

ERISA section 408(a) and Code section 4975(c)(2), the Department must find that the class exemption as amended is administratively feasible, in the interests of the plan and of its participants and beneficiaries and IRA owners, and protective of the rights of the plan's participants and beneficiaries and IRA owners;

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

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

#### Proposed Amendment

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),<sup>15</sup> the Department proposes to amend PTE 75-1, Part V, to read as follows:

The restrictions of section 406 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) of the Code, shall not apply to any extension of credit to an employee benefit plan or an individual retirement account (IRA) by a party in interest or a disqualified person with respect to the plan or IRA, provided that the following conditions are met:

(a) The party in interest or disqualified person:

(1) Is a broker or dealer registered under the Securities Exchange Act of 1934; and

(2) Does not have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan or IRA assets involved in the transaction, nor does it render investment advice (within the meaning of 29 CFR 2510.3-21) with respect to those assets, unless no interest or other consideration is received by the party in interest or disqualified person or any affiliate thereof in connection with such extension of credit.

(b) Such extension of credit:

(1) Is in connection with the purchase or sale of securities;

(2) Is lawful under the Securities Exchange Act of 1934 and any rules and regulations promulgated thereunder; and

(3) Is not a prohibited transaction within the meaning of section 503(b) of the Code.

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

(1) The potential failure of the purchase or sale of the securities is not the result of action or inaction by such fiduciary or an affiliate;

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

(3) Prior to the extension of credit, the plan or IRA receives written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged, in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. This Section (c)(3) will be considered satisfied if the plan or IRA receives the disclosure described in the Securities and Exchange Act Rule 10b-16;<sup>16</sup> and

(d) The broker-dealer 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 (e) of this exemption to determine whether the conditions of this exemption have been met, except that:

(1) No party other than the broker-dealer 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 (e) below; and

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

(e) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (d) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries and IRA owners, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan.

For purposes of this exemption, the terms "party in interest," "disqualified person" and "fiduciary" shall include such party in interest, disqualified person, or fiduciary, and any affiliates thereof, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e). Also for the purposes of this exemption, 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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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### 29 CFR Part 2550

[Application Number D-11850]

ZRIN: 1210-ZA25

#### **Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters**

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

**ACTION:** Notice of Proposed Amendment to and Proposed Partial Revocation of PTE 84-24.

<sup>15</sup> For purposes of this proposed amendment, references to ERISA should be read to refer as well to the corresponding provisions of the Code.

<sup>16</sup> 17 CFR 240.10b-16.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor of a proposed amendment to Prohibited Transaction Exemption (PTE) 84–24, an exemption 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 these plans and IRAs. The exemption allows fiduciaries to receive compensation when plans and IRAs enter into certain insurance and mutual fund transactions recommended by the fiduciaries as well as certain related transactions. The proposed amendments would increase the safeguards of the exemption. This document also contains a notice of pendency before the Department of the proposed revocation of the exemption as it applies to IRA purchases of mutual fund shares and certain annuity contracts. 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 amendment and proposed revocation to the class exemption should be sent to the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210–ZA25:

Federal eRulemaking Portal: *http://www.regulations.gov* at Docket ID number: EBSA–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–11850), 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–11850), 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 amendment to PTE 84–24<sup>1</sup> 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*

This proposal is 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.

PTE 84–24 permits certain investment advice fiduciaries to receive commissions in connection with the purchase and sale of recommended insurance and annuity products and mutual fund shares by the plans and IRAs, and certain related transactions. In the absence of an exemption, ERISA and the Code generally prohibit fiduciaries from using their authority to affect or increase their own compensation. This proposal would revoke the exemption for certain transactions and amend the 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.<sup>2</sup> 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 84–24 currently provides an exemption for certain prohibited transactions that occur when plans or IRAs purchase insurance and annuity contracts and shares in an investment

<sup>2</sup> 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.

<sup>1</sup> PTE 84–24, 49 FR 13208 (Apr. 3, 1984), as corrected, 49 FR 24819 (June 15, 1984), as amended, 71 FR 5887 (Feb. 3, 2006).

company registered under the Investment Company Act of 1940 (a mutual fund). The exemption permits insurance agents, insurance brokers and pension consultants that are parties in interest or fiduciaries with respect to plans and IRAs to effect the purchase of the insurance or annuity contracts for the plans or IRAs and receive a commission on the sale. The exemption is also available for the prohibited transaction that occurs when the insurance company selling the insurance or annuity contract is a party in interest or disqualified person with respect to the plan or IRA. Likewise, with respect to mutual fund transactions, PTE 84–24 permits mutual fund principal underwriters that are parties in interest or fiduciaries to effect the sale of mutual fund shares to plans or IRAs, and receive a commission on the transaction.

This proposal would make several changes to PTE 84–24. First, it would increase the safeguards of the exemption by requiring fiduciaries that rely 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 by more precisely defining the types of payments that are permitted under the exemption.

Second, on a going forward basis, the amendment would revoke relief for insurance agents, insurance brokers and pension consultants to receive a commission in connection with the purchase by IRAs of variable annuity contracts and other annuity contracts that are securities under federal securities laws and for mutual fund principal underwriters to receive a commission in connection with the purchase by IRAs of mutual fund shares.<sup>3</sup> A new exemption for the receipt of compensation by fiduciaries that provide investment advice to IRA owners is proposed elsewhere in this issue of the **Federal Register** in the “Best Interest Contract Exemption.” The Department believes that the provisions in the Best Interest Contract Exemption better protect the interests of IRAs with respect to investment advice regarding securities products.

<sup>3</sup> For purposes of this amendment, 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.

#### *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 proposal, 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 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.<sup>4</sup> In addition, they must refrain from engaging in “prohibited transactions,” which ERISA does not permit because of the dangers posed by the fiduciaries’ conflicts of interest with respect to the transactions.<sup>5</sup> When fiduciaries violate ERISA’s fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.<sup>6</sup> In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

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

<sup>4</sup> ERISA section 404(a).

<sup>5</sup> ERISA section 406. ERISA also prohibits certain transactions between a plan and a “party in interest.”

<sup>6</sup> ERISA section 409; see also ERISA section 405.

adviser to adhere to certain standards (the Impartial Conduct Standards). IRA owners would have a right to enforce these new contractual obligations.

Under this statutory framework, the determination of who is a “fiduciary” is of central importance. Many of ERISA’s and the Code’s protections, duties, and liabilities hinge on fiduciary status. In relevant part, 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(a)(1)(A)–(D) and Code section 4975(c)(1)(A)–(D) prohibit certain transactions between plans or IRAs and “parties in interest,” as defined in ERISA section 3(14), or “disqualified persons,” as defined in Code section 4975(e)(2). Fiduciaries and other service providers are parties in interest and disqualified persons under ERISA and the Code. As a result, they are prohibited from engaging in (1) the sale, exchange or leasing of property with a plan or IRA, (2) the lending of money or other extension of credit to a plan or IRA, (3) the furnishing of goods, services or facilities to a plan or IRA and (4) the transfer to or use by or for the benefit of a party in interest of plan assets.

ERISA section 406(b) and Code section 4975(c)(1)(E) and (F) are aimed at fiduciaries only. These provisions generally 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 and from receiving payments from third parties in connection with transactions involving the plan or IRA. Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries of plans and IRAs a duty not to act on conflicts of interest that may affect the fiduciary’s best judgment on behalf of the plan or IRA. Under these provisions, 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.

In the Department’s view, the receipt of a commission on the sale of an insurance or annuity contract or mutual fund shares by a fiduciary that recommended the investment violates the prohibited transaction provisions of ERISA section 406(b) and Code section 4975(c)(1)(E) and (F). The effecting of the sale by a fiduciary or service provider is a service, potentially in violation of ERISA section 406(a)(1)(C) and Code section 4975(c)(1)(C). Finally, the purchase of an insurance or annuity contract by a plan or IRA from an insurance company that is a fiduciary, service provider or other party in interest or disqualified person, violates ERISA section 406(a)(1)(A) and (D) and Code section 4975(c)(1)(A) and (D).

PTE 84–24 provides an exemption for these transactions for the following parties: insurance agents, insurance brokers, pension consultants, insurance companies and mutual fund principal underwriters. Currently, PTE 84–24 provides relief to these parties in connection with transactions involving both employee benefit plans, as defined in ERISA section 3(3), as well as IRAs and other plans described in Code section 4975, such as Archer MSAs described in Code section 220(d), health savings accounts described in Code section 223(d) and Coverdell education savings accounts described in Code section 530.<sup>7</sup>

Specifically, PTE 84–24 permits insurance agents, insurance brokers and pension consultants to receive, directly or indirectly, a commission for selling insurance or annuity contracts to plans and IRAs. The exemption also permits the purchase by plans and IRAs of insurance and annuity contracts from insurance companies that are parties in interest or disqualified persons. The term “insurance and annuity contract” includes variable annuities.<sup>8</sup>

In the area of mutual fund transactions, PTE 84–24 permits the mutual fund’s principal underwriter to receive commissions in connection with a plan’s or IRA’s purchase of mutual fund shares. The term “principal underwriter” is defined in the same manner as it is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29)).<sup>9</sup>

<sup>7</sup> See PTE 2002–13, 67 FR 9483 (March 1, 2002) (preamble discussion of certain exemptions, including PTE 84–24, that apply to plans described in Code section 4975).

<sup>8</sup> See PTE 77–9, 42 FR 32395 (June 24, 1977) (predecessor to PTE 84–24).

<sup>9</sup> The exemption also provides relief for: (1) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a master or prototype plan, and (2)

PTE 84–24 contains conditions under which the transactions must occur in order for the exemption to apply. Generally, the exemption requires that the transaction involving the insurance or annuity contract or mutual fund shares be effected by the insurance agent, insurance broker, insurance company, pension consultant or mutual fund principal underwriter in the ordinary course of its business. The terms of the transaction must be at least as favorable to the plan or IRA as an arm’s length transaction, and the party relying on the exemption must receive no more than reasonable compensation.

Additionally, the exemption restricts the parties that may use the exemption. Accordingly, the insurance agent, insurance broker, pension consultant, insurance company or investment company principal underwriter, and their affiliates, may not be a plan administrator (within the meaning of ERISA section 3(16) and Code section 414(g)), or an employer of employees covered by the plan.

Further, the insurance agent, insurance broker, pension consultant, insurance company or investment company principal underwriter may not be a trustee of the plan (other than a nondiscretionary trustee who does not render investment advice with respect to any assets of the plan) or a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the assets of the plan on a discretionary basis (*i.e.*, an investment manager). However, these entities may be affiliated with discretionary trustees or investment managers if the trustee or investment manager affiliate has no discretionary authority or control over the plan assets involved in the transaction other than as a nondiscretionary trustee.

The exemption requires that certain disclosures be made to an independent fiduciary of the plan or IRA, following which the independent fiduciary must approve the transaction. In the case of the purchase of an insurance or annuity contract, the insurance agent, insurance broker or pension consultant must disclose its relationship with the insurance company, the sales commission it will receive (including for renewal years), and a description of any charges, fees, discounts, penalties or

The purchase, with plan assets, of mutual fund shares from, or the sale of such securities to, a mutual fund or mutual fund principal underwriter, when such mutual fund or its principal underwriter or investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: the sponsorship of a master or prototype plan or the provision of nondiscretionary trust services to the plan; or both.

adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination or sale of such contract.

In the case of mutual fund shares, the principal underwriter similarly must disclose its relationship with the mutual fund, the sales commission it will receive, a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended mutual fund shares in connection with the purchase, holding, exchange, termination or sale of such shares.

If granted, this proposal would make changes, discussed below, to PTE 84–24, as well as a re-ordering of the sections of the exemption and the definitions set forth in the exemption.

## Description of the Proposal

### I. Impartial Conduct Standards

This proposal would amend PTE 84–24 to require insurance agents, insurance brokers, pension consultants, insurance companies and mutual fund principal underwriters that are 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.

Under the first conduct standard, the insurance agent, insurance broker, pension consultant, insurance company or mutual fund principal underwriter would be required to act in the plan's or IRA's best interest when providing investment advice regarding the purchase of the insurance or annuity contract or mutual fund shares. 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 circumstances, and the needs of the plan or IRA. Further, under the best interest standard, the insurance agent, insurance broker, pension consultant, insurance company or mutual fund principal underwriter must act without regard to its own financial or other interests or those of any affiliate or other party. Under this standard, the fiduciary must put the interests of the plan or IRA ahead of the fiduciary's own financial interests or those of its affiliates or 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 these standards. However, as a condition of

relief under the proposed amendment, both IRA and plan fiduciaries would have to uphold the best interest and other Impartial Conduct Standards set forth in Section II. The best interest standard is defined to effectively mirror the ERISA section 404 duties of prudence and loyalty, as applied in the context of fiduciary investment advice.

The second conduct standard requires that the statements by the insurance agent, insurance broker, pension consultant, insurance company or mutual fund principal underwriter 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. For this purpose, the failure to disclose a material conflict of interest relevant to the services the entity 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. Transactions that violate the requirements are not likely to be in the interests of or protective of plans and their participants and beneficiaries and IRA owners.

Unlike the new exemption proposals published elsewhere in the **Federal Register**, the Impartial Conduct Standards proposed herein do not include a requirement that the compensation received by the fiduciary and affiliates be reasonable. Such a requirement already exists under Section IV(c) of the exemption, and is therefore unnecessary in Section II.

Additionally, unlike the new exemption proposals, this proposed amendment does 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, this exemption, as amended, would be deemed unavailable for transactions occurring in connection with such violations.

### II. IRAs

Since PTE 84–24 was initially granted,<sup>10</sup> 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 their interests are protected by appropriate conditions in the Department's exemptions.

In connection with the Department's Proposed Regulation on the definition of fiduciary the Department has also proposed, elsewhere in this issue of the **Federal Register**, new class exemptions applicable to investment advice fiduciaries. The proposed "Best Interest Contract Exemption" would permit investment advice fiduciaries to receive compensation in a broad range of transactions commonly entered into by retail retirement investors (plan participants and beneficiaries, IRA owners and small plan sponsors) including investment in stocks, bonds, mutual funds and insurance and annuity contracts, and it contains safeguards specifically crafted for these investors.

The Best Interest Contract Exemption would require investment advice fiduciaries—including both the individual adviser and the firm that the adviser is employed by or otherwise the agent of—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. 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. Additionally, the Best Interest Contract Exemption would require detailed disclosure of fees associated with investments and the compensation received by investment advice fiduciaries in connection with the transactions.

As the Best Interest Contract Exemption was designed for IRA owners and other investors that rely on fiduciary investment advisers in the retail marketplace, the Department believes that some of the transactions involving IRAs that are currently permitted under PTE 84–24 should instead occur under the conditions of the Best Interest Contract Exemption, specifically, transactions involving variable annuity contracts and other annuity contracts that are securities under federal securities laws, and mutual fund shares. Therefore, this proposal would revoke relief in PTE 84–24 for such transactions. This change is

<sup>10</sup> PTE 84–24 was preceded by PTE 77–9, 42 FR 32395 (June 24, 1977), as corrected, 42 FR 33817 (July 1, 1977), and as amended, 44 FR 1479 (Jan. 5, 1979) and 44 FR 52365 (Sept. 7, 1979).

reflected in a proposed new Section I(b), setting forth the scope of the exemption. On the other hand, the Department has determined that transactions involving insurance and annuity contracts that are not securities can continue to occur under this exemption, with the added protections of the Impartial Conduct Standards.

In this proposal, therefore, the Department has distinguished between transactions that involve securities and those that involve insurance products that are not securities. The Department believes that annuity contracts that are securities and mutual fund shares are distributed through the same channels as many other investments covered by the Best Interest Contract Exemption, and such investment products all have similar disclosure requirements under existing regulations. In that respect, the conditions of the proposed Best Interest Contract Exemption are appropriately tailored for such transactions.

The Department is not certain that the conditions of the Best Interest Contract Exemption, including some of the disclosure requirements, would be readily applicable to insurance and annuity contracts that are not securities, or that the distribution methods and channels of insurance products that are not securities would fit within the exemption's framework. While the Best Interest Contract Exemption will be available for such products, the Department is seeking comment in that proposal on a number of issues related to use of that exemption for such insurance and annuity products.

The Department requests comment on this approach. In particular, the Department requests comment on whether the proposal to revoke relief for securities transactions involving IRAs (*i.e.*, annuities that are securities and mutual funds) but leave in place relief for IRA transactions involving insurance and annuity contracts that are not securities strikes the appropriate balance and is protective of the interests of the IRAs.

### III. Commissions

While PTE 84–24 provides an exemption for the specified parties to receive commissions in connection with the purchase of the insurance or annuity contracts and mutual fund shares, it does not currently contain a definition of commission. To provide certainty with respect to the payments permitted by the exemption, specific definitions for both (1) insurance commissions and (2) mutual fund commissions are now proposed in Section VI.

Section VI(f) would define an insurance commission to mean a sales

commission paid by the insurance company or an affiliate to the insurance agent, insurance broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailers that are paid in connection with the purchase or sale of the insurance or annuity contract. As proposed, insurance commissions would not include revenue sharing payments, administrative fees or marketing fees. Additionally, the term does not include payments from parties other than the insurance company or its affiliates, and it does not include payments that result from the underlying investments that are held pursuant to the insurance contract, such as payments derived from a variable annuity's investments.

Section VI(i) would define a mutual fund commission to mean a commission or sales load paid either by the plan or the mutual fund for the service of effecting or executing the purchase or sale of mutual fund shares, but not a 12b–1 fee, revenue sharing payment, administrative fee or marketing fee.

### IV. Recordkeeping Requirements

A new proposed Section V to PTE 84–24 would require the fiduciary engaging in a transaction covered by the exemption to maintain records necessary to enable certain persons (described in proposed Section V(b)) to determine whether the conditions of this exemption have been met. This requirement would replace the more limited existing recordkeeping requirement in Section V(e). 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**, and is intended to be protective of rights of plan participants and beneficiaries and IRA owners by ensuring they and the Department can confirm the exemption has been satisfied.

### V. Other

Finally, the proposed amendment makes several minor changes in order to update PTE 84–24. The definitions have been reordered in alphabetical order for ease of use. Section I has been deleted because retroactive relief is no longer necessary, and Section II and III have been combined in order to increase readability and clarity. Finally, the term “Act” has been replaced with “ERISA” to reflect modern usage.

### 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 the amendments to and partial revocation of this exemption, if granted, applicable on the Applicability Date.

### 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) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters 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 amendment to and proposed partial revocation of PTE 84–24 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, PTE 84-24, as amended, would require insurance agents and brokers, pension consultants, insurance companies, and investment company Principal Underwriters to make certain disclosures to and receive an advance written authorization from plan fiduciaries in order to receive relief from ERISA's and the Code's prohibited transaction rules for the receipt of compensation when plans enter into certain insurance and mutual fund transactions recommended by the fiduciaries. The proposed amendment would require insurance agents and brokers, pension consultants, insurance companies, and investment company Principal Underwriters relying on PTE 84-24 to maintain records necessary to prove that the conditions of the exemption 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 to and advance authorizations from plans, as well as 50% of disclosures to and advance authorizations from IRAs 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;

- Insurance agents and brokers, pension consultants, insurance companies, investment company Principal Underwriters, and plans 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<sup>11</sup>

- Eight percent of plans and nine percent of IRAs have relationships with insurance agents and brokers, pension consultants, and insurance companies.

- Approximately 1,300 insurance agents and brokers, pension consultants, and insurance companies will take advantage of this exemption with all of their client plans and IRAs.<sup>12</sup>

- Ten investment company Principal Underwriters will take advantage of this exemption and each will do so once with one client plan annually.<sup>13</sup>

#### Disclosures and Consent Forms

In order to receive commissions in conjunction with the purchase of insurance or annuity contracts, section IV(b) of PTE 84-24 as amended requires the insurance agent or broker or pension

<sup>11</sup> 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>).

<sup>12</sup> As described in the regulatory impact analysis for the accompanying rule, the Department estimates that approximately 1,300 insurance agents and pension consultants service the retirement market.

<sup>13</sup> In the Department's experience, investment company Principal Underwriters almost never use PTE 84-24. Therefore, the Department assumes that ten investment company Principal Underwriters will engage in one transaction annually under PTE 84-24.

consultant to obtain advance written authorization from a plan fiduciary or IRA holder independent of the insurance company (the independent fiduciary) following certain disclosures, including: if the agent, broker, or consultant is an Affiliate of the insurance company whose contract is being recommended, or if the ability of the agent, broker, or consultant to recommend insurance or annuity contracts is limited by any agreement with the insurance company, the nature of the affiliation, limitation, or relationship; the insurance commission; and a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended contract.

In order to receive commissions in conjunction with the purchase of securities issued by an investment company, section IV(c) of PTE 84-24 as amended requires the investment company Principal Underwriter to obtain approval from an independent plan fiduciary following certain disclosures: if the person recommending securities issued by an investment company is the Principal Underwriter of the investment company whose securities are being recommended, the nature of the relationship and of any limitation it places upon the Principal Underwriter's ability to recommend investment company securities; the commission; and a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination, or sale of the securities. Unless facts or circumstances would indicate the contrary, the approval required under section IV(c) may be presumed if the independent plan fiduciary permits the transaction to proceed after receipt of the written disclosure.

#### Legal Costs

According to 2012 Annual Return/Report of Employee Benefit (Form 5500) data and Internal Revenue Service Statistics of Income data, the Department estimates that there are approximately 677,000 ERISA covered pension plans and approximately 54.5 million individual retirement accounts (IRAs). Of these plans and IRAs, the Department assumes that 6.5 percent are new plans/IRAs or plans/IRAs entering into relationships with new financial institutions and, as stated previously, eight percent of these new plans and nine percent of these new IRAs will engage in transactions covered under PTE 84-24 with insurance agents or brokers and pension consultants. In the

plan universe, the Department assumes that a legal professional will spend one hour per plan reviewing the disclosures and preparing an authorization form for each of the approximately 3,500 plans entering into new relationships each year. In the IRA universe, the Department assumes that a legal professional working on behalf of each of the 1,300 insurance agents or pension consultants will spend one hour drafting an authorization form for IRA holders to sign. The Department also estimates that it will take two hours of legal time for each of the approximately 1,300 insurance companies and pension consultants, and one hour of legal time for each of the ten investment company Principal Underwriters, to produce the disclosures.<sup>14</sup> This legal work results in a total of approximately 7,000 hours annually at an equivalent cost of \$965,000.

#### Production and Distribution of Required Disclosures

The Department estimates that approximately 54,000 plans and 4.9 million IRAs have relationships with insurance agents or brokers and pension consultants and are likely to engage in transactions covered under this exemption. Of these 54,000 plans and 4.9 million IRAs, approximately 3,500 plans and 319,000 IRAs are new clients to the insurance agents or brokers and pension consultants each year. The Department assumes that ten plans have relationships with investment company Principal Underwriters that are new each year.

The Department estimates that 3,500 plans will send insurance agents or brokers and pension consultants a two page authorization letter and 319,000 IRAs will receive a two page authorization letter from insurance agents or brokers and pension consultants each year. Prior to obtaining authorization, insurance companies and pension consultants will send the same 3,500 plans and 319,000 IRAs 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. Paper copies of

the authorization letter and the pre-authorization disclosure will be mailed to 50 percent of the IRAs and distributed electronically to the remaining 50 percent. The Department estimates that electronic distribution will result in a de minimis cost, while paper distribution will cost approximately \$231,000. Paper distribution of the letter and disclosure will also require two minutes of clerical preparation time resulting in a total of 11,000 hours at an equivalent cost of approximately \$328,000.

The Department estimates that ten plans will receive the seven page pre-transaction disclosure from investment company Principal Underwriters; 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 \$5. Paper distribution will also require two minutes of clerical preparation time resulting in a total of 12 minutes at an equivalent cost of \$6. Approval to investment company Principal Underwriters will be granted orally at de minimis cost.

#### Recordkeeping Requirement

Section V of PTE 84–24, as amended, would require insurance agents and brokers, insurance companies, pension consultants, and investment company Principal Underwriters 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, plan participant, beneficiary or IRA owner, to determine whether the conditions of this exemption have been met.

The Department assumes that each 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 1,000 hours at an equivalent cost of \$92,000.

In connection with the recordkeeping and disclosure requirements discussed above, Section V(b) (2) and (3) of PTE 84–24 provides 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, almost 5,000 financial institutions and plans will produce 645,000 disclosures and notices annually. These disclosures and notices will result in over 19,000 burden hours annually, at an equivalent cost of \$1.4 million. This exemption will also result in a total annual cost burden of over \$231,000.

These paperwork burden estimates are summarized as follows:

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

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Titles:* (1) Proposed Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters.

*OMB Control Number:* 1210–NEW.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 4,828.

*Estimated Number of Annual Responses:* 644,669.

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

*Estimated Total Annual Burden Hours:* 19,184 hours.

<sup>14</sup> The Department assumes that it will require one hour of legal time per financial institution to prepare plan-oriented disclosures and one hour of legal time per financial institution to prepare IRA-oriented disclosures. Because insurance agents and pension consultants are permitted to use PTE 84–24 in their transactions with both plans and IRAs, this totals two hours of legal burden each. Because investment company principal underwriters are only permitted to use PTE 84–24 in their transactions with plans, this totals one hour of legal burden each.



*Estimated Total Annual Burden Cost:* \$231,074.

### 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) This amended exemption, 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 amendment and proposed partial revocation 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 proposal. Comments received will be available for public inspection at the above address.

### Proposed Amendment to PTE 84–24

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 84–24 as set forth below:

#### Section I. Covered Transactions

(a) *Exemptions.* The restrictions of ERISA section 406(a)(1)(A) through (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(A) through (F), do not apply to any of the following transactions if the conditions set forth in Sections II, III, IV and V, as applicable, are met:

(1) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of an Insurance Commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract.

(2) The receipt of a Mutual Fund Commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company.

(3) The effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company.

(4) The purchase, with plan assets, of an insurance or annuity contract from an insurance company.

(5) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a Master or Prototype Plan.

(6) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when the investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by

reason of: (A) The sponsorship of a Master or Prototype Plan; or (B) the provision of Nondiscretionary Trust Services to the plan; or (C) both (A) and (B).

(b) *Scope of these Exemptions.* The exemptions set forth in Section I(a) do not apply to the purchase by an Individual Retirement Account as defined in Section VI, of (1) a variable annuity contract or other annuity contract that is a security under federal securities laws, or (2) mutual fund shares.

#### Section II. Impartial Conduct Standards

If the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter is a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the following conditions must be satisfied with respect to the transaction to the extent they are applicable to the fiduciary's actions:

(a) When exercising fiduciary authority described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter acts in the Best Interest of the plan or IRA; and

(b) The statements by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter 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. For this purpose, the insurance agent's or broker's, pension consultant's, insurance company's or investment company Principal Underwriter's failure to disclose a Material Conflict of Interest relevant to the services it 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.

#### Section III. General Conditions

(a) The transaction is effected by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter in the ordinary course of its business as such a person.

(b) The transaction is on terms at least as favorable to the plan or IRA as an arm's length transaction with an unrelated party would be.

(c) The combined total of all fees, Insurance Commissions, Mutual Fund Commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter:

(1) For the provision of services to the plan or IRA; and

(2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of "reasonable compensation" within the contemplation of ERISA section 408(b)(2) and 408(c)(2) and Code section 4975(d)(2) and 4975(d)(10). If the total is in excess of "reasonable compensation," the "amount involved" for purposes of the civil penalties of ERISA section 502(i) and the excise taxes imposed by Code section 4975 (a) and (b) is the amount of compensation in excess of "reasonable compensation."

#### **Section IV. Conditions for Transactions Described in Section I(a)(1) Through (4)**

The following conditions apply solely to a transaction described in paragraphs (a)(1), (2), (3) or (4) of Section I:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter is not (1) a trustee of the plan or IRA (other than a Nondiscretionary Trustee who does not render investment advice with respect to any assets of the plan), (2) a plan administrator (within the meaning of ERISA section 3(16)(A) and Code section 414(g)), (3) a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the assets of the plan or IRA on a discretionary basis, or (4) an employer any of whose employees are covered by the plan. Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is Affiliated with a trustee or an investment manager (within the meaning of Section VI(e)) with respect to a plan or IRA may engage in a transaction described in Section I(a)(1)–(4) of this exemption (if permitted under Section I(b)) on behalf of the plan or IRA if the trustee or investment manager has no discretionary authority or control over the assets of the plan or IRA involved in the transaction other than as a Nondiscretionary Trustee.

(b)(1) With respect to a transaction involving the purchase with plan or IRA assets of an insurance or annuity contract or the receipt of an Insurance Commission thereon, the insurance agent or broker or pension consultant

provides to an independent fiduciary with respect to the plan or IRA prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an Affiliate of the insurance company whose contract is being recommended, or if the ability of the agent, broker or consultant to recommend insurance or annuity contracts is limited by any agreement with the insurance company, the nature of the affiliation, limitation, or relationship;

(B) The Insurance Commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the recommended contract; and

(C) A description of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination or sale of the contract.

(2) Following the receipt of the information required to be disclosed in paragraph (b)(1), and prior to the execution of the transaction, the independent fiduciary acknowledges in writing receipt of the information and approves the transaction on behalf of the plan. The fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction. The fiduciary may not receive, directly or indirectly (*e.g.*, through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(c)(1) With respect to a transaction involving the purchase with plan assets of securities issued by an investment company or the receipt of a Mutual Fund Commission thereon by an investment company Principal Underwriter, the investment company Principal Underwriter provides to an independent fiduciary with respect to the plan, prior to the execution of the transaction, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the person recommending securities issued by an investment company is the Principal Underwriter of

the investment company whose securities are being recommended, the nature of the relationship and of any limitation it places upon the Principal Underwriter's ability to recommend investment company securities;

(B) The Mutual Fund commission, expressed as a percentage of the dollar amount of the plan's gross payment and of the amount actually invested, that will be received by the Principal Underwriter in connection with the purchase of the recommended securities issued by the investment company; and

(C) A description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination or sale of the securities.

(2) Following the receipt of the information required to be disclosed in paragraph (c)(1), and prior to the execution of the transaction, the independent fiduciary approves the transaction on behalf of the plan. Unless facts or circumstances would indicate the contrary, the approval may be presumed if the fiduciary permits the transaction to proceed after receipt of the written disclosure. The fiduciary may be an employer of employees covered by the plan, but may not be a Principal Underwriter involved in the transaction. The fiduciary may not receive, directly or indirectly (*e.g.*, through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(d) With respect to additional purchases of insurance or annuity contracts or securities issued by an investment company, the written disclosure required under paragraphs (b) and (c) of this Section IV need not be repeated, unless:

(1) More than three years have passed since the disclosure was made with respect to the same kind of contract or security, or

(2) The contract or security being recommended for purchase or the Insurance Commission or Mutual Fund Commission with respect thereto is materially different from that for which the approval described in paragraphs (b) and (c) of this Section was obtained.

#### **Section V. Recordkeeping Requirements**

(a) The insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter 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 V(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 V(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 insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter, 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 the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter 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 the 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 the participant or beneficiary or IRA owner; 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 insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter which is privileged or confidential.

(3) Should the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter refuse to disclose information on the basis that the information is exempt from disclosure, the insurance agent or broker, pension consultant, insurance company or

investment company Principal Underwriter 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 the information.

#### Section VI. Definitions

For purposes of this exemption:

(a) The term “Affiliate” of a person means:

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

(2) Any officer, director, employee (including, in the case of Principal Underwriter, any registered representative thereof, whether or not the person is a common law employee of the Principal Underwriter), or relative of any such person, or any partner in such person; or

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

(b) The insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter that is a fiduciary acts in the “Best Interest” of the plan or IRA is 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.

(c) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The terms “Individual Retirement Account” 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.

(e) The terms “insurance agent or broker,” “pension consultant,” “insurance company,” “investment company,” and “Principal Underwriter” mean such persons and any Affiliates thereof.

(f) The term “Insurance Commission” mean a sales commission paid by the insurance company or an Affiliate to the insurance agent or broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailers, but not revenue sharing payments, administrative fees or

marketing payments, or payments from parties other than the insurance company or its Affiliates.

(g) The term “Master or Prototype Plan” means a plan which is approved by the Service under Rev. Proc. 2011–49, 2011–44 I.R.B. 608 (10/31/2011), as modified, or its successors.

(h) A “Material Conflict of Interest” exists when a 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.

(i) The term “Mutual Fund Commission” means a commission or sales load paid either by the plan or the investment company for the service of effecting or executing the purchase or sale of investment company shares, but does not include a 12b-1 fee, revenue sharing payment, administrative fee or marketing fee.

(j) The term “Nondiscretionary Trust Services” means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1). The term “Nondiscretionary Trustee” of a plan or IRA means a trustee whose powers and duties with respect to the plan are limited to the provision of Nondiscretionary Trust Services. For purposes of this exemption, a person who is otherwise a Nondiscretionary Trustee will not fail to be a Nondiscretionary Trustee solely by reason of his having been delegated, by the sponsor of a Master or Prototype Plan, the power to amend the plan.

(k) The term “Principal Underwriter” is defined in the same manner as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29)).

(l) The term “relative” means a “relative” as that term is defined in ERISA section 3(15) (or a “member of the family” as that term is defined in Code section 4975(e)(6)), or a brother, a sister, or a spouse of a brother or a sister.

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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