(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.

[FR Doc. 2015–08838 Filed 4–15–15; 11:15 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–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 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.

This notice proposes that new ''Impartial Conduct Standards'' be made conditions of the following exemptions: PTEs 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1. Fiduciaries would be required to act in accordance with these standards in transactions permitted by the exemptions. The standards will be uniformly imposed in multiple class exemptions, including new proposed exemptions published elsewhere in this issue of the **Federal Register**, to ensure that fiduciaries relying on the exemptions are held to a uniform set of standards and that these standards are applicable to transactions involving both plans and IRAs. The proposed amendments, if granted, would apply prospectively to fiduciaries relying on the exemptions.

Section 408(a) of ERISA specifically authorizes the Secretary of Labor to grant administrative exemptions from ERISA's prohibited transaction provisions.[1] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. Before granting an exemption, the Department must find that it is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of such plans and IRA owners. Interested parties are permitted to submit comments to the Department on these proposed amendments, through July 6, 2015. Additionally, 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**.

Summary of the Major Provisions

The proposal would amend prohibited transaction exemptions 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1. Each proposed amendment would apply the same Impartial Conduct Standards. The amendments would require a fiduciary that satisfies ERISA section 3(21)(A)(i) or (ii), or the corresponding provisions of Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the investment transaction, to meet the standards with respect to the investment transactions described in the applicable exemption.

Regulatory Impact Analysis

Executive Order 12866 and 13563 Statement

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

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

Background

Proposed Regulation

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 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

[1] Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. References in this document to sections of ERISA should be read to refer also to the corresponding sections of the Code. These proposed amendments to the class exemptions would apply to relief from the indicated prohibited transaction provisions of both ERISA and the Code.

[2] ERISA section 404(a).

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

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.

The statutory definition deliberately casts a wide net in assigning fiduciary responsibility with respect to plan and IRA assets. Thus, ''any authority or control'' over plan or IRA assets is sufficient to confer fiduciary status, and any persons who render ''investment advice for a fee or other compensation, direct or indirect'' are fiduciaries, regardless of whether they have direct control over the plan's or IRA's assets and regardless of their status as an investment adviser or broker under the federal securities laws. The statutory definition and associated fiduciary responsibilities were enacted to ensure that plans and IRAs can depend on persons who provide investment advice for a fee to provide recommendations that are untainted by conflicts of interest. In the absence of fiduciary status, persons who provide investment advice would neither be subject to ERISA's fundamental fiduciary standards, nor accountable for imprudent, disloyal, or tainted advice under ERISA or the Code, no matter how egregious the misconduct or how substantial the losses. Plans, individual participants and beneficiaries, and IRA owners often are not financial experts and consequently must rely on professional advice to make critical investment decisions. The statutory definition, prohibitions on conflicts of interest, and core fiduciary obligations of prudence and loyalty, all reflect Congress' recognition in 1974 of the fundamental importance of such advice. In the years since then, the significance of financial advice has become still greater with increased reliance on participant-directed plans and IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c) defining the circumstances under which a person is treated as providing ''investment advice'' to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA (the ''1975 regulation'').[5] The regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the regulation, for advice to constitute ''investment advice,'' an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property of the plan must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue. A 1976 Department of Labor Advisory Opinion further limited the application of the statutory definition of ''investment advice'' by stating that valuations of employer securities in connection with employee stock ownership plan (ESOP) purchases would not be considered fiduciary advice.[6]

As the marketplace for financial services has developed in the years since 1975, the five-part test may now undermine, rather than promote, the statutes' text and purposes. The narrowness of the 1975 regulation allows professional advisers, consultants and valuation firms to play a central role in shaping plan investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility when it enacted ERISA and the related Code provisions. Even when plan sponsors, participants, beneficiaries and IRA owners clearly rely on paid consultants for impartial guidance, the regulation allows consultants to avoid fiduciary status and disregard ERISA's fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest, give imprudent advice, and engage in transactions that would otherwise be categorically prohibited by ERISA and Code, without any liability under ERISA or the Code. In the Proposed Regulation, the Department seeks to replace the existing regulation with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which plans and IRAs currently operate.[7]

The Proposed Regulation describes the types of advice that constitute ''investment advice'' with respect to plan or IRA assets for purposes of the

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

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

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

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

definition of a fiduciary at ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). The proposal provides, subject to certain carve-outs, that a person renders investment advice with respect to a plan or IRA if, among other things, the person provides, directly to a plan, a plan fiduciary, a plan participant or beneficiary, IRA or IRA owner one of the following types of advice:

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

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

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

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

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

For advisers who do not represent that they are acting as ERISA (or Code) fiduciaries, the Proposed Regulation provides that advice rendered in conformance with certain carve-outs will not cause the adviser to be treated as a fiduciary under ERISA or the Code. For example, under the seller's carve-out, counterparties in arm's length transactions with plans may make investment recommendations without acting as fiduciaries if certain conditions are met.[8] Similarly, the proposal contains a carve-out from fiduciary status for persons who provide appraisals, fairness opinions, or statements of value in specified contexts (*e.g.,* with respect to ESOP transactions). The proposal additionally carves out from fiduciary status the marketing of investment alternative platforms, certain assistance in selecting investment alternatives and other activities. Finally, the Proposed Regulation contains a carve-out from fiduciary status for the provision of investment education.

Prohibited Transactions

Fiduciaries under ERISA and the Code are subject to certain prohibited transaction restrictions. ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his own interest or his own account. ERISA section 406(b)(2) provides that a fiduciary with respect to an employee benefit plan shall not ''in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.''[9] ERISA section 406(b)(3) and Code section 4975(c)(1)(F) prohibit a fiduciary from receiving any consideration for his own personal account from any party dealing with the plan or IRA in connection with a transaction involving the plan or IRA. Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries a duty not to act on conflicts of interest that may affect the fiduciary's best judgment on behalf of the plan or IRA.[10]

Prohibited Transaction Exemptions

ERISA and the Code counterbalance the broad proscriptive effect of the prohibited transaction provisions with numerous statutory exemptions. For example, ERISA section 408(b)(14) and Code section 4975(d)(17) specifically exempt transactions in connection with the provision of fiduciary investment advice to a participant or beneficiary of an individual account plan or IRA owner, where the advice, resulting transaction, and the adviser's fees meet certain conditions. ERISA and the Code also provide for administrative exemptions that the Secretary of Labor may grant on an individual or class basis if the Secretary finds that the exemption is (1) administratively feasible, (2) in the interests of plans and of their participants and beneficiaries and IRA owners and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners.

Over the years, the Department has granted several conditional administrative class exemptions from the prohibited transactions provisions of ERISA and the Code pursuant to which fiduciaries may receive compensation or other benefits in connection with investment transactions by plans and IRAs, under circumstances that would otherwise violate ERISA section 406(b) and Code section 4975(c)(1)(E) and (F). The exemptions focus on specific types of transactions or specific types of compensation arrangements. Reliance on these exemptions is subject to certain conditions that the Department has found necessary to protect the interests of plans and IRAs.

In connection with the development of the Department's proposed definition of fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), the Department has considered public input indicating the need for additional prohibited transaction relief for the wide variety of compensation structures that exist today in the marketplace for investment transactions. After consideration of the issue, the Department determined to propose, elsewhere in this issue of the **Federal Register**, two new class exemptions as well as amendments to two other existing class exemptions. These new and amended class exemptions provide relief for a fiduciary's receipt of compensation or other benefit resulting from its provision of investment advice to plans and IRAs in the context of many different types of investment transactions.

While each of the proposed new and amended class exemptions sets forth conditions that are tailored to their respective transactions, each also conditions relief on a fiduciary's compliance with certain Impartial Conduct Standards. The Department has determined that the Impartial Conduct Standards comprise important baseline safeguards that should be required of fiduciaries relying on other existing exemptions providing relief for plan and IRA investment transactions. Accordingly, this notice proposes that the Impartial Conduct Standards be made conditions of the following

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

[9] The Code does not contain a parallel provision.

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

existing exemptions: PTEs 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1.

Under the amendments, fiduciaries would be required to act in accordance with the Impartial Conduct Standards in transactions governed by the exemptions. This will result in additional protections for all plans, but most particularly for IRA owners. That is because fiduciaries' dealings with IRAs are governed by the Code, not by ERISA,[11] and the Code, unlike ERISA, does not directly impose responsibilities of prudence and loyalty on fiduciaries. The amendments to the exemptions would condition relief under the exemptions on the satisfaction of these responsibilities. For purposes of these amendments, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.[12] The impartial conduct standards will work across multiple class exemptions to ensure that these fiduciaries are held to a single set of standards and that these standards are applicable to both plans and IRAs. The proposed amendments, if granted, will apply prospectively to fiduciaries relying on the exemptions.

Description of the Proposal

The proposal would amend prohibited transaction exemptions 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1. Specifically, these exemptions provide the following relief:

- PTE 75–1, Part III [13] permits a fiduciary to cause a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary, when the fiduciary is also a member of the syndicate;
- PTE 75–1, Part IV [14] permits a plan or IRA to purchase securities in a principal transaction from a fiduciary that is a market maker with respect to such securities;
- PTE 77–4 [15] provides relief for a plan's or IRA's purchase or sale of open-end investment company shares where the investment adviser for the open-end investment company is also a fiduciary to the plan or IRA;
- PTE 80–83 [16] provides relief for a fiduciary causing a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary or an affiliate; and
- PTE 83–1 [17] provides relief for the sale of certificates in an initial issuance of certificates, by the sponsor of a mortgage pool to a plan or IRA, when the sponsor, trustee or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

This proposal sets forth an amendment to each of these exemptions. Each of the amendments is tailored to the structure and language of the applicable exemption. Therefore, the terminology and numbering varies from amendment to amendment. Despite such variation, each amendment would apply the same Impartial Conduct Standards uniformly across each exemption.

More specifically, the amendments would require a fiduciary that satisfies ERISA section 3(21)(A)(i) or (ii), or the corresponding provisions of Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the investment transaction, to meet the Impartial Conduct Standards described in the applicable exemption. Under the proposed amendments' first conduct standard, the fiduciary must act in the best interest of the plan or IRA. Best interest is defined to mean 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 circumstances, and the needs of the plan or IRA when providing investment advice to the plan or IRA or managing the plan's or IRA's assets. Further, under the best interest standard, the fiduciary must act without regard to the financial or other interests of the fiduciary or its affiliates or any other party. Under this standard, the fiduciary must put the interests of the plan or IRA ahead of its own financial interests or those of any affiliate or 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 amendments, both IRA and plan fiduciaries would have to agree to, and uphold, the best interest requirement. 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 they provide 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 owner's investment decisions, not be 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 these requirements are not likely to be in the interests of plans, their participants and beneficiaries, or IRA owners, or protective of their rights.

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.

[11] *See* ERISA section 404.

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

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

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

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

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

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

Applicability Date

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

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the plan's participants and beneficiaries and in a prudent fashion in accordance with ERISA section 404(a)(1)(B);

(2) 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 plans' participants and beneficiaries and IRA owners;

(3) If granted, an exemption will be applicable to a particular transactions only if the transactions satisfy the conditions specified in the amendments; and

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

Proposed Amendments to Class Exemptions

I. Prohibited Transaction Exemption 75–1, Part III

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

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

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

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

(2) All compensation received by the fiduciary in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. A ''material conflict of interest'' exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner. 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 or IRA owner's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the ''Best Interest'' of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary or any other party. Also for the purposes of this section, the term IRA means any 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.

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

II. Prohibited Transaction Exemption 75–1, Part IV

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

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

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

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

(2) All compensation received by the fiduciary in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. A ''material conflict of interest'' exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner. 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 or IRA owner's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the ''Best Interest'' of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary or any other party. Also for the purposes of this section, the term IRA means any 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.

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

III. Prohibited Transaction Exemption 77–4

The Department proposes to amend Prohibited Transaction Exemption 77–4 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

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

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

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

(2) All compensation received by the fiduciary and its affiliates in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. A ''material conflict of interest'' exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner. 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 or IRA owner's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the ''Best Interest'' of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party. Also for the purposes of this section, the term IRA means any 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.

IV. Prohibited Transaction Exemption 80–83

The Department proposes to amend Prohibited Transaction Exemption 80–83 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

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

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

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

(b) All compensation received by the fiduciary and its affiliates in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(c) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. A ''material conflict of interest'' exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner. 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 or IRA owner's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the ''Best Interest'' of the employee benefit plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the employee benefit plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party. Also for the purposes of this section, the term IRA means any 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.

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

V. Prohibited Transaction Exemption 83–1

The Department proposes to amend Prohibited Transaction Exemption 83–1 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

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

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

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

(2) All compensation received by the fiduciary and its affiliates in connection with the transaction is reasonable in relation to the total services the fiduciary and its affiliates provide to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. A ''material conflict of interest'' exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner. 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 or IRA owner's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the ''Best Interest'' of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the plan or IRA to the financial interests of the fiduciary, any affiliate or other party. Also for the purposes of this section, the term IRA means any 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.

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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