APPENDIX I FINANCIAL INSTITUTION ABC—WEB SITE DISCLOSURE MODEL FORM

Type of investment	Provider, name, sub-type	Transactional			Ongoing			Affiliate	Special rules
		Charges to investor	Compensation to firm	Compensation to adviser	Charges to investor	Compensation to firm	Compensation to adviser		
Non-Proprietary Mutual Fund (Load Fund).	XYZ MF Large Cap Fund, Class A Class B Class C.	[•]% sales load as applicable.	[•]% dealer concession.	[•]% of transactional fee Extent considered in annual bonus.	[•]% expense ratio.	[•]% 12b–1 fee, revenue sharing (paid by fund/affiliate).	[•]% of ongoing fees. Extent considered in annual bonus.	N/A	Breakpoints (as applicable) Contingent deferred shares charge (as applicable)
Proprietary Mutual Fund (No load).	ABC MF Large Cap Fund.	No upfront charge.	N/A	N/A	[•]% expense ratio.	[•]% asset-based annual fee for shareholder servicing (paid by fund/affiliate).	[•]% of ongoing fees Extent considered in annual bonus.	[•]% asset-based investment advisory fee paid by fund to affiliate of Financial Institution.	N/A
Equities, ETFs, Fixed Income.	....	$[•] commission per transaction.	$[•] commission per transaction.	[•]% of commission Extent considered in annual bonus.	N/A	N/A	N/A Extent considered in annual bonus.	N/A	N/A
Annuities (Fixed and Variable).	Insurance Company A.	No upfront charge on amount invested.	$[•] commission (paid by insurer).	[•]% of commission Extent considered in annual bonus.	[•]% M&E fee [•]% underlying expense ratio.	$[•] Ongoing trailing commission (paid by underlying investment providers).	[•]% of ongoing fees Extent considered in annual bonus.	N/A	Surrender charge

APPENDIX II FINANCIAL INSTITUTION XZY—TRANSACTION DISCLOSURE MODEL CHART

	Your investment	Total cost of your investment if held for:		
		1 year	5 years	10 years
Asset 1 Asset 2 Asset 3 Account fees				
Total				

[FR Doc. 2015–08832 Filed 4–15–15; 11:15 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11713]

ZRIN 1210–ZA25

Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs

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

ACTION: Notice of Proposed Class Exemption.

SUMMARY: This document contains a notice of pendency before the U.S. Department of Labor of a proposed exemption from certain prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). The provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from purchasing and selling securities when the fiduciaries are acting on behalf of their own accounts (principal transactions). The exemption proposed in this notice would permit principal transactions in certain debt securities between a plan, plan participant or beneficiary account, or an IRA, and a fiduciary that provides investment advice to the plan or IRA, under conditions to safeguard the interests of these investors. The proposed exemption would affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

DATES: *Comments:* Written comments concerning the proposed class exemption must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make this exemption available eight months after publication of the final exemption in the **Federal Register**.

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

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

Email to: e-OED@dol.gov.

Fax to: (202) 693–8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11713), U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11713), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington, DC 20001.

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

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

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

SUPPLEMENTARY INFORMATION: The Department is proposing this class exemption 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)).

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

Executive Summary

Purpose of Regulatory Action

The Department is proposing this exemption in connection with its proposed regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (Proposed Regulation), published elsewhere in this issue of the **Federal Register**. The Proposed Regulation specifies when an entity is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. If adopted, the Proposed Regulation would replace an existing regulation that was adopted in 1975. The Proposed Regulation is intended to take into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Proposed Regulation would update existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

The exemption proposed in this notice would allow investment advice fiduciaries to engage in purchases and sales of certain debt securities out of their inventory (*i.e.,* engage in principal transactions) with plans, participant or beneficiary accounts, and IRAs, under conditions designed to safeguard the interests of these investors. In the absence of an exemption, these transactions would be prohibited under ERISA and the Code. In this regard, ERISA and the Code generally prohibit fiduciaries with respect to plans and IRAs from purchasing or selling any property to plans, participant or beneficiary accounts, or IRAs. Fiduciaries also may not engage in self-dealing or, under ERISA, act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants and beneficiaries. When a fiduciary sells a security out of its own inventory in a principal transaction, it violates these prohibitions.

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant 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. Before granting an exemption, the Department must find that it is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of such plans and IRA owners. Interested parties are permitted to submit comments to the Department through July 6, 2015. The Department plans to hold an administrative hearing within 30 days of the close of the comment period.

Summary of the Major Provisions

The proposed exemption would allow an individual investment advice fiduciary (an adviser)[2] and the firm that employs or otherwise contracts with the adviser (a financial institution) to engage in principal transactions involving certain debt securities, with plans, participant and beneficiary accounts, and IRAs. The proposed exemption limits the type of debt securities that may be purchased or sold and contains conditions which the adviser and financial institution must satisfy in order to rely on the exemption. To safeguard the interests of plans, participants and beneficiaries, and IRA owners, the exemption would require the adviser and financial institution to contractually acknowledge fiduciary status and commit to adhere to certain ''Impartial Conduct Standards'' when providing investment advice regarding the principal transaction to the plan fiduciary with authority to make investment decisions for the plan, the participant or beneficiary of a plan, or the IRA owner (referred to herein as retirement investors), including providing advice that is in their best interest. The financial institution would further be required to warrant that it has adopted policies and procedures designed to mitigate the impact of material conflicts of interest and ensure that the individual advisers adhere to the Impartial Conduct Standards. The retirement investor would be required to consent to the principal transactions following disclosure of the material conflicts of interest associated with such transactions and of the debt security's pricing information. Financial institutions would be subject to recordkeeping requirements.

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 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal

[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)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. This proposed exemption would provide relief from the indicated prohibited transaction provisions of both ERISA and the Code.

[2] By using the term ''adviser,'' the Department does not intend to limit the exemption to investment advisers registered under the Investment Advisers Act of 1940 or under state law. As explained herein, an adviser must be an investment advice fiduciary of a plan or IRA who is an employee, independent contractor, agent, or registered representative of a registered investment adviser, bank, or registered broker-dealer.

agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

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

Background

Proposed Regulation Defining a Fiduciary

As explained more fully in the preamble to Department's Proposed Regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), also published in this issue of the **Federal Register**, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in its imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[3] In addition, they must refrain from engaging in ''prohibited transactions,'' which ERISA forbids because of the dangers posed by the fiduciaries' conflicts of interest with respect to the transactions.[4] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.[5] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs. Although ERISA's general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs, these fiduciaries are subject to the prohibited transaction rules. In this context fiduciaries engaging in the prohibited transactions are subject to an excise tax enforced by the Internal Revenue Service. Unlike participants in plans covered by Title I of ERISA, under the Code, IRA owners cannot bring suit against fiduciaries under ERISA for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct, nor can the Secretary of Labor bring suit to enforce the prohibited transaction rules. The exemption proposed herein, as well as another exemption for the receipt of compensation by investment advice fiduciaries published elsewhere in this issue of the **Federal Register**, would create contractual obligations for the adviser to adhere to certain standards (the Impartial Conduct Standards). IRA owners would have a right to enforce these new contractual rights.

Under this statutory framework, the determination of who is a ''fiduciary'' is of central importance. Many of ERISA's protections, duties, and liabilities hinge on fiduciary status. In relevant part, section 3(21)(A) of ERISA and section 4975(e)(3) of the Code provide that a person is a fiduciary with respect to a plan or IRA to the extent he or she (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 fiduciary responsibilities were enacted to ensure that plans and IRAs can depend on persons who provide investment advice for a fee to provide recommendations that are untainted by conflicts of interest. In the absence of fiduciary status, the providers of investment advice would neither be subject to ERISA's fundamental fiduciary standards, nor accountable for imprudent, disloyal, or tainted advice under ERISA or the Code, no matter how egregious the misconduct or how substantial the losses. Plans, individual participants and beneficiaries, and IRA owners often are not financial experts and consequently must rely on professional advice to make critical investment decisions. In the years since then, the significance of financial advice has become still greater with increased reliance on participant-directed plans and IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c)(1975) defining the circumstances under which a person is treated as providing ''investment advice'' to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA (the ''1975 regulation'').[6] The regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the regulation, for advice to constitute ''investment advice,'' an adviser who does not have discretionary authority or control with

[3] ERISA section 404(a).

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

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

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

respect to the purchase or sale of securities or other property of the plan must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue. A 1976 Department of Labor Advisory Opinion further limited the application of the statutory definition of ''investment advice'' by stating that valuations of employer securities in connection with employee stock ownership plan (ESOP) purchases would not be considered fiduciary advice.[7]

As the marketplace for financial services has developed in the years since 1975, the five-part test may now undermine, rather than promote, the statutes' text and purposes. The narrowness of the 1975 regulation allows professional advisers, consultants and valuation firms to play a central role in shaping plan investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility when it enacted ERISA and the related Code provisions. Even when plan sponsors, participants, beneficiaries and IRA owners clearly rely on paid consultants for impartial guidance, the regulation allows consultants to avoid fiduciary status and disregard the accompanying obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest, give imprudent advice, and engage in transactions that would otherwise be categorically prohibited by ERISA and the Code without liability under ERISA or the Code.

In the Proposed Regulation, the Department seeks to replace the existing regulation with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which plans and IRAs currently operate.[8] The Proposed Regulation describes the types of advice that constitutes ''investment advice'' with respect to plan or IRA assets for purposes of the definition of a fiduciary at ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). The proposal provides, subject to certain carve-outs, that a person renders investment advice with respect to a plan or IRA if, among other things, the person provides, directly to a plan, a plan fiduciary, a plan participant or beneficiary, IRA or IRA owner one of the following types of advice:

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

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

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

(4) A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (1) through (3), above.

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

In the Proposed Regulation, the Department refers to FINRA guidance on whether particular communications should be viewed as ''recommendations'' [9] within the meaning of the fiduciary definition, and requests comment on whether the Proposed Regulation should adhere to or adopt some or all of the standards developed by FINRA in defining communications which rise to the level of a recommendation. For more detailed information regarding the Proposed Regulation, see the Notice of the Proposed Regulation published in this issue of the **Federal Register**.

For advisers who do not represent that they are acting as ERISA (or Code) fiduciaries, the Proposed Regulation provides that advice rendered in conformance with certain carve-outs will not cause the adviser to be treated as a fiduciary under ERISA or the Code. For example, under the seller's carve-out, counterparties in arm's-length transactions with plans may make investment recommendations without acting as fiduciaries if certain conditions are met.[10] Similarly, the proposal contains a carve-out from fiduciary status for providers of appraisals, fairness opinions, or statements of value in specified contexts (*e.g.,* with respect to ESOP transactions). The proposal additionally carves out from fiduciary status the marketing of investment alternative platforms to plans, certain assistance in selecting investment alternatives, and other activities. Finally, the Proposed Regulation contains a carve-out from fiduciary status for the provision of investment education.

Prohibited Transactions

The Department anticipates that the Proposed Regulation will cover many investment professionals who do not currently consider themselves to be fiduciaries under ERISA or the Code. If the Proposed Regulation is adopted, these entities will become subject to the prohibited transaction restrictions in ERISA and the Code that apply specifically to fiduciaries. ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his own interest or his own account. ERISA section 406(b)(2)

[7] Advisory Opinion 76–65A (June 7, 1976).

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

[9] *See* NASD Notice to Members 01–23 and FINRA Regulatory Notices 11–02, 12–25 and 12–55.

[10] Although the preamble adopts the phrase ''seller's carve-out'' as a shorthand way of referring to the carve-out and its terms, the regulatory carve-out is not limited to sellers but rather applies more broadly to counterparties in arm's length transactions with plan investors with financial expertise.

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.'' [11] 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 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. Given these prohibitions, conferring fiduciary status on particular investment advice activities will have important implications for many investment professionals.

The purchase or sale of a security in a principal transaction between a plan or IRA and a fiduciary, resulting from the fiduciary's provision of investment advice, raises issues under ERISA section 406(b) and Code section 4975(c)(1)(E).[12] Nevertheless, the Department recognizes that certain investment advice fiduciaries view the ability to execute principal transactions as integral to the economically efficient distribution of fixed income securities. The Department has carefully considered requests for exemptive relief for principal transactions in connection with the development of the Proposed Regulation, in light of the existing legal framework. In this regard, as further discussed below, fiduciaries who engage in principal transactions under certain circumstances can avoid the ERISA and Code restrictions. Moreover, there are existing statutory and administrative exemptions, also discussed below, that already provide prohibited transaction relief for fiduciaries engaging in principal transactions with plans and IRAs. This notice proposes a new class exemption which would provide additional prohibited transaction relief for investment advice fiduciaries to engage in principal transactions with plans and IRAs.

1. Blind Transactions

Certain principal transactions between a plan or IRA and an investment advice fiduciary may not need exemptive relief because they are blind transactions executed on an exchange. The ERISA Conference Report states that a transaction will, generally, not be a prohibited transaction if the transaction is an ordinary ''blind'' purchase or sale of securities through an exchange where neither the buyer nor the seller (nor the agent of either) knows the identity of the other party involved.[13]

2. Principal Transactions Permitted Under an Exemption

ERISA and the Code counterbalance the broad proscriptive effect of the prohibited transaction provisions with numerous statutory exemptions. ERISA and the Code also provide for administrative exemptions that the Secretary of Labor may grant on an individual or class basis if the Secretary finds that the exemption is (1) administratively feasible, (2) in the interests of plans and their participants and beneficiaries, and (3) protective of the rights of the participants and beneficiaries of such plans.

A. Statutory Exemptions

ERISA section 408(b)(14) provides a statutory exemption for transactions entered into in connection with the provision of fiduciary investment advice to a participant or beneficiary of an individual account plan or an IRA owner. The exemption provides relief for, among other things, the acquisition, holding, or sale of a security or other property as an investment under the plan pursuant to the investment advice. As set forth in ERISA section 408(g), the exemption is available if the advice is provided under an ''eligible investment advice arrangement'' which either (1) ''provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected'' or (2) ''uses a computer model under an investment advice program meeting the requirements of [ERISA section 408(g)(3)].'' Additional conditions apply. Code section 4975(d)(17) provides the same relief from the taxes imposed by Code section 4975(a) and (b).

ERISA section 408(b)(16) provides relief for transactions involving the purchase or sale of securities between a plan and a party in interest, including an investment advice fiduciary, if the transactions are executed through an electronic communication network, alternative trading system, or similar execution system or trading venue. Among other conditions, subparagraph (B) of the statutory exemption requires that either: (i) ''the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority,'' or (ii) ''neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades[.]'' The transactions covered by ERISA section 408(b)(16) include principal transactions between a plan and an investment advice fiduciary. Code section 4975(d)(19) provides the same relief from the taxes imposed by Code section 4975(a) and (b).

B. Administrative Exemptions

An administrative exemption for certain principal transactions will continue to be available through PTE 75–1.[14] Specifically, PTE 75–1, Part IV, provides an exemption that is available to investment advice fiduciaries who are ''market-makers.'' Relief is available from ERISA section 406 for the purchase or sale of securities by a plan or IRA, from or to a market-maker with respect to such securities who is also an investment advice fiduciary with respect to the plan or IRA, or an affiliate of such fiduciary.

Further, Part II(1) of PTE 75–1 currently provides relief from ERISA section 406(a) and Code section 4975(c)(1)(A) through (D) for the purchase or sale of a security in a principal transaction between a plan or IRA and a broker-dealer registered under the Securities Exchange Act of 1934. However, the exemption permits plans and IRAs to engage in principal transactions with broker-dealers only if they do not have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of plan or IRA assets involved in the transaction, and *do not render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to the investment of those assets.* PTE 75–1, Part II(1) will continue to be available to parties in interest that are not fiduciaries and that satisfy its conditions.

[11] The Code does not contain this prohibition.

[12] The purchase or sale of a security in a principal transaction between a plan or IRA and a fiduciary also is prohibited by ERISA section 406(a)(1)(A) and (D) and Code section 4975(c)(1)(A) and (D).

[13] *See* H.R. Rep. 93–1280, 93rd Cong., 2d Sess. 307 (1974); *see also* ERISA Advisory Opinion 2004–05A (May 24, 2004).

[14] 40 FR 50845 (Oct. 31, 1975), as amended, 71 FR 5883 (Feb. 3, 2006).

C. New Exemption Proposed in This Notice

In response to public concerns, the Department is proposing in this notice additional relief for principal transactions in certain debt securities between a plan, participant or beneficiary account, or an IRA, and an investment advice fiduciary. While relief was informally requested with respect to a broad range of principal transactions (*e.g.,* those involving equities, debt securities, futures, derivatives, currencies, *etc.*), the Department has elected to propose relief solely with respect to certain widely-held debt securities. This limitation is based on the Department's view that principal transactions involve a potentially severe conflict of interest when engaged in by a fiduciary with respect to a plan, participant or beneficiary account, or an IRA. The Department is concerned that, when acting as a principal in a transaction involving a plan, participant or beneficiary account, or an IRA, a fiduciary may have difficulty reconciling its duty to avoid conflicts of interest with its concern for its own financial interests. Of primary concern are issues involving liquidity, pricing, transparency, and the fiduciary's possible incentive to ''dump'' unwanted assets. Accordingly, when crafting the exemption, the Department focused on debt securities as common investments of plans, participant or beneficiary accounts, and IRAs that may need to be sold on a principal basis because particular bond issues may be sold by only one or a limited number of financial institutions. Without an exemption, plans, participant or beneficiary accounts, and IRAs may face reduced choice in the market for these debt securities.

Under this rationale, however, the Department is not persuaded at this point that additional exemptive relief for principal transactions involving other types of assets would be in the interests of, and protective of, plans, their participants and beneficiaries and IRA owners. Equity securities, for example, are widely available through agency transactions that do not involve the particular conflicts of interest associated with principal transactions. Other assets such as futures, derivatives and currencies, may possess a level of complexity and risk that would require a retirement investor to rely heavily on a fiduciary's advice. In such cases, the Department is concerned that the class exemption proposed here would be insufficiently protective of plans, participants and beneficiaries, and IRA owners.

The Department requests comment on the limitation of the proposed exemption to debt securities. Public input is requested on whether there are additional assets that are commonly held by plans, participant or beneficiary accounts, and IRAs that are sold primarily in principal transactions. Commenters should provide specifics about the characteristics of such assets and the proposed safeguards that would apply to an exemption permitting their sale in a principal transaction. To the extent interested parties believe it is possible or appropriate to provide relief for additional transactions, the Department would also invite applications for additional exemptions tailored to the unique characteristics of those transactions and protective of the interests of plan participants and IRA owners.

Proposed Exemption for Principal Transactions in Certain Debt Securities

Section I of the proposed exemption would provide relief for ''Advisers'' and ''Financial Institutions'' to enter into ''principal transactions'' in ''debt securities'' with plans and IRAs. The proposed exemption uses the term ''Retirement Investor'' to describe the types of persons who can be investment advice recipients under the exemption, and the term ''Affiliate'' to describe people and entities with a connection to the Adviser or Financial Institution. These terms are defined in Section VI of this proposed exemption. The following sections discuss key definitional terms of the exemption as well as the scope and conditions of the proposed exemption.

Defined Terms

1. Adviser

The proposed exemption contemplates that an individual person, an Adviser, will provide advice to the Retirement Investor. An Adviser must be an investment advice fiduciary of a plan or IRA who is an employee, independent contractor, agent, or registered representative of a ''Financial Institution'' (discussed in the next section), and the Adviser must satisfy the applicable banking and securities laws with respect to the covered transaction.[15] Advisers may be, for example, registered representatives of broker-dealers registered under the Securities Exchange Act of 1934.

2. Financial Institutions

For purposes of the proposed exemption, a Financial Institution is the entity that employs an Adviser or otherwise retains the Adviser as an independent contractor, agent or registered representative.[16] Financial Institutions must be registered investment advisers, banks, or registered broker-dealers. This limitation is based on the Department's understanding that these entities may commonly sell debt securities out of inventory. The Department requests comment on whether there are other types of financial institutions that should be included in the definition.

3. Affiliates

The proposed exemption uses the term Affiliate to describe persons or entities with certain relationships to the Adviser and Financial Institution. An ''Affiliate'' means: (1) any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution; (2) any officer, director, employee, relative (as defined in ERISA section 3(15)) or member of family (as defined in Code section 4975(e)(6)), agent or registered representative of, or partner in such Adviser or Financial Institution; and (3) any corporation or partnership of which the Adviser or Financial Institution is an officer, director, or employee, or in which the Adviser or Financial Institution is a partner. For purposes of this definition, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

4. Retirement Investor

The proposed exemption uses the term ''Retirement Investor,'' to mean a plan fiduciary of a non-participant directed ERISA plan with authority to make investment decisions for the plan, a plan participant or beneficiary with authority to direct the investment of assets in his or her plan account or to take a distribution, or, in the case of an IRA, the beneficial owner of the IRA (*i.e.,* the IRA owner).

5. Principal Transaction

For purposes of the proposed exemption, a principal transaction is a purchase or sale of a debt security where an Adviser or Financial Institution is purchasing from or selling to the plan, participant or beneficiary account, or IRA on behalf of the account of the Financial Institution or the

[15] *See* Section VI(a) of the proposed exemption.

[16] *See* Section VI(f) of the proposed exemption.

account of any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution. The Department requests comment as to whether, and on what grounds, relief is also necessary for the purchase or sale of a debt security from the Adviser's own account in addition to the Financial Institution's own account.

6. Debt Securities

The proposed exemption is limited to principal transactions in certain debt securities. For purposes of the exemption, the term ''debt security,'' is defined by reference to Rule 10b–10(d)(4) under the Securities Exchange Act of 1934. The categories of covered debt securities include securities that are (1) dollar denominated, issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933; (2) U.S. agency debt securities (as defined in FINRA Rule 6710(l)); and (3) U.S. Treasury securities (as defined in FINRA Rule 6710(p)).

The debt security may not have been issued by the Financial Institution or any Affiliate. Additionally, the debt security may not be purchased by the plan, participant or beneficiary account, or IRA, in an underwriting or underwriting syndicate in which the Financial Institution or any Affiliate is the underwriter or a member. Purchases by plans, participant or beneficiary accounts, or IRAs may occur, however, if a debt security originally underwritten by the Financial Institution or an Affiliate was later obtained for sale in the secondary market.

The debt security must also possess no greater than moderate credit risk and be sufficiently liquid that the debt security could be sold at or near its fair market value within a reasonably short period of time. Debt securities subject to a moderate credit risk should possess at least average credit-worthiness relative to other similar debt issues. Moderate credit risk would denote current low expectations of default risk, with an adequate capacity for payment of principal and interest. These securities have a level of creditworthiness similar to investment grade securities.[17]

Scope of Relief in the Proposed Exemption

The proposed exemption provides relief for principal transactions in debt securities between a plan, participant or beneficiary account, or IRA and a Financial Institution or an entity in a control relationship with the Financial Institution, when the principal transaction is a result of the Adviser's and Financial Institution's provision of investment advice. Relief is proposed from ERISA sections 406(a)(1)(A) and (D), and 406(b)(1) and (2), and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D) and (E). Relief has not been proposed in this exemption from ERISA section 406(b)(3) and Code section 4975(c)(1)(F), which prohibit a plan fiduciary from receiving any consideration for its own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan. As a result, the proposed exemption does not include relief for the receipt by a fiduciary of consideration from a trading venue in connection with the execution of purchases and sales thereon (*e.g.,* payment for order flow).

Several limitations apply to the scope of the proposed exemption. First, relief is limited to Advisers whose fiduciary authority with respect to the plan, participant or beneficiary account, or IRA assets involved in the transaction is as a provider of investment advice.[18] Advisers who have full investment discretion with respect to the assets of a plan, participant or beneficiary account, or IRA or who have discretionary authority over the administration of the plan, participant or beneficiary account, or IRA, for example, may not take advantage of relief under the exemption.

Second, the exemption is not available to a transaction involving a plan covered by Title I of ERISA if the Adviser or Financial Institution, or any Affiliate is the employer of employees covered by the plan which is the recipient of the advice.[19] This restriction on employers does not apply in the case of an IRA or other similar plan that is not covered by Title I of ERISA. Accordingly, an Adviser or Financial Institution may provide advice to the beneficial owner of an IRA who is employed by the Adviser, its Financial Institution or an Affiliate, and receive compensation as a result, provided the IRA is not covered by Title I of ERISA.

Finally, the exemption does not apply if the Adviser or Financial Institution is a named fiduciary or plan administrator, as defined in ERISA section 3(16)(A) with respect to an ERISA plan, or an affiliate thereof, that was selected to provide advice to the plan by a fiduciary who is not independent of them.[20] This provision is intended to disallow selection of Advisers and Financial Institutions by named fiduciaries or plan administrators that have an interest in them.

Conditions of the Proposed Exemption

Sections II–V of the proposal set forth the conditions of the exemption. All applicable conditions must be satisfied in order to avoid application of the specified prohibited transaction provisions of ERISA and the Code. The Department believes that these conditions are necessary for the Secretary to find that the exemption is administratively feasible, in the interests of plans, their participants and beneficiaries and IRA owners, and protective of the rights of the participants and beneficiaries of such plans and IRA owners. Under ERISA section 408(a)(2), and Code section 4975(c)(2), the Secretary may not grant an exemption without making such findings. The proposed conditions are described below.

Contractual Obligations (Section II)

Section II(a) of the proposal requires that an Adviser and the Financial Institution enter into a written contract with the Retirement Investor prior to engaging in a principal transaction with a plan, participant or beneficiary account, or IRA. The contract must be executed by the Adviser and Financial Institution as well as the Retirement Investor, acting on behalf of the plan, participant or beneficiary account, or IRA. In the case of advice provided to a participant or beneficiary in a plan, the participant or beneficiary should be the Retirement Investor that is the party to the contract, on behalf of his or her individual account.

The contract may be part of a master agreement with the Retirement Investor and does not require execution prior to each additional principal transaction. The exemption does not, by its terms, mandate an ongoing or long-term advisory relationship, but rather leaves that to the parties. The terms of the contract, along with other representations, agreements, or understandings between the Adviser, Financial Institution and Retirement

[17] The U.S. Securities and Exchange Commission has similarly referred to securities that are 'subject to no greater than moderate credit risk' and sufficiently liquid that [the security] can be sold at or near its carrying value within a reasonably short period of time'' in setting standards of creditworthiness in its regulations. *See, e.g.,* Rule 6a–5 issued under Investment Company Act,17 CFR 270.6a–5 (77 FR 70117, November 23, 2012).

[18] *See* Section I(c)(1) of the proposed exemption.

[19] *See* Section I(c)(2) of the proposed exemption.

[20] *See* Section VI(f), defining the term ''Independent.''

Investor, will govern the ongoing or transactional nature of the relationship between the parties.

The contract is the cornerstone of the proposed exemption, and the Department believes that by requiring a contract as a condition of the proposed exemption, it creates a mechanism by which a Retirement Investor can be alerted to the Adviser's and Financial Institution's obligations and be provided with a basis upon which its rights can be enforced. In order to comply with the exemption, the contract must contain every required element set forth in Section II(b)–(e) and also must not include any of the prohibited provisions described in Section II(f). It is intended that the contract creates actionable obligations with respect to both the Impartial Conduct Standards and the warranties, described below. In addition, failure to satisfy the Independent Conduct Standards will result in loss of the exemption.

1. Fiduciary Status

The proposal sets forth multiple contractual requirements. The first and most fundamental contractual requirement, which is set out in Section II(b) of proposal, is that both the Adviser and Financial Institution must acknowledge fiduciary status under ERISA or the Code, or both, with respect to the investment recommendations to the Retirement Investor regarding principal transactions. If this acknowledgment of fiduciary status does not appear in a contract with a Retirement Investor, the exemption is not satisfied with respect to principal transactions involving that Retirement Investor. This fiduciary acknowledgment is critical to ensuring that there is no uncertainty—before or after investment advice is given with regard to the principal transaction—that both the Adviser and Financial Institution are acting as fiduciaries under ERISA and the Code. Nevertheless, it is important to note that the contractual language is only required to apply to communications that are investment recommendations to the Retirement Investor regarding principal transactions. Compliance with all the exemption's conditions is necessary only with respect to transactions that otherwise would constitute prohibited transactions under ERISA and the Code.

2. Standards of Impartial Conduct

Building upon the required acknowledgment of fiduciary status, the proposal additionally requires that both the Adviser and the Financial Institution contractually commit to adhering to specifically delineated Impartial Conduct Standards when providing investment advice to the Retirement Investor regarding principal transactions, and that they in fact do adhere to such standards. Therefore, if an Adviser and/or Financial Institution fail to comply with the Impartial Conduct Standards, relief under the exemption is no longer available and the contract is violated.

Specifically, Section II(c)(1) of the proposal requires that under the contract the Adviser and Financial Institution provide advice regarding principal transactions that is in the ''best interest'' of the Retirement Investor. Best interest is defined to mean that the Adviser and Financial Institution act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and the needs of the Retirement Investor when providing investment advice to the Retirement Investor. Further, under the best interest standard, the Adviser and Financial Institution must act without regard to the financial or other interests of the Adviser, Financial Institution, their Affiliates or any other party. Under this standard, the Adviser and Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution, their Affiliates or any other party.

The best interest standard set forth in this exemption is based on longstanding concepts derived from ERISA and the law of trusts. For example, ERISA section 404 requires a fiduciary 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. Accordingly, the Department would expect the standard to be interpreted in light of forty years of judicial experience with ERISA's fiduciary standards and hundreds more with the duties imposed on trustees under the common law of trusts. In general, courts focus on the process the fiduciary used to reach its determination or recommendation—whether the fiduciaries, ''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.'' *Donovan* v. *Mazzola,* 716 F.2d 1226, 1232 (9th Cir. 1983). Moreover, a fiduciary's investment recommendation is measured based on the circumstances prevailing at the time of the transaction, not on how the investment turned out with the benefit of hindsight.

In this regard, the Department notes that while fiduciaries of plans covered by ERISA are subject to the ERISA section 404 standards of prudence and loyalty, the Code contains no provisions that hold IRA fiduciaries to these standards. However, as a condition of relief under the proposed exemption, both IRA and plan fiduciaries would have to agree to, and uphold, the best interest requirement that is set forth in Section II(c). The best interest standard is defined to effectively mirror the ERISA section 404 duties of prudence and loyalty, as applied in the context of fiduciary investment advice.

The Impartial Conduct Standards continue in Section II(c) of the proposal. Section II(c)(2) requires that the Adviser and Financial Institution agree that they will not enter into a principal transaction with the plan, participant or beneficiary account, or IRA if the purchase or sales price of the debt security (including the mark-up or mark-down) is unreasonable under the circumstances. Finally, Section II(c)(3) requires that the Adviser's and Financial Institution's statements about the debt security, fees, material conflicts of interest, and any other matters relevant to a Retirement Investor's investment decisions, are not misleading.

Under ERISA section 408(a) and Code section 4975(c), the Department cannot grant an exemption unless it first finds that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRA owners. An exemption permitting transactions that violate the requirements of Section II(c) would be unlikely to meet these standards.

3. Warranty—Compliance With Applicable Law

Section II(d) of the proposal requires that contract include certain warranties intended to be protective of the rights of Retirement Investors. In particular, to satisfy the exemption, the Adviser, and Financial Institution must warrant that they and their Affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice and the purchase and sale of debt securities. This warranty must be in the contract but the exemption is not conditioned on compliance with the warranty. Accordingly, the failure to comply with applicable federal or state law could result in contractual liability for breach of warranty, but it would not result in loss of the exemption, as long as the breach did not involve a violation of one of the exemption's other conditions (*e.g.,* the best interest standard). Thus, for example, de minimis violations of state or federal law would not result in the loss of the exemption.

4. Warranty—Policies and Procedures

The Financial Institution must also contractually warrant that it has adopted written policies and procedures that are reasonably designed to mitigate the impact of material conflicts of interest that exist with respect to the provision of investment advice to Retirement Investors regarding principal transactions and ensure that individual Advisers adhere to the Impartial Conduct Standards described above. For purposes of the exemption, a material conflict of interest is deemed to exist when an Adviser or Financial Institution has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor.[21] Like the warranty on compliance with applicable law, discussed above, this warranty must be in the contract but the exemption is not conditioned on compliance with the warranty. Failure to comply with the warranty, however, could result in contractual liability for breach of warranty.

As part of the contractual warranty on policies and procedures, the Financial Institution must state that in formulating its policies and procedures, it specifically identified material conflict of interests and adopted measures to prevent those material conflicts of interest from causing violations of the Impartial Conduct Standards. Further, the Financial Institution must state that neither it nor (to the best of its knowledge) its Affiliates will use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differentiated compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations regarding principal transactions that are not in the best interest of Retirement Investors.

While these warranties must be part of the contract between the Adviser and Financial Institution and the Retirement Investor, the proposal does not mandate the specific content of the policies and procedures. This flexibility is intended to allow Financial Institutions to develop policies and procedures that are effective for their particular business models, within the constraints of their fiduciary obligations and the Impartial Conduct Standards. A more detailed description of the policies and procedures requirement is included in the discussion of the similar requirement in the Proposed Exemption for the Receipt of Compensation by Investment Advice Fiduciaries, published in this same issue of the **Federal Register**.

5. Contractual Disclosures

Finally, Section II(e) of the proposal requires certain disclosures in the written contract. If the disclosures do not appear in a contract with a Retirement Investor, the exemption is not satisfied with respect to transactions involving that Retirement Investor. The written contract must (i) set forth the circumstances under which the Adviser and Financial Institution may engage in principal transactions with the plan, participant or beneficiary account, or IRA and (ii) identify and disclose the material conflicts of interest associated with principal transactions. The contract must also document the Retirement Investor's affirmative written consent, on a prospective basis, to principal transactions with the Adviser or Financial Institution. Finally, the contract must inform the Retirement Investor (i) that the consent to principal transactions is terminable at will by the Retirement Investor at any time, without penalty to the plan, participant or beneficiary account, or IRA, and (ii) of the right to obtain complete information about all the fees and other payments currently associated with its investments.

Enforcement of the Contractual Obligations

The contractual conditions set forth in Section II of the proposal are enforceable. Plans, plan participants and beneficiaries, IRA owners, and the Department may use the contract as a tool to ensure compliance with the exemption. The Department notes, however, that this contractual tool creates different rights with respect to plans, participant and beneficiaries, IRA owners and the Department.

1. IRA Owners

The contract between the IRA owner and the Adviser and Financial Institution forms the basis of the IRA owner's enforcement rights. As outlined above, the contract embodies obligations on the part of the Adviser and Financial Institution. The Department intends that all the contractual obligations (the Impartial Conduct Standards and the warranties) will be actionable by IRA owners. The most important of these contractual obligations for enforcement purposes is the obligation imposed on both the Adviser and the Financial Institution to comply with the Impartial Conduct Standards. Because these standards are contractually imposed, the IRA owner has a claim if, for example, the Adviser recommends an investment product that is not in fact in the best interest of the IRA owner.

2. Plans, Plan Participants and Beneficiaries

The protections of the exemption and contractual terms will also be enforceable by plans, plan participants and beneficiaries. Specifically, if an Adviser or Financial Institution receives compensation in a prohibited transaction but fails to satisfy any of the Impartial Conduct Standards or any other condition of the exemption, the Adviser and Financial Institution would be unable to qualify for relief under the exemption, and, as a result, could be liable under ERISA section 502(a)(2) and (3). An Adviser's failure to comply with the exemption or the Impartial Conduct Standards would result in a non-exempt prohibited transaction and would likely constitute a fiduciary breach. As a result, a plan, plan participant or beneficiary would be able to sue under ERISA section 502(a)(2) or (3) to recover any loss in value to the plan (including the loss in value to an individual account), or to obtain disgorgement of any wrongful profits or unjust enrichment. Additionally, plans, participants and beneficiaries could enforce their obligations in an action based on breach of the agreement.

3. The Department

In addition, the Department will be able to enforce ERISA's prohibited transaction provisions with respect to employee benefit plans, but not IRAs, in the event that the Adviser or Financial Institution receives compensation in a prohibited transaction but fails to comply with the Impartial Conduct Standards or any other conditions of the exemption. If any of the specific conditions of the exemption are not met, the Adviser and Financial Institution will have engaged in a non-exempt prohibited transaction, and the Department will be entitled to seek relief under ERISA section 502(a)(2) and (5).

[21] *See* Section VI(h) of the proposed exemption.

4. Excise Taxes Under the Code

In addition to the claims described above that may be brought by IRA owners, plans, plan participants and beneficiaries, and the Department, to enforce the contract and ERISA, Advisers and Financial Institutions that engage in prohibited transactions under the Code are subject to an excise tax. The excise tax is generally equal to 15% of the amount involved. Parties who have participated in a prohibited transaction for which an exemption is not available must pay the excise tax and file Form 5330 with the Internal Revenue Service.

Prohibited Provisions

Finally, in order to preserve these various enforcement rights, Section II(f) of the proposal provides that certain provisions may not be in the contract. If these provisions appear in a contract with a Retirement Investor, the exemption is not satisfied with respect to transactions involving that Retirement Investor. First, the proposal provides that the contract may not contain exculpatory provisions that disclaim or otherwise limit liability for an Adviser's or Financial Institution's violations of the contract's terms. Second, the contract may not require the plan, IRA or Retirement Investor to agree to waive its right to bring or participate in a class action or other representative action in court in a contract dispute with the Adviser or Financial Institution. The right of a Retirement Investor to bring a class-action claim in court (and the corresponding limitation on fiduciaries' ability to mandate class-action arbitration) is consistent with FINRA's position that its arbitral forum is not the correct venue for class-action claims. As proposed, this section would not impact the ability of a Financial Institution or Adviser, and a Retirement Investor, to enter into pre-dispute binding arbitration agreement with respect to individual contract claims. The Department expects that most such individual arbitration claims under this exemption will be subject to FINRA's arbitration procedures and consumer protections. The Department seeks comments on whether there are certain procedures and/or consumer protections that it should adopt or mandate for those contract disputes not covered by FINRA.

General Conditions Applicable to Each Transaction (Section III)

Section III of the proposal sets forth conditions that apply to the terms of each principal transaction entered into under the exemption. As noted above, Section III(a) of the proposal provides that the debt security being bought or sold must not have been issued or, at the time of the transaction, underwritten by the Financial Institution or any Affiliate. The debt security also must possess no greater than a moderate credit risk and be sufficiently liquid that the debt security could be sold at or near its fair market value within a reasonably short period of time.

Section III(b) provides that the principal transaction may not be part of an agreement, arrangement, or understanding designed to evade compliance with ERISA or the Code, or to otherwise impact the value of the debt security. Such a condition protects against the Adviser or Financial Institution manipulating the terms of the principal transaction, either as an isolated transaction or as a part of a series of transactions, to benefit themselves or their Affiliates. Further, this condition would also prohibit an Adviser or Financial Institution from engaging in principal transactions with Retirement Investors for the purpose of ridding inventory of unwanted or poorly performing debt securities.

Section III(c) of the proposal provides that the purchase or sale of the debt security must be for no consideration other than cash. By limiting a purchase or sale of debt securities to cash consideration, the Department intends that relief will not be provided for a principal transaction that is executed on an in-kind basis.

Finally, Section III(d) of the proposal addresses the pricing of the principal transaction. Section III(d)(1) provides that the purchase or sale of the debt security must be executed at a price that the Adviser and Financial Institution reasonably believe is at least as favorable to the plan, participant or beneficiary account, or IRA than the price available to the plan, participant or beneficiary account, or IRA in a transaction that is not a principal transaction. Section III(d)(2) provides that the purchase or sale of the debt security must be at least as favorable to the plan, participant or beneficiary account, or IRA as the contemporaneous price for the debt security, or a similar security if a price is not available with respect to the same debt security, offered by two ready and willing counterparties that are not Affiliates in agency transactions. When evaluating the price offered by the counterparties, the Adviser and Financial Institution may take into account the resulting price to the plan, participant or beneficiary account, or IRA, including commissions. The Department intends that the proposal should allow a comparison between the actual cost to the plan, participant or beneficiary account, or IRA of the principal transaction (including the mark-up or mark-down) and the actual cost to the plan, participant or beneficiary account, or IRA of a non-principal transaction (*e.g.,* an agency transaction) in the same or a similar debt security, including a commission.

For purposes of Section III(d)(2), the similarity of a debt security should be construed in accordance with FINRA Rule 2121, or its successor, and the guidance promulgated thereunder. Generally, such guidance has stated that a similar debt security is one which is sufficiently similar to the subject debt security that it would serve as a reasonable alternative investment for the applicable investor.

Disclosure Requirements (Section IV)

Prior to engaging in a principal transaction, Section IV(a) of the proposal provides that the Adviser or Financial Institution must provide a pre-transaction disclosure to the Retirement Investor, either orally or in writing. The disclosure must notify the Retirement Investor that the purchase or sale of the debt security will be executed as a principal transaction between the Adviser or Financial Institution and the plan, participant or beneficiary account, or the IRA. Further, the disclosure must also provide the Retirement Investor with any available pricing information regarding the debt security, including two quotes obtained from unaffiliated parties required by Section III(d)(2).

As proposed, the pre-transaction disclosure set forth in Section IV(a) would also include the mark-up or mark-down to be charged in connection with the principal transaction. The purpose of this requirement would be to permit the Retirement Investor to evaluate the compensation and other transaction costs associated with the principal transaction. The Department believes it is important that the Financial Institution and Adviser disclose the compensation they will receive before the Retirement Investor consents to engage in the principal transaction.

For purpose of Section IV, the Department is considering defining a mark-up as the amount in excess of the ''prevailing market price'' that a customer pays for the debt security. Mark-down would be defined as the amount by which the price of a debt security is reduced from the ''prevailing market price'' that a customer receives for the debt security. The Department is further considering whether to define the ''prevailing market price'' by reference to FINRA Rule 2121 and Supplementary Material .02 thereunder, which sets forth a methodology for determining the prevailing market price.

We request comment on our proposed approach to the definition of mark-up and mark-down, and in particular, our potential reliance on the FINRA guidance in Rule 2121 for purposes of the disclosure requirement in this exemption. Would a disclosure of the mark-up/down as defined in this manner provide information that will be useful to Retirement Investors in evaluating the principal transaction? Are there practical difficulties with our approach? Are there other formulations of the mark-up mark-down definition that have advantages in these respects?

Section IV(b) of the proposal provides that the Financial Institution must provide a written confirmation of the principal transaction in accordance with Rule 10b–10 under the Securities Exchange Act of 1934 [22] that also includes disclosure of the mark-up, mark-down, or other payment to the Adviser, Financial Institution or Affiliate in connection with the Principal Transaction.

Section IV(c) of the proposal provides that the Adviser or the Financial Institution must provide the Retirement Investor with an annual statement that lists the principal transactions engaged in during the year, provides the prevailing market price at which the debt security was purchased or sold, and provides the applicable mark-up or mark-down or other payment for each debt security. The annual statement must also remind the Retirement Investor that it may withdraw its consent to principal transactions at any time, without penalty to the plan, participant or beneficiary account, or IRA. The annual statement may be provided in combination with other statements provided to the Retirement Investor by the Adviser or Financial Institution.

Finally, Section IV(d) of the proposal provides that, upon reasonable request, the Adviser or Financial Institution must provide the Retirement Investor with additional information regarding the debt security and the transaction for any principal transaction that has occurred within the past 6 years preceding the date of the request.

Recordkeeping (Section V) and Definitions (Section VI)

Section V of the proposal establishes a recordkeeping requirement, and Section VI sets forth definitions that are used in the proposed exemption.

Applicability Date

The Department is proposing that compliance with the final regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) will begin eight months after publication of the final regulation in the **Federal Register** (Applicability Date). The Department proposes to make this exemption, if granted, available on the Applicability Date.

No Relief Proposed From ERISA Section 406(a)(1)(C) or Code section 4975(c)(1)(C) for the Provision of Services

If granted, this proposed exemption will not provide relief from a transaction prohibited by ERISA section 406(a)(1)(C), or from the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(C), regarding the furnishing of goods, services or facilities between a plan and a party in interest. The provision of investment advice to a plan under a contract with a fiduciary is a service to the plan and compliance with this exemption will not relieve an Adviser or Financial Institution of the need to comply with ERISA section 408(b)(2), Code section 4975(d)(2), and applicable regulations thereunder.

Paperwork Reduction Act Statement

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

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs as part of its proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan, participant or beneficiary, or IRA owner, becomes a fiduciary. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov*.

The Department has submitted a copy of the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

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

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

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

As discussed in detail below, the proposed class exemption would permit principal transactions in certain debt securities between a plan, participant or beneficiary account, or an IRA, and a financial institution or certain of its affiliates. The proposed class exemption

[22] 17 CFR 240.10b–10.

would require financial institutions and their advisers to enter into a contractual arrangement with the retirement investor (*i.e.,* the plan fiduciary, participant or beneficiary, or the IRA owner), make certain disclosures to the retirement investors and maintain records necessary to prove that the conditions of the exemption have been met for a period of six (6) years from the date of each principal transaction. These requirements are ICRs subject to the PRA.

The Department has made the following assumptions in order to establish a reasonable estimate of the paperwork burden associated with these ICRs:

- Approximately 2,800 financial institutions [23] will utilize the proposed exemption to engage in principal transactions and eight percent will be new each year;
- Financial Institutions and advisers will use existing in-house resources to obtain the required quotes and maintain the recordkeeping systems necessary to meet the requirements of the exemption; and
- A combination of personnel will perform the tasks associated with the ICRs at an hourly wage rate of $125.95 for a financial manager, $30.42 for clerical personnel, $79.67 for an IT professional, and $129.94 for a legal professional.[24]

Obtaining Quotes

In order to engage in principal transactions, Section III(d) of the proposed class exemption requires financial institutions to obtain two price quotes from unaffiliated parties in agency transactions. The Department estimates that ten percent of defined benefit (DB) plans that obtain investment advice from fiduciaries will engage in principal transactions. These plans are assumed to engage in one transaction per year requiring a total of approximately 2,000 quotes annually. Similarly, the Department estimates that ten percent of defined contribution (DC) plans that do not allow participants to direct investments that obtain investment advice from fiduciaries will engage in principal transactions. These plans are assumed to engage in one transaction per year requiring a total of approximately 6,000 quotes annually. The Department estimates that one percent of DC plan participants, who direct their own investments and obtain investment advice from fiduciaries, will engage in 12 principal transactions annually (one per month) requiring approximately 261,000 quotes. Finally, the Department estimates that ten percent of IRA owners who obtain investment advice from fiduciaries will engage in principal transactions. They are assumed to engage in one transaction per year requiring a total of approximately 4 million quotes annually.

Overall, the terms of this exemption will result in financial institutions and advisers obtaining approximately 4.3 million quotes per year. The Department assumes that a financial manager will spend five minutes to obtain the quotes. Therefore, obtaining quotes will produce approximately 359,000 hours of burden annually at an equivalent cost of $45.2 million.

Contract

In order to engage in principal transactions under this proposed class exemption, Section II requires financial institutions and advisers to enter into a written contract with retirement investors affirmatively stating that the financial institution and adviser are fiduciaries under ERISA or the Code with respect to recommendations regarding principal transactions, and that the financial institution and adviser will act in the best interest of the retirement investor.

The Department assumes that financial institutions already maintain contracts with their clients. Drafting the contractual provisions required by Section II and inserting them into the existing contracts will require 24 hours of legal time during the first year that the financial institution uses the class exemption. This legal work results in approximately 67,000 hours of burden during the first year and approximately 5,000 hours of burden during subsequent years at an equivalent cost of $8.7 million and $699,000 respectively.

Because the Department assumes that financial institutions already maintain contracts with their clients, the required contractual provisions will not require any additional costs for production or distribution.

Disclosures and Statement

The conditions of this PTE require the financial institution and adviser to make certain disclosures to the retirement investor. These disclosures include the two price quotes obtained from unaffiliated parties in agency transactions, other available pre-transaction pricing information, as well as the mark-up/mark-down to be charged, and an annual statement describing all transactions made during the year. The quotes and pre-transaction pricing and mark-up disclosures may be made orally or in writing. The Department assumes that all financial institutions and advisers will use the oral option at no additional burden.

The Department estimates that 2 million plans and IRAs will receive a one-page annual statement. DB and DC plans that do not allow participants to direct investments will receive the statement electronically at de minimis cost. The statement will be distributed electronically to 38 percent of the 11,000 DC plan participants and 50 percent of 2 million IRA holders at de minimis cost. Paper statements will be mailed to 62 percent of DC plan participants and 50 percent of IRA owners. The Department estimates that electronic distribution will result in de minimis cost, while paper distribution will cost approximately $548,000. Paper distribution will also require two minutes of clerical time to print and mail the statement, resulting in 34,000 hours at an equivalent cost of $1 million annually.

Confirmation

The conditions of this PTE require the financial institution to provide a confirmation notice upon completion of each transaction. The Department believes that providing confirmation notices is a regular and customary business practice, and therefore no additional burden is imposed by this requirement.

Recordkeeping Requirement

Section V of the class exemption requires the financial institution to maintain or cause to be maintained for six years and disclosed upon request the records necessary for the Department, Internal Revenue Service, plan fiduciary, contributing employer or

[23] As described in the regulatory impact analysis for the accompanying rule, the Department estimates that approximately 2,619 broker-dealers service the retirement market. The Department anticipates that the exemption will be used primarily, but not exclusively, by broker-dealers. Further, the Department assumes that all broker-dealers servicing the retirement market will use the exemption. Beyond the 2,619 broker-dealers, the Department estimates that almost 200 other financial institutions will use the exemption.

[24] The Department's estimated 2015 hourly labor rates include wages, other benefits, and overhead, and are calculated as follows: Mean wage from the 2013 National Occupational Employment Survey (April 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/pdf/ocwage.pdf*); wages as a percent of total compensation from the Employer Cost for Employee Compensation (June 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/ecec.t02.htm*); overhead as a multiple of compensation is assumed to be 25 percent of total compensation for paraprofessionals, 20 percent of compensation for clerical, and 35 percent of compensation for professional; annual inflation assumed to be 2.3 percent annual growth of total labor cost since 2013 (Employment Costs Index data for private industry, September 2014 *http://www.bls.gov/news.release/eci.nr0.htm*).

employee organization whose members are covered by the plan, participants, beneficiaries and IRA owners to determine whether the conditions of this exemption have been met in a manner that is accessible for audit and examination.

The Department assumes that each financial institution will maintain these records in the normal course of business. Therefore, the Department has estimated that the additional time needed to maintain records consistent with the exemption will only require about one-half hour, on average, annually for a financial manager to organize and collate the documents or else draft a notice explaining that the information is exempt from disclosure, and an additional 15 minutes of clerical time to make the documents available for inspection during normal business hours or prepare the paper notice explaining that the information is exempt from disclosure. Thus, the Department estimates that a total of 45 minutes of professional time per firm would be required for a total hour burden of 2,100 hours at an equivalent cost of $198,000.

In connection with this recordkeeping and disclosure requirements discussed above, Section V(b)(2) and (3) provides that financial institutions relying on the exemption do not have to disclose trade secrets or other confidential information to members of the public (*i.e.,* plan fiduciaries, contributing employers or employee organizations whose members are covered by the plan, participants and beneficiaries and IRA owners), but that in the event they refuse to disclose information on this basis, they must provide a written notice to the requester advising of the reasons for the refusal and advising that the Department may request such information. The Department's experience indicates that this provision is not commonly invoked, and therefore, the written notice is rarely, if ever, generated. Therefore, the Department believes the cost burden associated with this clause is de minimis. No other cost burden exists with respect to recordkeeping.

IT Costs

The Department estimates that updating computer systems to insert the contract provisions into existing contracts, maintain the required records, and insert the required markup information into existing confirmation notices will require eight hours of IT staff time during the first year that the financial institution uses the PTE. This IT work results in approximately 22,000 hours of burden during the first year and approximately 1,800 hours of burden during subsequent years at an equivalent cost of $1.8 million and $142,000 respectively.

Overall Summary

Overall, the Department estimates that in order to meet the conditions of this class exemption, financial institutions and advisers will obtain approximately 4.3 million price quotes and distribute an additional 2 million statements annually. Obtaining these quotes, distributing statements, adjusting contracts, and maintaining records that the conditions of the exemption have been fulfilled will result in a total of 484,000 hours of burden during the first year and 402,000 hours of burden in subsequent years. The equivalent cost of this burden is $51.1million during the first year and $47.2 million in subsequent years. This exemption will result in a materials and postage cost burden of $548,000 annually.

These paperwork burden estimates are summarized as follows:

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

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: (1) Proposed Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs and (2) Proposed Investment Advice Regulation.

OMB Control Number: 1210–NEW.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 2,800.

Estimated Number of Annual Responses: 6,333,921.

Frequency of Response: When engaging in exempted transaction; Annually.

Estimated Total Annual Burden Hours: 484,072 hours during the first year, 401,643 in subsequent years.

Estimated Total Annual Burden Cost: $548,079.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan or IRA 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, where applicable, 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) If granted, this class exemption does not extend to transactions prohibited under ERISA section 406(a)(1)(B) and (C), ERISA section 406(b)(3) and Code section 4975(c)(1)(B), (C), and (F);

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

(4) If granted, this class exemption will be applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption; and

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

Proposed Exemption

The Department is proposing the following exemption 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).[25]

Section I—Exemption

(a) *In general.* ERISA and the Internal Revenue Code prohibit fiduciary advisers to employee benefit plans (Plans) and individual retirement plans (IRAs) from self-dealing, including receiving compensation that varies based on their investment recommendations. ERISA and the Code also prohibit fiduciaries from engaging in securities purchases and sales with Plans or IRAs on behalf of their own accounts (Principal Transactions). This exemption permits certain persons who provide investment advice to Retirement Investors (*i.e.,* fiduciaries of Plans, Plan participants or beneficiaries,

[25] For purposes of this proposed exemption, references to ERISA should be read to refer as well to the corresponding provisions of the Code.

or IRA owners) to engage in certain Principal Transactions as described below.

(b) *Exemption for Certain Principal Transactions.* This exemption permits an Adviser or Financial Institution to engage in the purchase or sale of a Debt Security in a Principal Transaction with a Plan, participant or beneficiary account, or IRA, and receive a mark-up, mark-down or other payment for themselves or any Affiliate, as a result of the Adviser's and Financial Institution's advice. As detailed below, parties seeking to rely on the exemption must contractually acknowledge fiduciary status, agree to adhere to Impartial Conduct Standards in rendering advice, disclose Material Conflicts of Interest associated with Principal Transactions and obtain the prospective written consent of the Plan or IRA; warrant that they have adopted policies and procedures designed to mitigate the dangers posed by Material Conflicts of Interest; disclose important information about the cost of the security in the Principal Transaction and retain certain records. This exemption provides relief from ERISA section 406(a)(1)(A) and (D) and section 406(b)(1) and (2), and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), and (E). The Adviser and Financial Institution must comply with the conditions of Sections II–V.

(c) *Scope of this exemption:* This exemption does not apply if:

(1) The Adviser: (i) Exercises any discretionary authority or discretionary control respecting management of the assets of the Plan or IRA involved in the transaction or exercises any discretionary authority or control respecting management or the disposition of the assets; or (ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA; or

(2) The Plan is covered by Title I of ERISA and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser or Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide investment advice to the plan by a fiduciary who is not Independent.

Section II—Contract, Impartial Conduct, and Other Requirements

(a) *Contract.* Prior to engaging in the Principal Transaction, the Adviser and Financial Institution enter into a written contract with the Retirement Investor, acting on behalf of the Plan, participant or beneficiary account, or IRA, that incorporates the terms required by Section II(b)–(e).

(b) *Fiduciary.* The written contract affirmatively states that the Adviser and Financial Institution are fiduciaries under ERISA or the Code, or both, with respect to any investment recommendation to the Retirement Investor regarding Principal Transactions.

(c) *Impartial Conduct Standards.* The Adviser and Financial Institution affirmatively agree to, and comply with, the following:

(1) When providing investment advice to a Retirement Investor regarding the Principal Transaction, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (*i.e.,* advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution, or any Affiliate or other party);

(2) The Adviser and Financial Institution will not enter into a Principal Transaction with the Plan, participant or beneficiary account, or IRA if the purchase or sales price of the Debt Security (including the mark-up or mark-down) is unreasonable under the circumstances; and

(3) The Adviser's and Financial Institution's statements about the Debt Security, fees, Material Conflicts of Interest, the Principal Transaction, and any other matters relevant to a Retirement Investor's investment decision in the Debt Security, are not misleading.

(d) *Warranty.* The Adviser and Financial Institution affirmatively warrant the following:

(1) The Adviser, Financial Institution and Affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice and the purchase and sale of the Debt Security;

(2) The Financial Institution has adopted written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest and to ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c);

(3) In formulating its policies and procedures, the Financial Institution has specifically identified Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards set forth in Section II(c); and

(4) Neither the Financial Institution nor (to the best of its knowledge) any Affiliate uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differentiated compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations regarding Principal Transactions that are not in the Best Interest of the Retirement Investor.

(e) *Principal Transaction Disclosures.* The written contract must specifically:

(1) Set forth in writing (i) the circumstances under which the Adviser and Financial Institution may engage in Principal Transactions with the Plan, participant or beneficiary account, or IRA and (ii) identify and disclose the Material Conflicts of Interest associated with Principal Transactions;

(2) Document the Retirement Investor's affirmative written consent, on a prospective basis, to Principal Transactions between the Adviser or Financial Institution and the Plan, participant or beneficiary account, or IRA; and

(3) Inform the Retirement Investor (i) that the consent set forth in Section II(e)(2) is terminable at will by the Retirement Investor at any time, without penalty to the Plan or IRA, and (ii) of the right to obtain complete information about all the fees and other payments currently associated with its investments.

(f) *Prohibited Contractual Provisions.* The written contract shall not contain the following:

(1) Exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution for a violation of the contract's terms; and

(2) A provision under which the Plan, IRA or the Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution.

Section III—General Conditions

(a) *Debt Security.* The Debt Security being purchased or sold:

(1) Was not issued by the Financial Institution or any Affiliate;

(2) Is not purchased by the Plan, participant or beneficiary account, or IRA in an underwriting or underwriting syndicate in which the Financial

Institution or any Affiliate is the underwriter or a member;

(3) Possesses no greater than a moderate credit risk; and

(4) Is sufficiently liquid that the Debt Security could be sold at or near its fair market value within a reasonably short period of time.

(b) *Arrangement.* The Principal Transaction is not part of an agreement, arrangement, or understanding designed to evade compliance with ERISA or the Code, or to otherwise impact the value of the Debt Security.

(c) *Cash.* The purchase or sale of the Debt Security is for cash.

(d) *Pricing.* The purchase or sale of the Debt Security is executed at a price that:

(1) The Adviser and Financial Institution reasonably believe is at least as favorable to the Plan, participant or beneficiary account, or IRA than the price available to the Plan, participant or beneficiary account, or IRA in a transaction that is not a Principal Transaction; and

(2) Is at least as favorable to the Plan, participant or beneficiary account, or IRA as the contemporaneous price for the Debt Security, or a similar security if a price is not available with respect to the same Debt Security, offered by two ready and willing counterparties that are not Affiliates.

When comparing the price offered by the counterparties referred to in (2), the Adviser and Financial Institution may take into account a commission as part of the resulting price to the Plan, participant or beneficiary account, or IRA, as compared to the price of the Debt Security, including any mark-up or mark-down.

Section IV—Disclosure Requirements

(a) *Pre-Transaction Disclosure.* Prior to engaging in the Principal Transaction, the Adviser or Financial Institution provides the following, orally or in writing, to the Retirement Investor:

(1) A statement that the purchase or sale of the Debt Security will be executed as a Principal Transaction between the Adviser or Financial Institution and the Plan, participant or beneficiary account, or IRA; and

(2) Any available pricing information regarding the Debt Security, including the two quotes obtained pursuant to Section III(d). The mark-up or mark-down or other payment that will be charged also must be disclosed.

(b) *Confirmation.* The Financial Institution provides a written confirmation of the Principal Transaction in accordance with Rule 10b–10 under the Securities Exchange Act of 1934 that also includes disclosure of the mark-up, mark-down, or other payment to the Adviser, Financial Institution or Affiliate in connection with the Principal Transaction.

(c) *Annual Disclosure.* The Adviser or Financial Institution provides the following written information to the Retirement Investor, annually, within 45 days of the end of the applicable year, in a single disclosure:

(1) A list identifying each Principal Transaction engaged in during the applicable period, the prevailing market price at which the Debt Security was purchased or sold, and the applicable mark-up or mark-down or other payment for each Debt Security; and

(2) A statement that the consent required pursuant to Section II(e)(2) is terminable at will, without penalty to the Plan or IRA.

(d) *Upon Request.* Upon the Retirement Investor's reasonable request, prior to or following the completion of a Principal Transaction, the Adviser or Financial Institution must provide the Retirement Investor with additional information regarding the Debt Security and its purchase or sale; provided that such request may not relate to a Principal Transaction that was executed more than six (6) years from the date of the request.

Section V—Recordkeeping

(a) The Financial Institution maintains for a period of six (6) years from the date of each Principal Transaction the records necessary to enable the persons described in Section V(b) to determine whether the conditions of this exemption have been met, except that:

(1) If such records are lost or destroyed, due to circumstances beyond the control of the Financial Institution, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party other than the Financial Institution that is engaging in the Principal Transaction shall be subject to the civil penalty that may be assessed under ERISA section 502(i) or to the taxes imposed by Code sections 4975(a) and (b) if the records are not maintained or are not available for examination as required by Section V(b).

(b)

(1) Except as provided in Section V(b)(2) and notwithstanding any provisions of ERISA sections 504(a)(2) and 504(b), the records referred to in Section V(a) are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) any fiduciary of the Plan or IRA that was a party to a Principal Transaction described in this exemption, or any duly authorized employee or representative of such fiduciary;

(iii) any employer of participants and beneficiaries and any employee organization whose members are covered by the Plan, or any authorized employee or representative of these entities; and

(iv) any participant or beneficiary of the Plan, or the beneficial owner of an IRA.

(2) None of the persons described in subparagraph (1)(ii) through (iv) are authorized to examine trade secrets of the Financial Institution, or commercial or financial information which is privileged or confidential; and

(3) Should the Financial Institution refuse to disclose information on the basis that such information is exempt from disclosure, the Financial Institution must by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

Section VI—Definitions

(a) ''Adviser'' means an individual who:

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

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

(3) Satisfies the applicable banking, and securities laws with respect to the covered transaction.

(b) ''Affiliate'' of an Adviser or Financial Institution mean:

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

(2) Any officer, director, employee, relative (as defined in ERISA section 3(15)) or member of family (as defined in Code section 4975(e)(6)), agent or registered representative of, or partner

in the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director, or employee, or in which the Adviser or Financial Institution is a partner.

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

(d) ''Debt Security'' means a ''debt security'' as defined in Rule 10b–10(d)(4) of the Exchange Act that is:

(1) U.S. dollar denominated, issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933;

(2) An ''Agency Debt Security'' as defined in FINRA Rule 6710(l) or its successor; or

(3) A ''U.S. Treasury Security'' as defined in FINRA Rule 6710(p) or its successor.

(e) ''Financial Institution'' means the entity that (i) employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative, and (ii) customarily purchases or sells Debt Securities for its own account in the ordinary course of its business, and that is:

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

(2) A bank or similar financial institution supervised by the United States or state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice resulting in the compensation is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by federal or state banking authorities; and

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

(f) ''Independent'' means a person that:

(1) Is not the Adviser or Financial Institution or an Affiliate;

(2) Does not receive compensation or other consideration for his or her own account from the Adviser, Financial Institution or an Affiliate; and

(3) Does not have a relationship to or an interest in the Adviser, Financial Institution or an Affiliate that might affect the exercise of the person's best judgment in connection with transactions described in this exemption.

(g) ''Individual Retirement Account'' or ''IRA'' means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in Code section 408(a) and a health savings account described in Code section 223(d).

(h) A ''Material Conflict of Interest'' exists when an Adviser or Financial Institution has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding Principal Transactions.

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

(j) ''Principal Transaction'' means a purchase or sale of a Debt Security where an Adviser or Financial Institution is purchasing from or selling to a Plan, participant or beneficiary account, or IRA on behalf of the Financial Institution's own account or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution.

(k) ''Retirement Investor'' means:

(1) A fiduciary of a non-participant directed Plan subject to Title I of ERISA with authority to make investment decisions for the Plan;

(2) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution; or

(3) The beneficial owner of an IRA acting on behalf of the IRA.

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11687]

ZRIN 1210–ZA25

Proposed Amendment to Prohibited Transaction Exemption (PTE) 75–1, Part V, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

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

ACTION: Notice of Proposed Amendment to PTE 75–1, Part V.

SUMMARY: This document contains a notice of pendency before the Department of Labor of a proposed amendment to PTE 75–1, Part V, a class exemption from certain prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). The provisions at issue generally prohibit fiduciaries of employee benefit plans and individual retirement accounts (IRAs), from lending money or otherwise extending credit to the plans and IRAs and receiving compensation in return. PTE 75–1, Part V, permits the extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities; however, it does not permit the receipt of compensation for an extension of credit by broker-dealers that are fiduciaries with respect to the assets involved in the transaction. The amendment proposed in this notice would permit investment advice fiduciaries to receive compensation when they extend credit to plans and IRAs to avoid a failed securities transaction. The proposed amendment would affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

DATES: *Comments:* Written comments concerning the proposed class exemption must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make this amendment applicable eight months after publication of the final amendment in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendment to the class exemption should be sent to