice in accordance with the

[18] In some of the amended exemptions, the text of the Best Interest standard does not specifically refer to an affiliate. The reference was not necessary in those exemptions because they define the term ''fiduciary'' to include ''such fiduciary and any affiliates of such fiduciary.''

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

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

[21] Available at *https://www.sec.gov/news/studies/2011/913studyfinal.pdf.*

[22] ERISA section 408(b)(2) and Code section 4975(d)(2) exempt certain arrangements between ERISA plans, IRAs, and non-ERISA plans, and service providers, that otherwise would be prohibited transactions under ERISA section 406 and Code section 4975. Specifically, ERISA section 408(b)(2) and Code section 4975(d)(2) provide relief from the prohibited transaction rules for service contracts or arrangements if the contract or arrangement is reasonable, the services are necessary for the establishment or operation of the plan or IRA, and no more than reasonable compensation is paid for the services.

[23] The Department also points out that there is no requirement in the other exemptions finalized today to contractually warrant compliance with applicable federal and state laws, as was proposed. However, it is still the Department's view that significant violations of applicable federal or state law could also amount to violations of the Impartial Conduct Standards, such as the best interest standard, in which case, relief would be unavailable for transactions occurring in connection with such violations.

[24] *See* fn. 1, *supra,* discussing of Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)).

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

Impartial Conduct Standards—*i.e.,* if they provided prudent advice without regard to the interests of such fiduciaries and their affiliates and related entities, in exchange for reasonable compensation and without misleading the investors.

These Impartial Conduct Standards are necessary to ensure that advisers' recommendations reflect the best interest of their retirement investor customers, rather than the conflicting financial interests of the advisers and their financial institutions. As a result, advisers and financial institutions bear the burden of showing compliance with the exemption and face liability for engaging in a non-exempt prohibited transaction if they fail to provide advice that is prudent or otherwise in violation of the standards. The Department does not view this as a flaw in the exemptions, as commenters suggested, but rather as a significant deterrent to violations of important conditions under the exemptions.

The Department similarly disagrees that Congress' directive to the SEC in the Dodd-Frank Act limits its authority to establish appropriate and protective conditions in the context of a prohibited transaction exemption. Section 913 of that Act directs the SEC to conduct a study on the standards of care applicable to brokers-dealers and investment advisers, and issue a report containing, among other things:

> an analysis of whether [sic] any identified legal or regulatory gaps, shortcomings, or overlap in legal or regulatory standards in the protection of retail customers relating to the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers.[26]

Section 913 authorizes, but does not require, the SEC to issue rules addressing standards of care for broker-dealers and investment advisers for providing personalized investment advice about securities to retail customers.[27] Nothing in the Dodd-Frank Act indicates that Congress meant to preclude the Department's regulation of fiduciary investment advice under ERISA or its application of such a regulation to securities brokers or dealers. To the contrary, Dodd-Frank in directing the SEC study specifically directed the SEC to consider the effectiveness of existing legal and regulatory standard of care under other federal and state authorities.[28] The Dodd-Frank Act did not take away the Department's responsibility with respect the definition of fiduciary under ERISA and in the Code; nor did it qualify the Department's authority to issue exemptions that are administratively feasible, in the interests of plans, participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the plans and IRA owners.

Some commenters suggested that it would be unnecessary to impose the Impartial Conduct Standards on advisers with respect to ERISA plans, as fiduciaries to these plans already are required to operate within similar statutory fiduciary obligations. The Department considered this comment but has determined not to eliminate the conduct standards as conditions of the exemptions for ERISA plans.

One of the Department's goals is to ensure equal footing for all retirement investors. The SEC staff Dodd-Frank Study required by section 913 of the Dodd-Frank Act found that investors were frequently confused by the differing standards of care applicable to broker-dealers and registered investment advisers. The Department hopes to minimize such confusion in the market for retirement advice by holding fiduciaries to similar standards, regardless of whether they are giving the advice to an ERISA plan, IRA, or a non-ERISA plan.

Moreover, inclusion of the standards as conditions of these existing exemptions adds an important additional safeguard for ERISA and IRA investors alike because the party engaging in a prohibited transaction has the burden of showing compliance with an applicable exemption, when violations are alleged.[29] In the Department's view, this burden-shifting is appropriate because of the dangers posed by conflicts of interest, as reflected in the Department's Regulatory Impact Analysis and the difficulties retirement investors have in effectively policing such violations.[30] One important way for financial institutions to ensure that they can meet this burden is by implementing strong anti-conflict policies and procedures, and by refraining from creating incentives to violate the Impartial Conduct Standards. Thus, the standards' treatment as exemption conditions creates an important incentive for financial institutions to carefully monitor and oversee their advisers' conduct for adherence with fiduciary norms.

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

Comments on each of the Impartial Conduct Standards are discussed below. In this regard, the Department notes that some commenters focused their comments on the Impartial Conduct Standards in the other exemption proposals, including the proposed Best Interest Contract Exemption, which is finalized elsewhere in this issue of the **Federal Register**. The Department determined it was important that the provisions of the exemptions, including the Impartial Conduct Standards, be uniform and compatible across exemptions. For this reason, the Department considered all comments made on any of the exemption proposals on a consolidated basis, and corresponding changes were made across the exemptions. For ease of use, this preamble includes the same general discussion of comments as in the Best Interest Contract Exemption, despite the fact that some comments discussed below were not made directly with respect to the exemptions amended in this Notice.

1. Best Interest

Under the first Impartial Conduct Standard, fiduciaries relying on the amended exemptions must act in the best interest of the plan or IRA at the time of the exercise of authority (including, in the case of an investment advice fiduciary, the recommendation). Best interest is defined to mean acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such

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

[27] 15 U.S.C. 80b–11(g)(1).

[28] Dodd-Frank Act, sec. 913(b)(1) and (c)(1).

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

[30] *See* Fiduciary Investment Advice Final Rule Regulatory Impact Analysis.

matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and the needs of the plan or IRA, without regard to the financial or other interests of the fiduciary or its affiliates or any other party.[31]

The Best Interest standard set forth in the amended exemptions is based on longstanding concepts derived from ERISA and the law of trusts. It is meant to express the concept, set forth in ERISA section 404 that a fiduciary is required to act ''solely in the interest of the participants . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.'' Similarly, both ERISA section 404(a)(1)(A) and the trust-law duty of loyalty require fiduciaries to put the interests of trust beneficiaries first, without regard to the fiduciaries' own self-interest. Under this standard, for example, a fiduciary, in choosing between two investments, could not select an investment because it is better for the fiduciary's bottom line, even though it is a worse choice for the plan or IRA.[32]

A wide range of commenters indicated support for a broad ''best interest'' standard. Some comments indicated that the best interest standard is consistent with the way advisers provide investment advice to clients today. However, a number of these commenters expressed misgivings as to the definition used in the proposed amendments, in particular, the ''without regard to'' formulation. The commenters indicated uncertainty as to the meaning of the phrase, including: Whether it permitted the fiduciary to be paid; and whether it permitted investment advice on proprietary products. One commenter was especially concerned that the amendments might restrict fiduciaries' ability to sell proprietary products, which are specifically permitted in PTE 77–4.

Other commenters asked the Department to use a different definition of ''Best Interest'' or simply use the exact language from ERISA's section 404 duty of loyalty. Others suggested definitional approaches that would require that the fiduciary ''not subordinate'' its customers' interests to its own interests, or that the fiduciary put its customers' interests ahead of its own interests, or similar constructs.[33]

The Financial Industry Regulatory Authority (FINRA) [34] suggested that the federal securities laws should form the foundation of the Best Interest standard. Specifically, FINRA urged that the Best Interest definition in the exemptions incorporate the ''suitability'' standard applicable to investment advisers and broker dealers under federal securities laws. According to FINRA, this would facilitate customer enforcement of the Best Interest standard by providing adjudicators with a well-established basis on which to find a violation.

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

The final amendments retain the Best Interest definition as proposed, with minor adjustments. The first prong of the standard was revised in each amended exemption to more closely track the statutory language of ERISA section 404(a), and, is consistent with the Department's intent to hold investment advice fiduciaries to a prudent investment professional standard. Accordingly, the definition of Best Interest now requires advice that ''reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person *acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,* based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA . . .'' The exemptions adopt the second prong of the proposed definition, ''without regard to the financial or other interests of the fiduciary, any affiliate or other party,'' without change. The Department continues to believe that the ''without regard to'' language sets forth the appropriate, protective standard under which a fiduciary investment adviser should act. Many of the alternative approaches suggested by commenters pose their own ambiguities and interpretive challenges, and lower standards run the risk of undermining this regulatory initiative's goal of reducing the impact of conflicts of interest on plans and IRAs.

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

The Department recognizes that FINRA issued guidance on rule 2111 in which it explains that ''in interpreting the suitability rule, numerous cases explicitly state that a broker's recommendations must be consistent with his customers' best interests,'' and provided examples of conduct that would be prohibited under this standard, including conduct that these amended exemptions would not allow.[35] The guidance goes on to state

[31] As noted above, some of the amended exemptions' Best Interest definitions do not include the term ''affiliate,'' since the exemption defines the fiduciary to include its affiliate.

[32] The standard does not prevent investment advice fiduciaries from restricting their recommended investments to proprietary products or products that generate revenue sharing. Section IV of the Best Interest Contract Exemption specifically addresses how the standard may be satisfied under such circumstances.

[33] The alternative approaches are discussed in greater detail in the preamble to the Best Interest Contract Exemption, adopted elsewhere in today's issue of the **Federal Register**.

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

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

that ''[t]he suitability requirement that a broker make only those recommendations that are consistent with the customer's best interests prohibits a broker from placing his or her interests ahead of the customer's interests.'' The Department, however is reluctant to adopt as an express standard such guidance, which has not been formalized as a clear rule and that may be subject to change. Additionally, FINRA's suitability rule may be subject to interpretations which could conflict with interpretations by the Department, and the cases cited in the FINRA guidance, as read by the Department, involved egregious fact patterns that one would have thought violated the suitability standard, even without reference to the customer's ''best interest.''

Accordingly, after review of the issue, the Department has decided not to accept the comment. The Department has concluded that its articulation of a clear loyalty standard within the exemption, rather than by reference to the FINRA guidance, will provide clarity and certainty to investors and better protect their interests.

The Best Interest standard, as set forth in the exemptions, is intended to effectively incorporate the objective standards of care and undivided loyalty that have been applied under ERISA for more than forty years. Under these objective standards, the fiduciary must adhere to a professional standard of care in making investments or investment recommendations that are in the plan's or IRA's Best Interest. The fiduciary may not base his or her discretionary acquisitions or recommendations on the fiduciary's own financial interest in the transaction. Nor may the fiduciary acquire or recommend the investment unless it meets the objective prudent person standard of care. Additionally, the duties of loyalty and prudence embodied in ERISA are objective obligations that do not require proof of fraud or misrepresentation, and full disclosure is not a defense to making imprudent acquisitions or recommendations or favoring one's own interests at the plan's or IRA's expense.

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

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

Other commenters asked for confirmation that the Best Interest standard is applied based on the facts and circumstances as they existed at the time of the fiduciary's action, and not based on hindsight. Consistent with the well-established legal principles that exist under ERISA today, the Department confirms that the Best Interest standard is not a hindsight standard, but rather is based on the facts as they existed at the time of the transaction. Thus, the courts have evaluated the prudence of a fiduciary's actions under ERISA by focusing on the process the fiduciary used to reach its determination or recommendation—whether the fiduciary, ''at the time they engaged in the challenged transactions, employed the proper procedures to investigate the merits of the investment and to structure the investment.'' [36] The standard does not measure compliance by reference to how investments subsequently performed or turn fiduciaries into guarantors of investment performance, even though they gave advice that was prudent and loyal at the time of transaction.[37]

This is not to suggest that the ERISA section 404 prudence standard or Best Interest standard, are solely procedural standards. Thus, the prudence standard, as incorporated in the Best Interest standard, is an objective standard of care that requires investment advice fiduciaries to investigate and evaluate investments, make recommendations, and exercise sound judgment in the same way that knowledgeable and impartial professionals would. ''[T]his is not a search for subjective good faith—a pure heart and an empty head are not enough.'' [38] Whether or not the fiduciary is actually familiar with the sound investment principles necessary to make particular recommendations, the fiduciary must adhere to an objective professional standard. Additionally, fiduciaries are held to a particularly stringent standard of prudence when they have a conflict of interest.[39] For this reason, the Department declines to provide a safe harbor based on ''procedural prudence'' as requested by a commenter.

The Department additionally confirms its intent that the phrase ''without regard to'' be given the same meaning as the language in ERISA section 404 that requires a fiduciary to act ''solely in the interest of'' participants and beneficiaries, as such standard has been interpreted by the Department and the courts. Therefore, the standard would not, as some commenters suggested, foreclose the fiduciary from being paid. In response to concerns about the satisfaction of the standard in the context of proprietary product recommendations or investment menus limited to proprietary products and/or investments that generate third party payments, the Department has revised Section IV of the Best Interest Contract Exemption to provide additional clarity and specific guidance on this issue.

In response to commenter concerns, the Department also confirms that the

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

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

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

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

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

Finally, in response to questions regarding the extent to which this Best Interest standard or other provisions of the amendments impose an ongoing monitoring obligation on fiduciaries, the text does not impose a monitoring requirement, but instead leaves that to the parties. This is consistent with the Department's interpretation of an investment advice fiduciary's monitoring responsibility as articulated in the preamble to the Regulation.

2. Reasonable Compensation

The Impartial Conduct Standards also include the reasonable compensation standard. Under this standard, compensation received by the fiduciary and its affiliates in connection with the applicable transaction may not exceed compensation for services that is reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

The obligation to pay no more than reasonable compensation to service providers is long recognized under ERISA and the Code. ERISA section 408(b)(2) and Code section 4975(d)(2), require that services arrangements involving plans and IRAs result in no more than reasonable compensation to the service provider. Accordingly fiduciaries—as service providers—have long been subject to this requirement, regardless of their fiduciary status. At bottom, the standard simply requires that compensation not be excessive, as measured by the market value of the particular services, rights, and benefits the fiduciary is delivering to the plan or IRA. Given the conflicts of interest associated with the commissions and other payments covered by the exemptions, and the potential for self-dealing, it is particularly important that fiduciaries adhere to these statutory standards, which are rooted in common law principles.[40]

Several commenters supported this standard. The requirement that compensation be limited to what is reasonable is an important protection of the exemptions and a well-established standard, they said. A number of other commenters requested greater specificity as to the meaning of the reasonable compensation standard. As proposed, the standard stated that all compensation received by the fiduciary and its affiliates in connection with the transaction must be reasonable in relation to the total services the fiduciary and its affiliates provide to the plan or IRA. Some commenters stated that the proposed reasonable compensation standard was too vague. Because the language of the proposal did not reference ERISA section 408(b)(2) and Code section 4975(d)(2), commenters asked whether the standard differed from those statutory provisions. In particular, some commenters questioned the meaning of the proposed language ''in relation to the total services the fiduciary provides to the plan or IRA.'' The commenters indicated that the proposal did not adequately explain this formulation of the reasonable compensation standard.

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

Commenters also asked the Department to provide examples of scenarios that met the reasonable compensation standard and safe harbors and others requested examples of scenarios that would fail to meet these standards. FINRA and other commenters suggested that the Department incorporate existing FINRA rules 2121 and 2122, and NASD rule 2830 regarding the reasonableness of compensation for broker-dealers.[41]

Commenters also asked how the standard would be satisfied for proprietary products. One commenter indicated that the calculation should not include affiliates' or related entities' compensation as this would appear to put them at a comparative disadvantage.

Finally, a few commenters took the position that the reasonable compensation determination should not be a requirement of an exemption. In their view, a plan fiduciary that is not providing investment advice or exercising investment discretion should decide the reasonableness of the compensation paid to the one who is. Another commenter suggested that if an independent plan fiduciary sets the menu of investment options this should be sufficient to comply with the reasonable compensation standard.

In response to comments on this requirement, the Department has retained the reasonable compensation standard as a condition of the amended exemptions. As noted above, the ''reasonable compensation'' obligation is a feature of ERISA and the Code under current law that has long applied to financial services providers, whether fiduciaries or not. The standard is also applicable to fiduciaries under the common law of agency and trusts. It is particularly important that fiduciaries adhere to these standards when engaging in the transactions covered under these amended exemptions, so as to avoid exposing plans and IRAs to harms associated with conflicts of interest.

Although some commenters suggested that the reasonable compensation determination be made by another plan fiduciary, the exemptions (like the statutory obligation) obligate fiduciaries to avoid overcharging their plan and IRA customers, despite the conflicts of interest associated with their compensation. Fiduciaries and other services providers may not charge more than reasonable compensation regardless of whether another fiduciary has signed off on the compensation. Nothing in the exemptions, however, precludes fiduciaries from seeking impartial review of their fee structures to safeguard against abuse, and they may well want to include such reviews in their policies and procedures.

[40] *See generally* Restatement (Third) of Trusts section 38 (2003).

[41] FINRA's comment letter described NASD rule 2830 as imposing specific caps on compensation with respect to investment company securities that broker-dealers may sell. While the Department views this cap as an important protection of investors, it establishes an outside limit rather than a standard of reasonable compensation.

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

In response to comments, however, the operative text of the final amendments was clarified to provide that, to the extent it applies to services, the reasonable compensation standard is the same as the well-established requirement set forth in ERISA section 408(b)(2) and Code section 4975(d)(2), and the regulations thereunder. The reasonableness of the fees depends on the particular facts and circumstances at the time of the recommendation. Several factors inform whether compensation is reasonable including, *inter alia,* the market pricing of service(s) provided and the underlying asset(s), the scope of monitoring, and the complexity of the product. No single factor is dispositive in determining whether compensation is reasonable; the essential question is whether the charges are reasonable in relation to what the investor receives. Consistent with the Department's prior interpretations of this standard, the Department confirms that a fiduciary does not have to recommend the transaction that is the lowest cost or that generates the lowest fees without regard to other relevant factors. In this regard, the Department declines to specifically reference FINRA's standard in the exemptions, but rather relies on ERISA's own longstanding reasonable compensation formulation.

In response to concerns about application of the standard to investment products that bundle together services and investment guarantees or other benefits, the Department responds that the reasonable compensation condition is intended to apply to the compensation received by the Financial Institution, Adviser, Affiliates, and Related Entities in same manner as the reasonable compensation condition set forth in ERISA section 408(b)(2) and Code section 4975(d)(2). Accordingly, the exemption's reasonable compensation standard covers compensation received directly from the plan or IRA and indirect compensation received from any source other than the plan or IRA in connection with the recommended transaction.[42] When assessing the reasonableness of a charge, one generally needs to consider the value of all the services and benefits provided for the charge, not just some. If parties need additional guidance in this respect, they should refer to the Department's interpretations under ERISA section 408(b)(2) and Code section 4975(d)(2) and the Department will provide additional guidance if necessary.

A commenter urged the Department to provide that compensation received by an Affiliate would not have to be considered in applying the reasonable compensation standard. According to the commenter, including such compensation in the assessment of reasonable compensation would place proprietary products at a disadvantage. The Department disagrees with the proposition that a proprietary product would be disadvantaged merely because more of the compensation goes to affiliated parties than in the case of competing products, which allocate more of the compensation to non-affiliated parties. The availability of the exemptions, however, does not turn on how compensation is allocated between affiliates and non-affiliates. Certainly, the Department would not expect that a proprietary product would be at a disadvantage in the marketplace because it carefully ensures that the associated compensation is reasonable. Assuming the Best Interest standard is satisfied and the compensation is reasonable, the exemption should not impede the recommendation of proprietary products. Accordingly, the Department disagrees with the commenter. The Department declines suggestions to provide specific examples of ''reasonable'' amounts or specific safe harbors. Ultimately, the ''reasonable compensation'' standard is a market based standard. As noted above, the standard incorporates the familiar ERISA section 408(b)(2) and Code section 4975(d)(2) standards The Department is unwilling to condone all ''customary'' compensation arrangements and declines to adopt a standard that turns on whether the agreement is ''customary.'' For example, it may in some instances be ''customary'' to charge customers fees that are not transparent or that bear little relationship to the value of the services actually rendered, but that does not make the charges reasonable. Finally, the Department notes that all recommendations are subject to the overarching Best Interest standard, which incorporates the fundamental fiduciary obligations of prudence and loyalty. An imprudent recommendation for an investor to overpay for an investment transaction would violate that standard, regardless of whether the overpayment was attributable to compensation for services, a charge for benefits or guarantees, or something else.

3. Misleading Statements

The final Impartial Conduct Standard requires that statements by the fiduciaries to the plans and IRAs about the recommended transaction, fees and compensation, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, may not be materially misleading at the time they are made.

In response to commenters, the Department added a materiality standard to the definition of material conflict of interest and adjusted the text to clarify that the standard is measured at the time of the representations, *i.e.,* the statements must not be misleading ''at the time they are made.''

A number of commenters focused on the definition of material conflict of interest used in the proposals. As proposed, a material conflict of interest would have existed when a fiduciary ''has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner.'' Some commenters took the position that the proposal did not adequately explain the term ''material'' or incorporate a ''materiality'' standard into the definition.

However, another commenter indicated that the Department should not use the term ''material'' in the definition of conflict of interest. The commenter believed that it could result in a standard that was too subjective from the perspective of the fiduciary relying on the exemption, and could undermine the protectiveness of the exemption.

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

[42] Such compensation includes, for example charges against the investment, such as commissions, sales loads, sales charges, redemption fees, surrender charges, exchange fees, account fees and purchase fees, as well as compensation included in operating expenses and other ongoing charges, such as wrap fees.

The Department did not accept certain other comments. One commenter requested that the standard indicate that the statements must have been reasonably relied on by the plan or IRA. The Department rejected the comment. The Department's aim is to ensure that fiduciaries uniformly adhere to the Impartial Conduct Standards, including the obligation to avoid materially misleading statements, when they exercise discretion or provide investment advice to plans and IRAs.

One commenter asked the Department to require only that the fiduciary ''reasonably believe'' the statements are not misleading. The Department is concerned that this standard could undermine the protections of this condition, by requiring plans and IRAs to prove the fiduciary's actual belief rather than focusing on whether the statement is objectively misleading. However, to address commenters' concerns about the risks of engaging in a prohibited transaction, as noted above, the Department has clarified that the standard is measured at the time of the representations and has added a materiality standard.

The Department believes that plans and IRAs are best served by statements and representations that are free from material misstatements. Fiduciaries best avoid liability—and best promote the interests of the plans and IRAs—by ensuring that accurate communications are a consistent standard in all their interactions with their customers.

A commenter suggested that the Department adopt FINRA's ''Frequently Asked Questions regarding Rule 2210'' in this connection.[43] FINRA's rule 2210, Communications with the Public, sets forth a number of procedural rules and standards that are designed to, among other things, prevent broker-dealer communications from being misleading. The Department agrees that adherence to FINRA's standards can promote materially accurate communications, and certainly believes that fiduciaries should pay careful attention to such guidance documents. After review of the rule and FAQs, however, the Department declines to simply adopt FINRA's guidance, which addresses written communications, since the condition of the exemptions is broader in this respect. In the Department's view, the meaning of the standard is clear, and is already part of a plan fiduciary's obligations under ERISA. If, however, issues arise in implementation of the exemptions, the Department will consider requests for additional guidance.

Failure to Disclose

Commenters expressed concern about the statement in the third Impartial Conduct Standard that ''failure to disclose a material conflict of interest . . . is deemed to be a misleading statement.'' The commenters indicated that, without a materiality standard, this language would result in an overly broad and uncertain disclosure requirement. The requirement would be especially burdensome in light of the potential consequences of engaging in a non-exempt prohibited transaction, including rescission, repayment of lost earnings, excise tax, and personal liability, commenters said. One commenter stated that this was effectively a change to the existing disclosure requirements of the exemptions, particularly PTE 77–4.

The Department has considered these comments. As noted above, the amended exemptions include a materiality standard in the definition of material conflict of interest. Nevertheless, the Department was persuaded by commenters to eliminate the statement from the third Impartial Conduct Standard. When viewed as a whole, the Department believes the conditions already existing in these exemptions, with the addition of the Impartial Conduct Standards adopted in these final amendments, provide sufficient protections to retirement investors without this additional disclosure provision.

4. PTE 77–4

The Department received some comments specific to PTE 77–4 that were generally outside the scope of these amendments. A few commenters requested that PTE 77–4 be amended to permit fiduciaries to rely on negative consent under the exemption. Another commenter requested amendments or interpretations relating to the extent of relief provided by the exemption. For example, one commenter requested that the Department clarify that the prospectus delivery requirement found at PTE 77–4 section II(d) may be satisfied by identifying a Web site address where investment materials can be obtained. This commenter also requested that PTE 77–4 be expanded to include investments in commingled trusts and exchange-traded funds.

Regardless of possible merit, these requests raise issues outside the scope of these amendments. The amendments were focused on the implementation of the Impartial Conduct Standards with respect to these existing class exemptions, and were not intended to address other issues with respect to these exemptions. The issues raised in these comments were not proposed and commenters did not have the opportunity to address them. Therefore, the comments were not accepted at this time. Parties wishing to pursue these comments may seek an advisory opinion or an amendment to PTE 77–4 from the Department.

Applicability Date

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

The Department has also determined that, in light of the importance of the Regulation's consumer protections and the significance of the continuing monetary harm to retirement investors without the rule's changes, that an Applicability Date of April 10, 2017, is appropriate for plans and their affected financial services and other service providers to adjust to the basic change from non-fiduciary to fiduciary status. The amendments as finalized herein have the same Applicability Date; parties may therefore rely on the amended exemptions beginning on the Applicability Date.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified

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

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

(2) The Department finds that the amended exemptions are administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of plans' participants and beneficiaries and IRA owners;

(3) The amended exemptions are applicable to a particular transaction only if the transactions satisfy the conditions specified in the amendments;

(4) The amended exemptions are 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.

Amendments to Class Exemptions

I. Prohibited Transaction Exemption 75–1, Part III

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

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

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

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

(2) All compensation received by the fiduciary in connection with the transaction neither exceeds compensation for services that is reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

(3) The fiduciary's statements about recommended investments, fees and compensation, material conflicts of interest, and any other matters relevant to the plan's or IRA owner's investment decisions, are not materially misleading at the time they are made. A ''material conflict of interest'' exists when a fiduciary has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to the plan or IRA owner.

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

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

II. Prohibited Transaction Exemption 75–1, Part IV

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

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

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

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

(2) All compensation received by the fiduciary in connection with the transaction neither exceeds compensation for services that is reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

(3) The fiduciary's statements about recommended investments, fees and compensation, material conflicts of interest, and any other matters relevant to the plan's or IRA owner's investment decisions, are not materially misleading at the time they are made. A ''material conflict of interest'' exists when a fiduciary has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to the plan or IRA owner.

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

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

III. Prohibited Transaction Exemption 77–4

The Department 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:

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

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

(2) All compensation received by the fiduciary and its affiliates in connection with the transaction neither exceeds

compensation for services that is reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

(3) The fiduciary's statements about recommended investments, fees and compensation, material conflicts of interest, and any other matters relevant to the plan's or IRA owner's investment decisions, are not materially misleading at the time they are made. A ''material conflict of interest'' exists when a fiduciary has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to the plan or IRA owner.

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

IV. Prohibited Transaction Exemption 80–83

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

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

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

(b) All compensation received by the fiduciary and its affiliates in connection with the transaction neither exceeds compensation for services that is reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

(c) The fiduciary's statements about recommended investments, fees and compensation, material conflicts of interest, and any other matters relevant to the plan's or IRA owner's investment decisions, are not materially misleading at the time they are made. A ''material conflict of interest'' exists when a fiduciary has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to the plan or IRA owner.

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

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

V. Prohibited Transaction Exemption 83–1

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

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

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

(2) All compensation received by the fiduciary and its affiliates in connection with the transaction neither exceeds compensation for services that is reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

(3) The fiduciary's statements about recommended investments, fees and compensation, material conflicts of interest, and any other matters relevant to the plan's or IRA owner's investment decisions, are not materially misleading at the time they are made. A ''material conflict of interest'' exists when a fiduciary has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to the plan or IRA owner.

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

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

Phyllis C. Borzi,

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

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