DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11327]

ZRIN 1210–ZA25

Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86–128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTE 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks

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

ACTION: Notice of proposed amendments to and proposed partial revocation of PTEs 86–128 and 75–1.

SUMMARY: This document contains a notice of pendency before the Department of Labor of proposed amendments to Prohibited Transaction Exemptions (PTEs) 86–128 and 75–1, exemptions from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing in connection with transactions involving plans and IRAs. The exemptions allow fiduciaries to receive compensation in connection with certain securities transactions entered into by plans and IRAs. The proposed amendments would increase the safeguards of the exemptions. This document also contains a notice of pendency before the Department of the proposed revocation of PTE 86–128 with respect to transactions involving investment advice fiduciaries and IRAs, and of PTE 75–1, Part II(2), and PTE 75–1, Parts I(b) and I(c), as duplicative in light of existing or newly proposed relief. The amendments and revocations would affect participants and beneficiaries of plans, IRA owners and certain fiduciaries of plans and IRAs.

DATES:

Comments: Written comments must be received by the Department on or before July 6, 2015.

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

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

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

Email to: e-OED@dol.gov.

Fax to: (202) 693–8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11327), 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–11327), 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, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210, (202) 693–8824 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department is proposing the amendments to and partial revocation of PTEs 86–128 and 75–1 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

These proposed amendments and revocations are being published in the same issue of the **Federal Register** as the Department's proposed regulation that would amend the definition of a ''fiduciary'' of an employee benefit plan or an IRA under ERISA and the Internal Revenue Code (Proposed Regulation). 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.

PTEs 86–128 and 75–1, Part II(2), permit fiduciaries to receive fees in connection with certain securities transactions entered into by plans and IRAs in accordance with the fiduciaries' advice. In the absence of an exemption, ERISA and the Code generally prohibit fiduciaries from using their authority to affect or increase their own compensation. These proposed amendments would affect the scope of the exemptions and conditions under which fiduciaries may receive such compensation.

The Secretary of Labor may grant and amend administrative exemptions from the prohibited transaction provisions of

ERISA and the Code.[1] Before granting an amendment to an exemption, the Department must find that the amended exemption is administratively feasible, in the interests of plans, their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of such plans and IRA owners. 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

PTE 86–128 currently provides an exemption for certain fiduciaries and their affiliates to receive a fee from a plan or IRA for effecting or executing securities transactions as an agent on behalf of the plan or IRA. It also allows a fiduciary to act in an ''agency cross transaction''—as an agent both for the plan or IRA and for another party—and receive reasonable compensation from the other party. The exemption generally requires compliance with certain conditions such as advance disclosures to and approval by an independent fiduciary, although such conditions are not currently applicable to transactions involving IRAs.

This proposed amendment to PTE 86–128 would increase the safeguards of the exemption in a number of ways. The amendment would require fiduciaries relying on the exemption to adhere to certain ''Impartial Conduct Standards,'' including acting in the best interest of the plans and IRAs when providing advice, and would define the types of payments that are permitted under the exemption. The amendment would restrict relief under this exemption to IRA fiduciaries that have discretionary authority or control over the management of the IRA's assets (*i.e.,* investment managers) and would take the additional step of imposing the exemption's conditions on investment management fiduciaries when they engage in transactions with IRAs. The proposal would revoke relief for fiduciaries who provide investment advice to IRAs. A new exemption for receipt of compensation by fiduciaries who provide investment advice to IRAs, plan participants, and certain small plans is proposed elsewhere in this issue of the **Federal Register** in the ''Best Interest Contract Exemption.'' In the Department's view, the provisions of the Best Interest Contract Exemption better protect the interests of IRAs with respect to investment advice regarding securities transactions.

This proposed amendment also would add a new transaction to the exemption for certain fiduciaries to act as principals (as opposed to agents for third parties) in selling mutual fund shares to plans and IRAs and to receive commissions for doing so. An exemption for this transaction is currently available in PTE 75–1, Part II(2), with few applicable safeguards.

Several changes are proposed with respect to PTE 75–1. The Department is proposing to revoke PTE 75–1, Part II(2), as that exemption would be incorporated within PTE 86–128 subject to additional safeguards. Part I(b) and (c) of PTE 75–1 also would be revoked. These provisions of PTE 75–1 provide relief for certain non-fiduciary services to plans and IRAs. If these provisions are revoked, persons seeking to engage in such transactions should look to the existing statutory exemptions provided in ERISA section 408(b)(2) and Code section 4975(d)(2), and the Department's implementing regulations at 29 CFR 2550.408b-2, for relief.

Finally, this document proposes to amend the remaining exemption of PTE 75–1, Part II, to revise the recordkeeping requirement of that exemption.

Executive Order 12866 and 13563 Statement

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

Under Executive Order 12866, ''significant'' regulatory actions are subject to the requirements of the Executive Order and review by the 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

As explained more fully in the preamble to the Department's proposed regulation on the definition of fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), also published in this issue of the **Federal Register**, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in its imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[2] In

[1] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption under ERISA. Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under Code section 4975 to the Secretary of Labor.

[2] ERISA section 404(a).

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.[3] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.[4] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

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

Under this statutory framework, the determination of who is a ''fiduciary'' is of central importance. Many of ERISA's protections, duties, and liabilities hinge on fiduciary status. In relevant part, section 3(21)(A) of ERISA and section 4975(e)(3) of the Code provide that a person is a fiduciary with respect to a plan or IRA to the extent he or she (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.

ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his or her own interest or his or her own account. 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. Accordingly, a fiduciary may not cause a plan or IRA to pay an additional fee to such fiduciary, or to a person in which such fiduciary has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary.

The Department understands that investment professionals are often compensated on a commission basis for effecting or executing securities transactions for plans, plan participants, and IRA owners. Because such payments vary based on the advice provided, the Department views a fiduciary that recommends to a plan or IRA a securities transaction and then receives a commission for itself or a related party as violating the prohibited transaction provisions of ERISA section 406(b) and Code section 4975(c)(1)(E).

PTE 86–128 [5] provides an exemption from these prohibited transactions provisions for certain types of fiduciaries to use their authority to cause a plan or IRA to pay a fee to the fiduciary, or its affiliate, for effecting or executing securities transactions as agent for the plan. The exemption further provides relief for these types of fiduciaries to act as agent in an ''agency cross transaction'' for both a plan or IRA and one or more other parties to the transaction, and for such fiduciaries or their affiliates to receive fees from the other party(ies) in connection with the agency cross transaction. An agency cross transaction is defined in the exemption as a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

As originally granted, the exemption in PTE 86–128 could be used only by fiduciaries who were not discretionary trustees, plan administrators, or employers of any employees covered by the plan.[6] PTE 86–128 was amended in 2002 to permit use of the exemption by discretionary trustees, and their affiliates, without meeting the ''recapture of profits'' provisions, subject to certain additional requirements.[7] Additionally, in 2011 the Department clarified that PTE 86–128 provides relief for covered transactions engaged in by fiduciaries who provide investment advice.[8]

If granted, this proposed amendment would make additional changes, discussed below, to PTE 86–128, as well as a re-ordering of the sections of the exemption.[9] The Department notes that the relief provided under PTE 86–128 is limited to ERISA section 406(b) and Code section 4975(c)(1)(E) and (F), for self-dealing and other conflict of interest transactions involving fiduciaries. Relief from the prohibitions of ERISA section 406(a)(1)(C) or Code section 4975(c)(1)(C), for the provision of services to a plan, would be available only by meeting the requirements of the statutory exemptions of ERISA section 408(b)(2) and Code section 4975(d)(2) and the Department's regulations in 29 CFR 2550.408b–2.[10]

Description of the Proposed Amendments

I. Impartial Conduct Standards

This proposal would amend PTE 86–128 to require fiduciaries engaging in the exempted transactions to adhere to certain Impartial Conduct Standards. The Impartial Conduct Standards are set forth in a new proposed Section II. The standards would only be applicable to the extent they are applicable to the fiduciary's actions.

Under the first conduct standard, fiduciaries would be required to act in the plan's or IRA's best interest when providing investment advice to the plan or IRA, or managing the plan's or IRA's assets. Best interest is defined as acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial

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

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

[5] PTE 86–128, 51 FR 41686 (November 18, 1986), replaced PTE 79–1, 44 FR 5963 (January 30, 1979) and PTE 84–46, 49 FR 22157 (May 25, 1984).

[6] Plan trustees, plan administrators and employers were permitted to rely on the exemption if they returned or credited to the plan all profits (recapture of profits) earned in connection with the transactions covered by the exemption.

[7] 67 FR 64137 (October 17, 2002).

[8] *See* Advisory Opinion 2011–08A (June 21, 2011).

[9] This proposal would move the definitions from Section I to Section VII. The other sections are re-ordered accordingly. Additionally, within the definitions section, the following definitions are new or revised: Independent (Section VII(f)), plan (Section VII(j)), individual retirement account (Section VII(k)), Related Entity (Section VII(l)), Best Interest (Section VII(m)), and Commission (VII(n)).

[10] These statutory exemptions provide relief for making reasonable arrangements between a plan and a party in interest (disqualified person) for, among other things, services necessary for operation of the plan, if no more than reasonable compensation is paid therefore. ERISA section 408(b)(2) and Code section 4975(d)(2) do not provide relief from ERISA section 406(b) or Code section 4975(c)(1)(E) and (F).

circumstances, and the needs of the plan or IRA. Further, under the best interest standard, fiduciaries must act without regard to their own financial or other interests or those of any affiliates or other party. Under this standard, fiduciaries must put the plan's or IRA's interests ahead of the fiduciaries' own financial interests or those of any other party.

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

The second conduct standard requires that all compensation received by the fiduciary and its affiliates in connection with the applicable transaction be reasonable in relation to the total services provided to the plan or IRA. The third conduct standard requires that statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA's investment decisions, are not misleading. The Department notes in this regard that a fiduciary's *failure* to disclose a material conflict of interest may be considered a misleading statement. Transactions that violate the requirements are not likely to be in the interests of or protective of plans, their participants and beneficiaries, and IRA owners.

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

II. IRAs

Currently, Section IV(a) of PTE 86–128 contains an exception from the conditions of the exemption for covered transactions engaged in on behalf of individual retirement accounts described in 29 CFR 2510.3–2(d) (IRAs), and plans, other than training programs, that cover no employees within the meaning of 29 CFR 2510.3–3. The exception was included in response to comments received on the original proposal of PTE 86–128's predecessor, PTE 79–1, suggesting that such plans and IRAs did not need the protection provided by the conditions of the exemption because the participants of such plans and IRAs directly exercise control over their accounts. Additionally, the comments suggested that imposing the conditions on these plans and IRAs would result in unnecessary costs.[11]

Upon reconsideration of the issue, however, the Department has determined that these policy reasons do not support a continued exception from the conditions of PTE 86–128 for IRAs. Since PTE 86–128 was granted, the amount of assets held in IRAs has grown dramatically. The financial services marketplace has become more complex, and compensation structures and the types of products offered have changed significantly beyond what the Department contemplated at the time. The fact that IRA owners generally do not benefit from the protections afforded by the fiduciary duties owed by plan sponsors to their employee benefit plans makes it all the more critical that appropriate safeguards in an exemption apply to IRAs.

The Department therefore is proposing to revise the exemption in several ways with respect to transactions involving IRAs. First, if the amendment is adopted, fiduciaries that exercise discretionary authority or control with respect to IRAs as described in Code section 4975(e)(3)(A) (*i.e.,* investment managers) will be required, among other things, to make the disclosures and receive approvals that are currently required by the exemption with respect to other types of plans. The Department believes that compliance with these conditions will enhance the ability of the authorizing fiduciary, which, in the case of an IRA would be the IRA owner, to monitor fees and compensation paid in connection with their accounts.

Further, if the amendment is adopted, the exemption will no longer provide relief to IRA fiduciaries engaging in the covered transactions if they are fiduciaries due to the provision of investment advice for a fee as described in Code section 4975(e)(3)(B). This change is reflected in a proposed new Section I(c), setting forth the scope of the exemption, which will apply on a prospective basis. Elsewhere in this issue of the **Federal Register**, the Department has proposed a new exemption that specifically provides relief for the receipt by such fiduciaries of a broad range of types of compensation (Best Interest Contract Exemption). The Best Interest Contract Exemption was crafted to protect the interests of retail retirement investors—plan participants and beneficiaries, IRA owners and small plan sponsors—that rely on fiduciary investment advisers to engage in securities transactions, and it contains safeguards specifically crafted for these investors. The exemption requires the investment advice fiduciary to contractually acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, adopt policies and procedures reasonably designed to minimize the harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice. As a result, the exemption ensures that IRA owners have a contract-based claim to hold their fiduciary investment advisers accountable if they violate basic obligations of prudence and loyalty.

The proposed definition of IRA in Section I(c) is ''any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.'' The Department notes that this is not identical to the definition currently in Section IV(a), the exception for IRAs, which is ''individual retirement accounts meeting the conditions of 29 CFR 2510.3–2(d), or plans, other than training programs, that cover no employees within the meaning of 29 CFR 2510.3–3.'' However, this new definition is identical to the definition of IRA used in the proposed Best Interest Contract Exemption. Accordingly, the Best Interest Contract Exemption will be available for transactions involving IRAs that are excluded from this exemption.

III. The Mutual Fund Exemption of PTE 75–1, Part II

PTE 75–1, granted October 31, 1975,[12] provides an exemption for broker-

[11] *See* preamble to PTE 79–1, 44 FR 5963, 5964 (Jan. 30, 1979).

[12] 40 FR 50845 (Oct. 31, 1975).

dealers, reporting dealers and banks to engage in certain classes of transactions with employee benefit plans and IRAs. The exemption has five parts, two of which (Part II and Part V) were amended in 2006.[13]

Part II of PTE 75–1 is captioned ''Principal transactions.'' Part II(1) of the exemption permits the purchase or sale of a security between an employee benefit plan or IRA and a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et. seq.*), a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State. The exemption provided in Part II(1) does not extend to the fiduciary self-dealing and conflicts of interest prohibitions of ERISA and the Code.

PTE 75–1, Part II(2), contains a special exemption for mutual fund purchases (the mutual fund exemption) between fiduciaries and plans or IRAs. Although it does provide relief for fiduciary self-dealing and conflicts of interest, the exemption is only available if the fiduciary who decides on behalf of the plan or IRA to enter into the transaction is not a principal underwriter for, or affiliated with, the mutual fund.

In 2004, when proposing to amend Part II of PTE 75–1,[14] the Department sought public comments on the current utility of the mutual fund exemption. The Department was uncertain if the mutual fund exemption continued to provide meaningful relief to fiduciaries, insofar as many sales of mutual fund shares are made to and from the mutual fund itself. It was the Department's understanding that any broker-dealer involvement in these mutual fund transactions was as agent on behalf of a plan or IRA. Under such circumstances, the transactions would not appear to be properly characterized as ''principal'' transactions.

The Department received three comments on the continuing utility of the mutual fund exemption. The commenters stated that the mutual fund exemption continued to be widely used by the public. As background, the commenters noted that mutual fund transactions had some characteristics of principal transactions as well as agency transactions. In 1975, when the mutual fund exemption was originally granted, mutual funds typically entered into distribution agreements with principal underwriters, and the underwriters in turn entered into selling agreements designated as ''dealer'' agreements, with retail broker-dealers. However, sales of mutual funds under these dealer agreements exhibited many of the economic characteristics of agency transactions. For example, commenters stated that the selling broker-dealer was not at risk because it could not inventory mutual fund shares. Additionally, as mutual funds were required to be sold at net asset value (NAV), the broker-dealer usually received a fixed sales commission for effecting the transaction, rather than a negotiable dealer mark-up.

These commenters indicated that these features were still commonplace in mutual fund transactions. Additionally, the commenters indicated that this exemption was commonly understood to provide relief for the receipt of commissions by such broker-dealer fiduciaries in connection with the transactions.[15] In issuing the final amendment to PTE 75–1, Part II, the Department acknowledged these comments and stated that additional time was needed to fully consider the issues raised in these comments. Pending further action by the Department, the mutual fund exemption has remained in effect.[16]

After further consideration of these comments, the Department concurs that the relief provided by the mutual fund exemption remains relevant to broker-dealer fiduciaries that use their authority to cause plans and IRAs to purchase mutual fund shares. The Department believes that the transaction described in PTE 75–1, Part II(2), is most accurately described as a ''riskless principal'' transaction, in which the fiduciary that is providing investment advice purchases shares on its own account for the purpose of covering a purchase order previously received from a plan or IRA, and then sells the shares to the plan or IRA to satisfy the order.

However, the existing mutual fund exemption needs to be revised in a manner that would make it consistent with more recent exemptions that similarly provide broad relief from fiduciary self-dealing and conflicts of interest. PTE 86–128 covers transactions that are the most similar to those covered in the mutual fund exemption in that the relief it provides permits a fiduciary to use its authority to receive a commission for effecting or executing a plan's or IRA's securities transactions as agent for the plan or IRA, subject to a number of specific requirements designed to protect the interests of plan participants and beneficiaries and IRA owners.

The Department is therefore proposing a new Section I(b) of PTE 86–128 that would provide relief for the transaction currently covered in PTE 75–1, Part II(2). New Section I(b) would permit a broker-dealer fiduciary to use its authority to cause a plan (or IRA, as applicable) to purchase shares of a mutual fund from the broker-dealer fiduciary, acting as principal, where the shares were acquired solely to cover the plan's prior order, and for the receipt of a commission by such fiduciary in connection with the transaction.[17] Consistent with the exemption originally provided for this transaction in PTE 75–1, Part II(2), relief is not available if such fiduciary is a principal underwriter for, or affiliated with, such investment company. The Department intends that, with respect to this new proposed transaction, the compensation to the broker-dealer will be limited to the commission (*i.e.,* sales load) disclosed by the mutual fund, but may be paid either by the plan or the mutual fund.

To provide certainty with respect to the payments permitted by the exemption in both Section I(a) and newly proposed Section I(b), the Department is proposing a new defined term ''Commission.'' This term, used in Section I(b), will also replace the language currently in the exemption that permits a fiduciary to cause a plan or IRA to pay a ''fee for effecting or executing securities transactions.'' The term ''Commission'' is defined to mean a brokerage commission or sales load paid for the service of effecting or executing the transaction, but not a 12b–1 fee, revenue sharing payment,

[13] 71 FR 5883 (Feb. 3, 2006).

[14] 69 FR 23216 (April 28, 2004).

[15] Although PTE 75–1, Part II, is silent on the payment of commissions, the commenters point to the preamble to the proposal of PTE 77–9 (41 FR 56760, December 29, 1976)(final exemption superseded by PTE 84–24, 49 FR 13208, April 3, 1984, as amended, 71 FR 5887, February 3, 2006) which states that PTE 75–1, Part II, covers ''the purchase and sale of mutual fund shares by a plan from or to a broker-dealer which is a plan fiduciary, provided that such broker-dealer is not a principal underwriter for, or affiliated with, such mutual fund, and the receipt of commissions by such fiduciary/broker-dealer in connection with the purchase of mutual fund shares by plans.''

[16] 71 FR 5883, 5885 (Feb. 3, 2006).

[17] Section I(b) would provide relief from the restrictions of ERISA section 406(a)(1)(A) and (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F). The proposed new covered transaction, as a principal transaction, involves the purchase and sale of shares between a plan and a party in interest, and the transfer of a plan asset to a party in interest, which would violate the cited provisions of ERISA section 406(a) and Code section 4975(c)(1)(A) and (D) in the absence of an exemption.

marketing fee, administrative fee, sub-TA fee, or sub-accounting fee. Further, based on the language of Section I(a)(1), the term ''Commission'' as used in that section is limited to payments directly from the plan or IRA.[18] On the other hand, the Commission payment described in Section I(b) is not limited to payments directly from the plan or IRA and includes payments from the mutual fund. The Department understands that sales load payments in connection with mutual fund transactions are commonly made by the mutual fund.

The proposed new covered transaction in Section I(b) would be subject to the general prohibition in PTE 86–128 on churning, and the new proposed Impartial Conduct Standards in Section II. In addition, the Department is also proposing a new Section IV to PTE 86–128 which sets forth conditions applicable solely to the proposed new covered transaction. The proposed new Section IV incorporates conditions currently applicable to PTE 75–1, Part II(2).

Specifically, the conditions applicable to the proposed new covered transaction in Section I(b), as set forth in proposed Section IV, are: (1) The fiduciary customarily sells securities for its own account in the ordinary course of its business as a broker-dealer; (2) the transaction is at least as favorable to the plan or IRA as an arm's length transaction with an unrelated party would be; and (3) unless rendered inapplicable by Section V of the exemption, the requirements of Sections III(a) through III(f), III(h) and III(i) (if applicable), and III(j) are satisfied with respect to the transaction. The Department seeks comments as to whether any of the conditions described in Section IV(c) should be revised as applied to the proposed new covered transaction. The exceptions contained in Section V would be applicable to this proposed new covered transaction as well.[19]

Relief is not proposed in the new Section I(b) for sales by a plan or IRA to a fiduciary due to the Department's belief that it is not necessary for a plan or IRA to sell a mutual fund share to a fiduciary that is acting as a principal. The Department requests comment on this limitation, as well as on its understanding of this transaction and the related fee payments.

Additionally, in connection with the proposed new covered transaction, the Department is proposing to revoke the mutual fund exemption provisions from PTE 75–1, Part II(2). The Department is further proposing to revise the recordkeeping provisions of Section (e) of PTE 75–1, Part II. Section (e) currently provides that records demonstrating compliance with the exemption must be maintained by the plan or IRA involved in the transaction. The proposed amendment would place the responsibility for maintaining such records on the broker-dealer, reporting dealer, or bank engaging in the transaction with such plan or IRA.

IV. Relief for Related Entities

Currently, PTE 86–128 provides relief for a fiduciary to use its authority to cause a plan or IRA to pay a fee to *that person* for effecting or executing securities transactions. The term ''person'' is defined to include the person's affiliates, which are: (1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with, the person; (2) any officer, director, partner, employee, relative (as defined in ERISA section 3(15)), brother, sister, or spouse of a brother or sister, of the person; and (3) any corporation or partnership of which the person is an officer, director or employee or in which such person is a partner.

The Department understands that in some cases, fiduciaries are concerned that the relief provided by the exemption to persons (including their affiliates) is too narrow. In this regard, it is a prohibited transaction for a fiduciary to use the ''authority, control, or responsibility which makes such a person a fiduciary to cause a plan to pay an additional fee to such fiduciary (or to a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) to provide a service.''[20] The concern expressed to the Department is that the definition of affiliate is not broad enough to cover all persons in whom a fiduciary has an interest that may affect its best judgment. Specifically, it is not necessary for a fiduciary to have control over or be under control by an entity in order for the fiduciary to have an interest in the entity that may affect the exercise of the fiduciary's best judgment as a fiduciary.

To address this concern, the amendment would add relief for covered transactions when fees are paid to a ''related entity.''[21] The term ''related entity'' is defined as an entity, other than an affiliate, in which a fiduciary has an interest that may affect the exercise of its best judgment as a fiduciary. Additionally, Section II(b) of the exemption would reflect this additional relief to related entities. Section II(b) would require that all compensation received by the person (*i.e.,* the fiduciary and its affiliates) and any related entity in connection with the transaction is reasonable in relation to the total services the person provides to the plan or IRA.

The Department requests comment on the necessity of incorporating relief for related entities in PTE 86–128, and the approach taken in this proposal to do so.

V. The 2002 Amendment and Clarification of Recapture of Profits Exception of PTE 86–128

As explained above, discretionary trustees were first permitted to rely on PTE 86–128 without meeting the ''recapture of profits'' provision pursuant to an amendment in 2002 (2002 Amendment). To effect this change, the 2002 Amendment revised Section III(a), which had provided that ''[t]he person engaging in the covered transaction [may not be] a trustee (other than a nondiscretionary trustee), or an administrator of the plan, or an employer any of whose employees are covered by the plan.'' Under the amendment, the reference to ''trustee (other than a nondiscretionary trustee)'' was deleted from Section III(a). Further, under the amendment, discretionary trustees had to satisfy certain additional conditions, set forth in Section III(h) and (i), in order to rely on the exemption. Section III(h) provides that discretionary trustees may engage in the covered transactions only with plans or IRAs with total net assets of at least $50 million.[22] Section III(i) requires discretionary trustees to provide additional disclosures.

The Department understands that subsequent to the 2002 Amendment, questions were raised as to whether discretionary trustees were permitted to rely on the ''recapture of profits''

[18] Section I(a)(2) of the proposed amended exemption clarifies that relief for plan fiduciaries acting as agents in agency cross transactions is limited to compensation paid in the form of Commissions, although the Commission may be paid by the other party to the transaction.

[19] The condition set forth in Section V(c)(1)(B) of the exemption requires the disclosure of information that the person seeking authorization ''reasonably believes to be necessary'' for the authorizing fiduciary to determine whether the authorization should be made. This condition is followed by a list of required items. To improve objectivity of the exemption, the Department is proposing to delete the language ''reasonably believes to be necessary'' from Section V(c)(1)(B) but leave the list of specified items in place.

[20] ERISA section 406(b); Code section 4975(c)(1)(E).

[21] See re-ordered Section VII(m).

[22] Special rules apply under Section III(h) for pooled funds and groups of plans maintained by a single employer or controlled group of employers.

provision of the exemption (redesignated in this proposal as Section V(b)) as an alternative to complying with Sections III(h) and (i). This provision allows persons identified in Section III(a) to engage the covered transactions if they return or credit to the plan or IRA all profits. By deleting the reference to discretionary trustees from Section III(a), the Department believes that the 2002 Amendment inadvertently may have prevented trustees of plans or IRAs from using the recapture of profits approach, and instead, has limited the exemption to trustees that satisfy Section III(h) and (i). As this result was not intended, the Department proposes to modify the exemption to permit all trustees, regardless of associated plan or IRA size, to utilize the exception as originally permitted in PTE 86–128 for the recapture of profits.

In order to achieve this result, the Department has proposed amendments to several different conditions of PTE 86–128. Section V(c), which is re-designated as Section V(b) in this proposal, provides that Sections III(a) and III(i) do not apply in any case where the person engaging in the covered transaction returns or credits to the plan or IRA all profits earned by that person in connection with the securities transaction associated with the covered transaction. In addition, the Department proposes to reinsert a reference to trustees (other than nondiscretionary trustees) in Section III(a) along with the existing references to plan administrators and employers. Finally, a sentence has been added to the end of Section III(a) stating: ''Notwithstanding the foregoing, this condition does not apply to a trustee that satisfies Section III(h) and (i).'' The purpose of these proposed amendments is to clarify that trustees may engage in covered transactions subject to the recapture of profits limitations in Section V(b) of the exemption.

VI. Recordkeeping Requirements

A proposed new Section VI to PTE 86–128 would require the fiduciary engaging in a transaction covered by the exemption to maintain records necessary to enable certain persons (described in proposed Section VI(b)) to determine whether the conditions of this exemption have been met. The proposed recordkeeping requirement is consistent with other existing class exemptions as well as the recordkeeping provisions of the other notices of proposed exemption published in this issue of the **Federal Register**.

Description of the Proposed Revocation of PTE 75–1, Part I(b) and (c), and II(2), and Proposed Amendment to and Restatement of PTE 75–1, Part II

Lastly, the Department proposes to revoke Part I(b) and I(c) of PTE 75–1, and Part II(2) of PTE 75–1. Part I(b) of PTE 75–1 provides relief from ERISA section 406 and the taxes imposed by Code section 4975(a) and (b), for the effecting of securities transactions, including clearance, settlement or custodial functions incidental to effecting the transactions, by parties in interest or disqualified persons other than fiduciaries. Part I(c) of PTE 75–1 provides relief from ERISA section 406 and Code section 4975(a) and (b) for the furnishing of advice regarding securities or other property to a plan or IRA by a party in interest or disqualified person under circumstances which do not make the party in interest or disqualified person a fiduciary with respect to the plan or IRA.

PTE 75–1 was granted shortly after ERISA's passage in order to provide certainty to the securities industry over the nature and extent to which ordinary and customary transactions between broker-dealers and plans or IRAs would be subject to the ERISA prohibited transaction rules. Paragraphs (b) and (c) in Part I of PTE 75–1, specifically, served to provide exemptive relief for certain non-fiduciary services provided by broker-dealers in securities transactions. Code section 4975(d)(2), ERISA section 408(b)(2) and regulations thereunder, have clarified the scope of relief for service providers to plans and IRAs.[23] The Department believes that the relief provided in Parts I(b) and I(c) of PTE 75–1 duplicates the relief available under the statutory exemptions. Therefore, the Department is proposing the revocation of these parts.

As noted earlier, the exemption in PTE 75–1, Part II(2), would, under this proposal, be incorporated into PTE 86–128. Accordingly, the Department is proposing herein the revocation of PTE 75–1, Part II(2). In connection with the proposed revocation of PTE 75–1, Part II(2), the Department is proposing to amend Section (e) of the remaining exemption in PTE 75–1, Part II, the recordkeeping provisions of the exemption, to place the recordkeeping responsibility on the broker-dealer, reporting dealer, or bank engaging in transactions with the plan or IRA, as opposed to the plan or IRA itself.

[23] See 29 CFR 2550.408b-2, 42 FR 32390 (June 24, 1977) and Reasonable Contract or Arrangement under Section 408(b)(2)—Fee Disclosure, Final Rule, 77 FR 5632 (Feb. 3, 2012).

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 the final regulation is published in the **Federal Register** (Applicability Date). The Department proposes to make the amendments to and partial revocation of this exemption, if granted, applicable on the Applicability Date as well.

Paperwork Reduction Act Statement

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

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86–128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Partial Revocation of PTE 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks as part of its proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan or IRA 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 amendments to and partial revocation of PTEs 86–128 and 75–1 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 Amendments 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, as amended, PTE 86–128 would require financial firms to make certain disclosures to plan fiduciaries in order to receive relief from ERISA's and the Code's prohibited transaction rules for the receipt of commissions and to engage in riskless principal transactions involving mutual fund shares. Financial firms relying on either PTE 86–128 or PTE 75–1, as amended, would be required to maintain records necessary to prove that the conditions of these exemptions have been met. These requirements are information collection requests (ICRs) subject to the Paperwork Reduction Act.

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

• 38% of disclosures will be distributed electronically via means already used by respondents in the normal course of business and the costs arising from electronic distribution will be negligible;

• Financial institutions will use existing in-house resources to prepare the legal authorizations and disclosures, and maintain the recordkeeping systems necessary to meet the requirements of the exemption;

• 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, and $129.94 for a legal professional; and [24]

• Approximately 2,800 financial institutions [25] will take advantage of this exemption and they will use this exemption in conjunction with transactions involving 25.6 percent of their client plans.[26]

Disclosures and Consent Forms

In order to receive commissions in conjunction with the purchase of mutual fund shares or securities products, sections III(b) and III(d) of PTE 86–128 as amended require financial institutions to obtain advance written authorization from a plan fiduciary independent of the financial institutions (the authorizing fiduciary) and furnish the authorizing fiduciary with information necessary to determine whether an authorization should be made, including a copy of the exemption, a form for termination, a description of the financial institution's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests.

Section III(c) requires financial institutions to obtain annual written reauthorization or provide the authorizing fiduciary with an annual termination form explaining that the authorization is terminable at will, without penalty to the plan, and that failure to return the form will result in continued authorization for the financial institution to engage in covered transactions on behalf of the plan. Furthermore, Section III(e) requires the financial institution to provide the authorizing fiduciary with either (a) a confirmation slip for each individual securities transaction within 10 days of the transaction containing the information described in Rule 10b–10(a)(1–7) under the Securities Exchange Act of 1934, 17 CFR 240.10b–10 or (b) a quarterly report containing certain financial information including the total of all transaction-related charges incurred by the plan. The Department assumes that financial institutions will meet this requirement for 40 percent of plans through the provision of a confirmation slip, which already is provided to their clients in the normal course of business, while financial institutions will meet this requirement for 60 percent of plans through provision of the quarterly report.

Finally, Section III(f) requires the financial institution to provide the authorizing fiduciary with an annual summary of the confirmation slips or quarterly reports. The summary must contain the following information: The total of all securities transaction-related charges incurred by the plan during the period in connection with the covered securities transactions, the amount of the securities transaction-related charges retained by the authorized person and the amount of these charges paid to other persons for execution or other services; a description of the financial institution's brokerage placement practices if such practices have materially changed during the period covered by the summary; and a portfolio turnover ratio calculated in a manner reasonable designed to provide the authorizing fiduciary the information needed to assist in discharging its duty of prudence. Section III(i) states that a financial institution that is a discretionary plan trustee who qualifies to use the exemption must provide the authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis.

[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*).

[25] 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.

[26] This is a weighted average of the Department's estimates of the share of DB plans and DC plans with broker-dealer relationships. The Department welcomes comment on this estimate.

Legal Costs

According to the 2012 Form 5500, approximately 677,000 plans exist in the United States that could enter into relationships with financial institutions. Of these plans, the Department assumes that 6.5 percent are new plans or plans entering into relationships with new financial institutions and, as stated previously, 25.6 percent of these plans will engage in transactions covered under this PTE. The Department estimates that granting written authorization to the financial institutions will require one hour of legal time for each of the approximately 11,000 plans entering into new relationships with financial institutions each year. The Department also estimates that it will take one hour of legal time for each of the approximately 2,800 financial institutions to produce the annual termination form. This legal work results in a total of approximately 14,000 hours annually at an equivalent cost of $1.8 million.

Production and Distribution of Required Disclosures

The Department estimates that approximately 173,000 plans have relationships with financial institutions and are likely to engage in transactions covered under this exemption. Of these 173,000 plans, approximately 11,000 are new clients to the financial institutions each year.

The Department estimates that 11,000 plans will send financial institutions a two page authorization letter each year. Prior to obtaining authorization, financial institutions will send the same 11,000 plans a seven page pre-authorization disclosure. Paper copies of the authorization letter and the pre-authorization disclosure will be mailed for 62 percent of the plans and distributed electronically for the remaining 38 percent. The Department estimates that electronic distribution will result in a de minimis cost, while paper distribution will cost approximately $10,000. Paper distribution of the letter and disclosure will also require two minutes of clerical preparation time resulting in a total of 500 hours at an equivalent cost of approximately $14,000.

The Department estimates that all of the 173,000 plans will receive a two-page annual termination form from financial institutions; 38 percent will be distributed electronically and 62 percent will be mailed. The Department estimates that electronic distribution will result in a de minimis cost, while the paper distribution will cost $63,000. Paper distribution will also require two minutes of clerical preparation time resulting in a total of 4,000 hours at an equivalent cost of $109,000.

The Department estimates that 60 percent of plans (approximately 104,000) will receive quarterly two-page transaction reports from financial institutions four times per year; 38 percent will be distributed electronically and 62 percent will be mailed. The Department estimates that electronic distribution will result in a de minimis cost, while paper distribution will cost $152,000. Paper distribution will also require two minutes of clerical preparation time resulting in a total of 9,000 hours at an equivalent cost of $261,000.

The Department estimates that all of the 173,000 plans will receive a five-page annual statement with a two-page summary of commissions paid from financial institutions; 38 percent will be distributed electronically and 62 percent will be mailed. The Department assumes that these disclosures will be distributed with the annual termination form, resulting in no further hour burden or postage cost. Electronic distribution will result in a de minimis cost, while the paper distribution will cost $38,000 in materials costs.

Finally, the Department estimates that it will cost financial institutions $3 per plan, for each of the 173,000 plans, to track all the transactions data necessary to populate the quarterly transaction reports, the annual statements, and the report of commissions paid. This results in an IT tracking cost of $520,000.

Recordkeeping Requirement

Section VI of PTE 86–128, as amended, and condition (e) of PTE 75–1, Part II, as amended, would require financial institutions 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 employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether the conditions of this exemption have been met.

The Department assumes that each financial institution will maintain these records on behalf of their client plans in their 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 financial institution per year 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 VI(b) of PTE 86–128 and Section (f) of PTE 75–1, Part II, provide that parties 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 a party refuses to disclose information on this basis, it 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.

Overall Summary

Overall, the Department estimates that in order to meet the conditions of this amended class exemption, over 14,000 financial institutions and plans will produce 958,000 disclosures and notices annually. These disclosures and notices will result in almost 29,000 burden hours annually, at an equivalent cost of $2.4 million. This exemption will also result in a total annual cost burden of almost $783,000.

These paperwork burden estimates are summarized as follows:

Type of Review: Revision of a Currently Approved Information Collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: (1) Proposed Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 86–128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Partial Revocation of PTE 75–1, and (2) Proposed Investment Advice Regulation.

OMB Control Number: 1210–0059.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 14.059.

Estimated Number of Annual Responses: 957,880.

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

Estimated Total Annual Burden Hours: 28,795 hours.

Estimated Total Annual Burden Cost: $782,647.

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 from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary discharge his or her duties respecting a plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

(3) If granted, an exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) These amended exemptions, if granted, 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.

Written Comments

The Department invites all interested persons to submit written comments on the proposed amendments and proposed revocations to the address and within the time period set forth above. All comments received will be made a part of the public record for this proceeding and will be available for examination on the Department's Internet Web site. Comments should state the reasons for the writer's interest in the proposed amendment and revocation. Comments received will be available for public inspection at the above address.

Proposed Amendment to PTE 86–128

Under section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644 (October 27, 2011)), the Department proposes to amend and restate PTE 86–128 as set forth below:

Section I. Covered Transactions

(a) *Securities Transactions Exemptions.* If each of the conditions of Sections II and III of this exemption is either satisfied or not applicable under Section V, the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(E) or (F) shall not apply to—(1) A plan fiduciary's using its authority to cause a plan to pay a Commission to that person or a Related Entity as agent for the plan, but only to the extent that such transactions are not excessive, under the circumstances, in either amount or frequency; and (2) A plan fiduciary's acting as the agent in an agency cross transaction for both the plan and one or more other parties to the transaction and the receipt by such person of a Commission from one or more other parties to the transaction.

(b) *Mutual Fund Transactions Exemption.* If each condition of Sections II and IV is either satisfied or not applicable under Section V, the restrictions of ERISA sections 406(a)(1)(A), 406(a)(1)(D) and 406(b) and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F), shall not apply to a plan fiduciary's using its authority to cause the plan to purchase shares of an open end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (Mutual Fund) from such fiduciary, acting as principal, and to the receipt of a Commission by such person in connection with such transaction, but only to the extent that such transactions are not excessive, under the circumstances, in either amount or frequency; provided that, the fiduciary (1) is a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), and (2) is not a principal underwriter for, or affiliated with, such Mutual Fund, within the meaning of sections 2(a)(29) and 2(a)(3) of the Investment Company Act of 1940.

(c) *Scope of these Exemptions.* The exemptions set forth in Section I(a) and (b) do not apply to a transaction if (1) the plan is an Individual Retirement Account and (2) the fiduciary engaging in the transaction is a fiduciary by reason of the provision of investment advice for a fee, described in Code section 4975(e)(3)(B) and the applicable regulations.

Section II. Impartial Conduct Standards

If the fiduciary engaging in the covered transaction is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the transaction, the following conditions must be satisfied with respect to such transaction to the extent they are applicable to the fiduciary's actions:

(a) When exercising fiduciary authority described in ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the transaction, the fiduciary acts in the Best Interest of the plan.

(b) All compensation received by the person and any Related Entity in connection with the transaction is reasonable in relation to the total services the person and any Related Entity provide to the plan.

(c) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's investment decisions, are not misleading. For this purpose, a fiduciary's failure to disclose a Material Conflict of Interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's investment decisions is deemed to be a misleading statement

III. Conditions Applicable to Transactions Described in Section I(a)

Except to the extent otherwise provided in Section V of this exemption, Section I of this exemption applies only if the following conditions are satisfied:

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

(b) The covered transaction is performed under a written authorization executed in advance by a fiduciary of each plan whose assets are involved in the transaction, which plan fiduciary is independent of the person engaging in the covered transaction. The authorization is terminable at will by the plan, without penalty to the plan, upon receipt by the authorized person of written notice of termination.

(c) The authorized person obtains annual reauthorization to engage in transactions pursuant to the exemption in the method set forth in Section III(b). Alternatively, the authorized person may supply a form expressly providing an election to terminate the authorization described in Section III(b) with instructions on the use of the form to the authorizing fiduciary no less than annually. The instructions for such form must include the following information:

(1) The authorization is terminable at will by the plan, without penalty to the plan, when the authorized person receives (via first class mail, personal delivery, or email) from the authorizing fiduciary or other plan official having authority to terminate the authorization, a written notice of the intent of the plan to terminate authorization; and

(2) Failure to return the form or some other written notification of the plan's intent to terminate the authorization within thirty (30) days from the date the termination form is sent to the authorizing fiduciary will result in the continued authorization of the authorized person to engage in the covered transactions on behalf of the plan.

(d) Within three months before an initial authorization is made pursuant to Section III(b), the authorizing fiduciary is furnished with a copy of this exemption, the form for termination of authorization described in Section III(c), a description of the person's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests.

(e) The person engaging in a covered transaction furnishes the authorizing fiduciary with either:

(1) A confirmation slip for each securities transaction underlying a covered transaction within ten business days of the securities transaction containing the information described in Rule 10b–10(a)(1–7) under the Securities Exchange Act of 1934; or

(2) at least once every three months and not later than 45 days following the period to which it relates, a report disclosing:

(A) A compilation of the information that would be provided to the plan pursuant to Section III(e)(1) during the three-month period covered by the report;

(B) the total of all securities transaction-related charges incurred by the plan during such period in connection with such covered transactions; and

(C) the amount of the securities transaction-related charges retained by such person, and the amount of such charges paid to other persons for execution or other services. For purposes of this paragraph (e), the words ''incurred by the plan'' shall be construed to mean ''incurred by the pooled fund'' when such person engages in covered transactions on behalf of a pooled fund in which the plan participates.

(f) The authorizing fiduciary is furnished with a summary of the information required under Section III(e)(1) at least once per year. The summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following:

(1) The total of all securities transaction-related charges incurred by the plan during the period in connection with covered securities transactions.

(2) The amount of the securities transaction-related charges retained by the authorized person and the amount of these charges paid to other persons for execution or other services.

(3) A description of the brokerage placement practices of the person that is engaging in the covered transaction, if such practices have materially changed during the period covered by the summary.

(4)(A) A portfolio turnover ratio, calculated in a manner which is reasonably designed to provide the authorizing fiduciary with the information needed to assist in making a prudent determination regarding the amount of turnover in the portfolio. The requirements of this paragraph (f)(4)(A) will be met if the ''annualized portfolio turnover ratio,'' calculated in the manner described in paragraph (f)(4)(B), is contained in the summary.

(B) The ''annualized portfolio turnover ratio'' shall be calculated as a percentage of the plan assets consisting of securities or cash over which the authorized person had discretionary investment authority, or with respect to which such person rendered, or had any responsibility to render, investment advice within the meaning of ERISA section 3(21)(A)(ii), (the portfolio) at any time or times (management period(s)) during the period covered by the report. First, the ''portfolio turnover ratio'' (not annualized) is obtained by dividing (i) the lesser of the aggregate dollar amounts of purchases or sales of portfolio securities during the management period(s) by (ii) the monthly average of the market value of the portfolio securities during all management period(s). Such monthly average is calculated by totaling the market values of the portfolio securities as of the beginning and end of each management period and as of the end of each month that ends within such period(s), and dividing the sum by the number of valuation dates so used. For purposes of this calculation, all debt securities whose maturities at the time of acquisition were one year or less are excluded from both the numerator and the denominator. The ''annualized portfolio turnover ratio'' is then derived by multiplying the ''portfolio turnover ratio'' by an annualizing factor. The annualizing factor is obtained by dividing (iii) the number twelve by (iv) the aggregate duration of the management period(s) expressed in months (and fractions thereof). Examples of the use of this formula are provided in Section VII.

(C) The information described in this paragraph (f)(4) is not required to be furnished in any case where the authorized person has not exercised discretionary authority over trading in the plan's account, nor provided investment advice within the meaning of ERISA section 3(21)(A)(ii), during the period covered by the report.

For purposes of this paragraph (f), the words ''incurred by the plan'' shall be construed to mean ''incurred by the pooled fund'' when such person engages in covered transactions on behalf of a pooled fund in which the plan participates.

(g) If an agency cross transaction to which Section V(a) does not apply is involved, the following conditions must also be satisfied:

(1) The information required under Section III(d) or Section V(c)(1)(B) of this exemption includes a statement to the effect that with respect to agency cross transactions, the person effecting or executing the transactions will have a potentially conflicting division of

loyalties and responsibilities regarding the parties to the transactions;

(2) The summary required under Section III(f) of this exemption includes a statement identifying the total number of agency cross transactions during the period covered by the summary and the total amount of all commissions or other remuneration received or to be received from all sources by the person engaging in the transactions in connection with the transactions during the period;

(3) The person effecting or executing the agency cross transaction has the discretionary authority to act on behalf of, and/or provide investment advice to, either (A) one or more sellers or (B) one or more buyers with respect to the transaction, but not both.

(4) The agency cross transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available; and

(5) The agency cross transaction is executed or effected at a price that is at or between the independent bid and independent ask prices for the security prevailing at the time of the transaction.

(h) Except pursuant to Section V(b), a trustee (other than a non-discretionary trustee) may engage in a covered transaction only with a plan that has total net assets with a value of at least $50 million and in the case of a pooled fund, the $50 million requirement will be met if 50 percent or more of the units of beneficial interest in such pooled fund are held by plans having total net assets with a value of at least $50 million.

For purposes of the net asset tests described above, where a group of plans is maintained by a single employer or controlled group of employers, as defined in ERISA section 407(d)(7), the $50 million net asset requirement may be met by aggregating the assets of such plans, if the assets are pooled for investment purposes in a single master trust.

(i) The trustee described in Section III(h) engaging in a covered transaction furnishes, at least annually, to the authorizing fiduciary of each plan the following:

(1) The aggregate brokerage commissions, expressed in dollars, paid by the plan to brokerage firms affiliated with the trustee;

(2) the aggregate brokerage commissions, expressed in dollars, paid by the plan to brokerage firms unaffiliated with the trustee;

(3) the average brokerage commissions, expressed as cents per share, paid by the plan to brokerage firms affiliated with the trustee; and

(4) the average brokerage commissions, expressed as cents per share, paid by the plan (to brokerage firms unaffiliated with the trustee.

For purposes of this paragraph (i), the words ''paid by the plan'' shall be construed to mean ''paid by the pooled fund'' when the trustee engages in covered transactions on behalf of a pooled fund in which the plan participates.

(j) In the case of securities transactions involving shares of Mutual Funds, other than exchange traded funds, at the time of the transaction, the shares are purchased or sold at net asset value (NAV) plus a commission, in accordance with applicable securities laws and regulations.

Section IV. Conditions Applicable to Transactions Described in Section I(b)

Section I(b) of this exemption applies only if the following conditions are satisfied:

(a) The fiduciary engaging in the covered transaction customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer.

(b) At the time the transaction is entered into, the terms are at least as favorable to the plan as the terms generally available in an arm's length transaction with an unrelated party.

(c) Except to the extent otherwise provided in Section V, the requirements of Section III(a) through III(f), III(h) and III(i) (if applicable), and III(j) are satisfied with respect to the transaction.

Section V. Exceptions From Conditions

(a) Certain agency cross transactions. Section III of this exemption does not apply in the case of an agency cross transaction, provided that the person effecting or executing the transaction:

(1) Does not render investment advice to any plan for a fee within the meaning of ERISA section 3(21)(A)(ii) with respect to the transaction;

(2) is not otherwise a fiduciary who has investment discretion with respect to any plan assets involved in the transaction, *see* 29 CFR 2510.3–21(d); and

(3) does not have the authority to engage, retain or discharge any person who is or is proposed to be a fiduciary regarding any such plan assets.

(b) Recapture of profits. Sections III(a) and III(i) do not apply in any case where the person who is engaging in a covered transaction returns or credits to the plan all profits earned by that person and any Related Entity in connection with the securities transactions associated with the covered transaction.

(c) Special rules for pooled funds. In the case of a person engaging in a covered transaction on behalf of an account or fund for the collective investment of the assets of more than one plan (a pooled fund):

(1) Sections III(b), (c) and (d) of this exemption do not apply if—

(A) the arrangement under which the covered transaction is performed is subject to the prior and continuing authorization, in the manner described in this paragraph (c)(1), of a plan fiduciary with respect to each plan whose assets are invested in the pooled fund who is independent of the person. The requirement that the authorizing fiduciary be independent of the person shall not apply in the case of a plan covering only employees of the person, if the requirements of Section V(c)(2)(A) and (B) are met.

(B) The authorizing fiduciary is furnished with any information that is reasonably necessary to determine whether the authorization should be given or continued, not less than 30 days prior to implementation of the arrangement or material change thereto, including (but not limited to) a description of the person's brokerage placement practices, and, where requested any other reasonably available information regarding the matter upon the reasonable request of the authorizing fiduciary at any time.

(C) In the event an authorizing fiduciary submits a notice in writing to the person engaging in or proposing to engage in the covered transaction objecting to the implementation of, material change in, or continuation of, the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the pooled fund, without penalty to the plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the nonwithdrawing plans. In the case of a plan that elects to withdraw under this subparagraph (c)(1)(C), the withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a plan electing to withdraw.

(D) In the case of a plan whose assets are proposed to be invested in the pooled fund subsequent to the implementation of the arrangement and that has not authorized the arrangement in the manner described in Section V(c)(1)(B) and (C), the plan's investment in the pooled fund is subject to the prior written authorization of an authorizing fiduciary who satisfies the requirements of subparagraph (c)(1)(A).

(2) Section III(a) of this exemption, to the extent that it prohibits the person from being the employer of employees covered by a plan investing in a pool managed by the person, does not apply if—

(A) The person is an ''investment manager'' as defined in section 3(38) of ERISA, and

(B) Either (i) the person returns or credits to the pooled fund all profits earned by the person and any Related Entity in connection with all covered transactions engaged in by the fund, or (ii) the pooled fund satisfies the requirements of paragraph V(c)(3).

(3) A pooled fund satisfies the requirements of this paragraph for a fiscal year of the fund if—

(A) On the first day of such fiscal year, and immediately following each acquisition of an interest in the pooled fund during the fiscal year by any plan covering employees of the person, the aggregate fair market value of the interests in such fund of all plans covering employees of the person does not exceed twenty percent of the fair market value of the total assets of the fund; and

(B) The aggregate brokerage commissions received by the person and any Related Entity, in connection with covered transactions engaged in by the person on behalf of all pooled funds in which a plan covering employees of the person participates, do not exceed five percent of the total brokerage commissions received by the person and any Related Entity from all sources in such fiscal year.

Section VI. Recordkeeping Requirements

(a) The plan fiduciary engaging in the covered transactions maintains or causes to be maintained for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable the persons described in Section VI(b) to determine whether the conditions of this exemption have been met, except that:

(1) If the records necessary to enable the persons described in Section VI(b) below to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the such plan fiduciary, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than such plan fiduciary who is responsible for record-keeping, shall be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b) if the records are not maintained or are not available for examination as required by paragraph (b) below; and

(b)(1) Except as provided below in subparagraph (2) and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in the above paragraph are unconditionally available at their customary location for examination during normal business hours by—

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

(B) Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the plan or the duly authorized representative of such participant or beneficiary; and

(2) None of the persons described in subparagraph (1)(B)–(D) above shall be authorized to examine trade secrets or commercial or financial information of such fiduciary which is privileged or confidential.

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

Section VII. Definitions

The following definitions apply to this exemption:

(a) The term ''person'' includes the person and affiliates of the person.

(b) An ''affiliate'' of a person includes the following:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with, the person;

(2) Any officer, director, partner, employee, relative (as defined in ERISA section 3(15)), brother, sister, or spouse of a brother or sister, of the person; and

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

A person is not an affiliate of another person solely because one of them has investment discretion over the other's assets. The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) An ''agency cross transaction'' is a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

(d) The term ''covered transaction'' means an action described in Section I of this exemption.

(e) The term ''effecting or executing a securities transaction'' means the execution of a securities transaction as agent for another person and/or the performance of clearance, settlement, custodial or other functions ancillary thereto.

(f) A plan fiduciary is ''independent'' of a person if it (1) is not the person, (2) does not receive compensation or other consideration for his or her own account from the person, and (3) does not have a relationship to or an interest in the person that might affect the exercise of the person's best judgment in connection with transactions described in this exemption. Notwithstanding the foregoing, if the plan is an individual retirement account not subject to title I of ERISA, and is beneficially owned by an employee, officer, director or partner of the person engaging in covered transactions with the IRA pursuant to this exemption, such beneficial owner is deemed ''independent'' for purposes of this definition.

(g) The term ''profit'' includes all charges relating to effecting or executing securities transactions, less reasonable and necessary expenses including reasonable indirect expenses (such as overhead costs) properly allocated to the performance of these transactions under generally accepted accounting principles.

(h) The term ''securities transaction'' means the purchase or sale of securities.

(i) The term ''nondiscretionary trustee'' of a plan means a trustee or custodian whose powers and duties with respect to any assets of the plan are limited to (1) the provision of nondiscretionary trust services to the plan, and (2) duties imposed on the trustee by any provision or provisions of ERISA or the Code. The term ''nondiscretionary trust services'' means custodial services and services ancillary to custodial services, none of which services are discretionary. For purposes of this exemption, a person does not fail to be a nondiscretionary trustee solely by reason of having been delegated, by the sponsor of a master or prototype plan, the power to amend such plan.

(j) The term ''plan'' means an employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1) (including an Individual Retirement Account as defined in VII(k)).

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

(l) The term ''Related Entity'' means an entity, other than an affiliate, in which a person has an interest which may affect the person's exercise of its best judgment as a fiduciary.

(m) A fiduciary acts in the ''Best Interest'' of the plan when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan, without regard to the financial or other interests of the fiduciary, its affiliate, a Related Entity or any other party.

(n) The term ''Commission'' means a brokerage commission or sales load paid for the service of effecting or executing the transaction, but not a 12b–1 fee, revenue sharing payment, marketing fee, administrative fee, sub-TA fee or sub-accounting fee.

(o) A ''Material Conflict of Interest'' exists when person has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Plan or IRA.

Section VIII. Examples Illustrating the Use of the Annualized Portfolio Turnover Ratio Described in Section III(f)(4)(B)

(a) M, an investment manager affiliated with a broker dealer that M uses to effect securities transactions for the accounts that it manages, exercises investment discretion over the account of plan P for the period January 1, 2014, though June 30, 2014, after which the relationship between M and P ceases. The market values of P's account with A at the relevant times (excluding debt securities having a maturity of one year or less at the time of acquisition) are:

Date	Market value ($ millions)
January 1, 2014	10.4
January 31, 2014	10.2
February 28, 2014	9.9
March 31, 2014	10.0
April 30, 2014	10.6
May 31, 2014	11.5
June 30, 2014	12.0
Sum of market value	74.6

Aggregate purchases during the 6-month period were $850,000; aggregate sales were $1,000,000, excluding in each case debt securities having a maturity of one year or less at the time of acquisition.

For purposes of Section III(f)(4) of this exemption, M computes the annualized portfolio turnover as follows:

A = $850,000 (lesser of purchases or sales)

B = $10,657,143 ($74.6 million divided by 7, *i.e.,* number of valuation dates)

Annualizing factor = C/D = 12/6 = 2

Annualized portfolio turnover ratio = 2 × (850,000/10,657,143) = 0.160 = 16.0 percent

(b) Same facts as (a), except that M manages the portfolio through July 15, 2014, and, in addition, resumes management of the portfolio on November 10, 2014, through the end of the year. The additional relevant valuation dates and portfolio values are:

Dates	Market value ($ millions)
July 15, 2014	12.2
November 10, 2014	9.4
November 30, 2014	9.6
December 31, 2014	9.8
Sum of market values	41.0

During the periods July 1, 2014, through July 15, 2014, and November 10, 2014, through December 31, 2014, there were an additional $650,000 of purchases and $400,000 of sales. Thus, total purchases were $1,500,000 (*i.e.,* $850,000 + $650,000) and total sales were $1,400,000 (*i.e.,* $1,000,000 + $400,000) for the management periods.

M now computes the annualized portfolio turnover as follows:

A = $1,400,000 (lesser of aggregate purchases or sales)

B = $10,509,091 ($10,509,091 ($115.6 million divided by 11)

Annualizing factor = C/D = 12/ (6.5 + 1.67) = 1.47

Annualized portfolio turnover ratio = 1.47 × (1,400,000/10,509,091) = 0.196 = 19.6 percent.

Proposed Revocation of Parts I(b), I(c) and II(2) of PTE 75–1 and Restatement of PTE 75–1

The Department is proposing to revoke Parts I(b), I(c) and II(2) of PTE 75–1. In connection with the proposed revocation of Part II(2), the Department is republishing Part II of PTE 75–1. Part II of PTE 75–1 shall read as follows:

The restrictions of section 406(a) of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any purchase or sale of a security between an employee benefit plan and a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government (Government securities) and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State if the following conditions are met:

(a) In the case of such broker-dealer, it customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer.

(b) In the case of such reporting dealer or bank, it customarily purchases and sells Government securities for its own account in the ordinary course of its business and such purchase or sale between the plan and such reporting dealer or bank is a purchase or sale of Government securities.

(c) Such transaction is at least as favorable to the plan as an arm's length transaction with an unrelated party would be, and it was not, at the time of such transaction, a prohibited transaction within the meaning of section 503(b) of the Code.

(d) Neither the broker-dealer, reporting dealer, bank, nor any affiliate thereof has or exercises any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

(e) The broker-dealer, reporting dealer, or bank engaging in the covered transaction maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (f) of this exemption to determine whether the conditions of this exemption have been met, except that:

(1) No party in interest other than the broker-dealer, reporting dealer, or bank engaging in the covered transaction, shall be subject to the civil penalty, which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (f) below; and

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the broker-dealer, reporting dealer, or bank, such records are lost or destroyed prior to the end of such six year period.

(f)(1) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are unconditionally available for examination during normal business hours by:

A. Any duly authorized employee or representative of the Department or the Internal Revenue Service;

B. Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary;

C. Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

D. Any participant or beneficiary of the plan or the duly authorized representative of such participant or beneficiary; and

(2) None of the persons described in subparagraph (1)(B)–(D) above shall be authorized to examine trade secrets or commercial or financial information of the broker-dealer, reporting dealer, or bank which is privileged or confidential.

(3) Should such broker-dealer, reporting dealer, or bank refuse to disclose information on the basis that such information is exempt from disclosure, the broker-dealer, reporting dealer, or bank shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

For purposes of this exemption, the terms ''broker-dealer,'' ''reporting dealer'' and ''bank'' shall include such persons and any affiliates thereof, and the term ''affiliate'' shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e).

Signed at Washington, DC, this 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–11820]

ZRIN 1210–ZA25

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

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

ACTION: Notice of proposed amendments to class exemptions.

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

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

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

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

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

Email to: e-OED@ dol.gov.

Fax to: (202) 693–8474.

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

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11820), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington, DC 20001. *Instructions.* All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments will also be available online at *www.regulations.gov,* at Docket ID number: EBSA–2014–0016 and *www.dol.gov/ebsa,* at no charge.

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

FOR FURTHER INFORMATION CONTACT: Brian Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8854 (this is not a toll-free number).

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

Executive Summary

Purpose of Regulatory Action

The Department is proposing these amendments to existing class exemptions in connection with its proposed regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (Proposed Regulation), published elsewhere in this issue of the **Federal Register**. The Proposed Regulation specifies when an entity is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. If adopted, the Proposed Regulation would replace an