(o) ''Retirement Investor'' means:

(1) A participant or beneficiary of a Plan with authority to direct the investment of assets in their account or to take a distribution;

(2) The beneficial owner of an IRA acting on behalf of the IRA; or

(3) A fiduciary acting on behalf of a Plan or an IRA.

(p) A ''Senior Executive Officer'' is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Insurer.

Signed at Washington, DC, this 24th day of October, 2023.

Lisa M. Gomez,

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

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12094]

ZRIN 1210–ZA34

Proposed Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128

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

ACTION: Notice of Proposed Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of proposed amendments to Prohibited Transaction Exemptions (PTEs) 75–1, 77–4, 80–83, 83–1, and 86–128, exemptions from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The amendments would affect participants and beneficiaries of plans, IRA owners, and certain fiduciaries of plans and IRAs.

DATES: *Public Comments.* Comments are due on or before January 2, 2024.

Public Hearing. The Department anticipates holding a public hearing approximately 45 days following the date of publication in the **Federal Register**. Specific information regarding the date, location, and submission of requests to testify will be published in a notice in the **Federal Register**.

Applicability Date. The Department proposes to make the final amendment effective 60 days after it is published in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendments should be sent to the Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor through the Federal eRulemaking Portal and identified by Application No. D–12094:

Federal eRulemaking Portal: https://www.regulations.gov. at Follow the instructions for submitting comments.

Docket: For access to the docket to read background documents, including the plain-language summary of the proposal of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023, or comments, go to the Federal eRulemaking Portal at *https://www.regulations.gov.*

See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

FOR FURTHER INFORMATION CONTACT: Susan Wilker, telephone (202) 693–8540, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Comment Instructions

Warning: All comments received will be included in the public record without change and will be made available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number), or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the *https://www.regulations.gov* website is an ''anonymous access'' system, which means EBSA will not know your identity or contact information unless you provide it. If you send an email directly to EBSA without going through *https://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

Background

As described elsewhere in this edition of the **Federal Register**, the Department is proposing to amend the regulation defining when a person renders ''investment advice for a fee or other compensation, direct or indirect'' with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a ''fiduciary'' in section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and in section 4975(e)(3)(B) of the Internal Revenue Code (Code). The Department is also proposing, elsewhere in this edition of the **Federal Register**, to amend prohibited transaction exemption (PTE) 2020–02 to provide additional clarity for advice fiduciaries and additional protections for plans and investors and PTE 84–24 to address specific issues that financial institutions face complying with the conditions of PTE 2020–02 when distributing annuities through independent agents.

The Department is hereby proposing amendments to existing PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 that currently provide relief for investment advice fiduciaries to receive compensation when plans and IRAs enter into certain transactions recommended by the fiduciaries as well as certain related transactions. 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 proposed amendments would remove fiduciary investment advice, as defined under ERISA and in a proposed regulation issued by the Department that is found elsewhere in this issue of the **Federal Register**, from the covered transactions in each exemption and make certain other administrative changes. The Department is proposing these amendments on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[1]

[1] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

Current PTEs 75–1, 77–4, 80–83, 83–1, and 86–128

PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 currently provide investment advice fiduciaries with relief for the following transactions:

PTE 75–1 [2] provides an exemption for broker-dealers, reporting dealers, and banks to engage in certain classes of transactions with employee benefit plans and IRAs. The exemption has five parts: [3]

- Part I provides relief for agency transactions and services; [4]
- Part II(1) permits the purchase or sale of a security between an employee benefit plan or IRA and a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et. seq.*), a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State. The exemption provided in Part II(1) does not extend to the fiduciary self-dealing and conflicts of interest prohibitions of ERISA and the Code;
- Part II(2) contains a special exemption for mutual fund purchases (the mutual fund exemption) between fiduciaries and plans or IRAs. Although it does provide relief for fiduciary self-dealing and conflicts of interest, the mutual fund exemption is only available if the fiduciary who decides on behalf of the plan or IRA to enter into the transaction is not a principal underwriter for, or affiliated with, the mutual fund;
- Part III permits a fiduciary to cause a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary itself when the fiduciary is also a member of the syndicate;
- Part IV 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; and
- Part V permits the extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities;

PTE 77–4 [5] 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 [6] 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;

PTE 83–1 [7] 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; and

PTE 86–128 [8] provides an exemption for certain types of fiduciaries to use their authority to cause a plan or IRA to pay a fee to the fiduciary, or its affiliate, for effecting or executing securities transactions as agent for the plan. The exemption further provides relief for these types of fiduciaries to act as agent in an ''agency cross transaction'' for both a plan or IRA and one or more other parties to the transaction, and for such fiduciaries or their affiliates to receive fees from the other party(ies) in connection with the agency cross transaction. An agency cross transaction is defined in the exemption as a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

Other Advice Exemptions

PTE 2020–02

PTE 2020–02 [9] permits investment advice fiduciaries to receive compensation as a result of their advice, including as a result of advice to roll over assets from an employee benefit plan to an IRA, and to engage in certain principal transactions and was designed to promote investment advice that is in the best interest of retirement investors (*e.g.,* plan participants and beneficiaries, and IRA owners). The exemption's conditions emphasize mitigating conflicts of interest and ensuring that retirement investors receive advice that is prudent and loyal. An important objective of the exemption is to require fiduciary investment advice providers to adhere to stringent standards that are designed to ensure that their investment recommendations reflect the best interest of plan and IRA investors. Accordingly, financial institutions and investment professionals relying on PTE 2020–02 must: (i) acknowledge their fiduciary status in writing; (ii) disclose their services and material conflicts of interest; and adhere to impartial conduct standards; (iii) adopt policies and procedures prudently designed to ensure compliance with the impartial conduct standards and mitigate conflicts of interest that could otherwise cause violations of those standards; (iii) document and disclose the specific reasons that any rollover recommendations are in the retirement investor's best interest; (iv) and conduct an annual retrospective compliance review.

The Department is proposing an amendment to PTE 2020–02 that is published separately in this edition of the **Federal Register**. The proposed amendment to PTE 2020–02 would build on these existing conditions to provide more protections for retirement investors receiving advice and more certainty for financial institutions and investment professionals complying with the exemption's conditions. In this regard, among other things, the Department is proposing additional disclosures to ensure that retirement investors have sufficient information to make informed decisions about the costs of the investment advice transaction and about the significance and severity of the investment advice fiduciary conflicts of interest. The proposed amendment also would provide more guidance for financial institutions and investment professionals complying with the impartial conduct standards and implementing the policies and procedures requirement. As discussed in detail in the preamble to the amendment, these additional conditions would provide important protections to retirement investors by enhancing the existing protections of PTE 2020–02.

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[2] 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).

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

[4] Part I(a) expired on May 1, 1978. It ultimately was replaced by PTE 86–128 (51 FR 41686 (Nov. 18, 1986)).

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

[6] 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).

[7] Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, 48 FR 895 (Jan. 7, 1984), as amended at 67 FR 9483 (March 1, 2002).

[8] Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers, 51 FR 41686 (November 18, 1986), as amended at 67 FR 64137 (October 17, 2002).

[9] Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees 85 FR 82798 (Dec. 18, 2020).

PTE 84–24

PTE 84–24 [10] provides exemptive relief for certain prohibited transactions that occur when plans or IRAs purchase insurance and annuity contracts and shares in an investment 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 also is 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.

The Department is proposing an amendment to PTE 84–24 that is published separately in this edition of the **Federal Register** that would provide an alternative exemption for independent insurance agents to receive insurance commissions in connection with recommendations of annuity products if certain conditions are met that are similar to the conditions contained in PTE 2020–02. These conditions are tailored to protect retirement investors from the specific conflicts of interest that arise when independent insurance agents are compensated through insurance commissions. Additionally, the amendment would exclude investment advice fiduciaries from the existing relief provided in the current Section II of PTE 84–24, add a new eligibility provision for investment advice transactions, and amend the current recordkeeping condition to be similar to the recordkeeping provision in PTE 2020–02.

Description of Proposed Amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128

Providing for a single standard of care (which is currently found in PTE 2020–02) that would apply universally to all fiduciary investment advice, regardless of the specific type of product or advice provider, will provide greater protection for retirement investors and create a level playing field among investment advice providers. Therefore, to ensure a universal standard of care for the provision of investment advice that is based on the conditions of PTE 2020–02, the Department is proposing to amend PTEs 75–1 Parts III & IV, 77–4, 80–83, 83–1, and 86–128 to include the following statement: ''*Exception.* No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.''

As a result of this amendment, investment advice fiduciaries would instead rely on the amended PTE 2020–02 for exemptive relief for covered investment advice transactions. By providing exemptive relief for fiduciary investment advice transactions under one exemption, PTE 2020–02, retirement investors would receive consistent protections when receiving investment advice from investment professionals such that a level playing regulatory playing field would apply regardless of the investment product the advisor recommends. The Department requests comment on this proposed change.

In addition to removing exemptive relief for investment advice transactions, the Department also is proposing certain administrative amendments to these exemptions, which are discussed below.

Amendments to PTE 75–1

The Department is proposing to revoke parts of PTE 75–1, which was granted shortly after ERISA's passage to provide certainty to the securities industry over the nature and extent to which ordinary and customary transactions between broker-dealers and plans or IRAs would be subject to ERISA's prohibited transaction rules.

PTE 75–1 Part I

PTE 75–1, Part I, paragraphs (b) and (c) provide exemptive relief for certain non-fiduciary services provided by broker-dealers in securities transactions. Code section 4975(d)(2), ERISA section 408(b)(2) and regulations thereunder, have clarified the scope of relief for service providers to plans and IRAs.[11] The Department believes that the relief provided in Parts I(b) and I(c) of PTE 75–1 duplicates the relief available under the statutory exemptions at Code section 4975(d)(2) and ERISA section 408(b)(2). Therefore, the Department is proposing to revoke paragraphs (b) and (c) of Part I, and requests comments on this proposed revocation.

PTE 75–1, Part II

PTE 75–1, Part II(2), contains a special exemption for mutual fund purchases (the mutual fund exemption) between fiduciaries and plans or IRAs subject to minimal safeguards for retirement investors. The conditions of the exemption require a fiduciary to customarily purchase and sell securities for its own account in the ordinary course of its business, the transaction to occur on terms at least as favorable to the plan as an arm's length transaction with an unrelated party, and records to be maintained.

The Department is proposing to revoke PTE 75–1, Part II(2), because it has determined that it is not protective of retirement investors and has been broadly interpreted beyond the Department's intention when it was issued.[12] The transactions that have been covered by PTE 75–1 Part II(2) are largely now covered by newer, more protective exemptions, and fiduciaries providing investment advice on the purchase or sale of a mutual fund security can rely on PTE 2020–02. Moreover, fiduciaries providing investment management on the purchase or sale of a mutual fund security can receive non-commission compensation under PTE 77–4. The Department requests comment on this proposed revocation, and also on how the remaining parts of PTE 75–1 Part II will be used.

The Department is further proposing to revise the recordkeeping provisions of Section (e) of PTE 75–1, Part II. Section (e) currently provides that records demonstrating compliance with the exemption must be maintained by the plan or IRA involved in the transaction. The proposed amendment would place the responsibility for maintaining such records on the broker-dealer, reporting dealer, or bank engaging in the transaction with such plan or IRA. The proposed amendment also would provide that parties relying on the exemption do not have to disclose trade secrets or other confidential information to members of the public (*i.e.,* plan fiduciaries, contributing employers or employee organizations whose members are covered by the plan, participants and beneficiaries and IRA owners), but that in the event a party refuses to disclose information on this basis, it must

[10] 49 FR 13208 (April 3, 1983), as amended at 71 FR 5887 (Feb. 3, 2006).

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

[12] 81 FR 21181, 21199 (Apr. 8, 2016).

provide a written notice to the requester advising it of the reasons for the refusal and that the Department may request such information on the requester's behalf.

The Department requests comment regarding whether fiduciaries providing discretionary investment management services on the purchase or sale of a mutual fund security in a principal transaction need the relief that is provided by PTE 75–1, Part II(2), and, if so, what conditions would be appropriate.

Part 75–1, Part V

PTE 75–1, Part V permits a broker-dealer to extend credit to a plan or IRA in connection with the purchase or sale of securities. It originally did not permit the receipt of compensation for an extension of credit by broker-dealers that are fiduciaries with respect to the assets involved in the transaction. In 2016, the Department amended this exemption to allow investment advice fiduciaries to receive compensation when they extend credit to plans and IRAs to avoid a failed securities transaction. As a condition of the amendment, the failure of the purchase or sale of the securities could not have been caused by the fiduciary or an affiliate. The Department also added a definition of the term ''IRA'' as any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.[13] The amendment also revised the recordkeeping provisions of PTE 75–1, Part V, to require the broker-dealer engaging in the covered transaction, as opposed to the plan or IRA, to maintain the records. The Department is proposing to make these amendments to PTE 75–1 Part V as it did in 2016.

PTE 86–128

The Department is proposing certain administrative changes to PTE 86–128, which are not directly related to the provision of fiduciary investment advice. As it did in 2016, the Department is proposing to delete Section IV(a), which provides an exclusion from the conditions of the exemption for certain plans not covering employees, including IRAs, to increase the safeguards available to these retirement investors. Therefore, investment advice fiduciaries to IRAs would have to rely on another exemption, such as PTE 2020–02. Fiduciaries that exercise full discretionary authority or control with respect to IRAs could continue to rely on PTE 86–128, as long as they comply with all of the exemption's conditions.

The Department is also proposing certain technical changes to the exemption, including deleting subsection IV(b)(1), and redesignating remaining sections as needed. The language currently in Section IV(b)(1) excludes investment advice providers; however, investment advice providers would be excluded from the exemption as a whole; therefore, the exclusion does not need to be repeated in Section IV. As a result of the deletion of Section IV(a) and IV(b)(1), the Department is redesignating subsections IV(b)(2) and (3) as subsections IV(a)(1) and (2), respectively, and Section IV(c) as Section IV(b).

The Department is proposing to revise the new Section IV(b) to read: ''Recapture of profits. Sections III(a) and III(i) of this exemption do not apply in cases where the person engaging in a covered transaction returns or credits to the plan all profits earned by that person in connection with the securities transactions associated with the covered transaction.'' Discretionary trustees were first permitted to rely on PTE 86–128 without meeting the ''recapture of profits'' provision pursuant to an amendment made in 2002 (2002 Amendment). To effect this change, the 2002 Amendment revised Section III(a), which had provided that ''[t]he person engaging in the covered transaction [may not be] a trustee (other than a nondiscretionary trustee), or an administrator of the plan, or an employer any of whose employees are covered by the plan.'' Under the amendment, the reference to ''trustee (other than a nondiscretionary trustee)'' was deleted from Section III(a), and discretionary trustees had to satisfy certain additional conditions set forth in Section III(h) and (i) to rely on the exemption. Section III(h) provides that discretionary trustees may engage in the covered transactions only with plans or IRAs with total net assets of at least $50 million,[14] and Section III(i) requires discretionary trustees to provide additional disclosures. The Department understands that after the 2002 Amendment, practitioners had questions regarding whether discretionary trustees were permitted to rely on the ''recapture of profits'' provision, which allows persons identified in Section III(a) to engage in the covered transactions if they return or credit to the plan or IRA all profits, as an alternative to complying with Sections III(h) and (i). By deleting the reference to discretionary trustees from Section III(a), the Department believes that the 2002 Amendment inadvertently may have prevented trustees of plans or IRAs from using the recapture of profits approach, and instead, has limited the exemption to trustees that satisfy Section III(h) and (i). This result was not intended, therefore, the Department is proposing to modify the exemption to permit all trustees, regardless of associated plan or IRA size, to utilize the recapture of profits exception as they originally were permitted to do in PTE 86–128.

In order to achieve this result, the Department has proposed an amendment to section IV(c) providing that Sections III(a) and III(i) do not apply in any case where the person engaging in the covered transaction returns or credits to the plan or IRA all profits earned by that person in connection with the securities transaction associated with the covered transaction. In addition, the Department proposes to reinsert a reference to trustees (other than nondiscretionary trustees) in Section III(a) along with the existing references to plan administrators and employers. Finally, the Department is proposing to add a sentence to the end of Section III(a) stating: ''Notwithstanding the foregoing, this condition does not apply to a trustee that satisfies Section III(h) and (i).'' The purpose of these proposed amendments is to clarify that trustees may engage in covered transactions subject to the recapture of profits limitations in Section V(b) of the exemption.

The Department is not proposing to amend PTE 86–128 to include mutual fund principal transactions that are currently covered in PTE 75–1 Part II(2). The Department previously made such a change in 2016 to allow both investment advice and investment discretion mutual fund principal fund transactions to rely on an amended PTE 86–128. However, the Department now believes other exemptions, including PTE 2020–02, provide sufficient relief for these types of transactions and enhanced protection for retirement investors.

[13] The Department has previously determined, after consulting with the Internal Revenue Service (the IRS), that plans described in 4975(e)(1) of the Code are included within the scope of relief provided by PTE 75–1 because it was issued jointly by the Department and the IRS. *See* PTE 2002–13, 67 FR 9483 (Mar. 1, 2002) (preamble discussion). For simplicity and consistency with the other new exemptions and amendments to other existing exemptions published elsewhere in this issue of the **Federal Register**, the Department has adopted this specific definition of IRA.

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

Lastly, the Department is proposing to add a new Section VII to PTE 86–128 that would require the fiduciary engaging in a transaction covered by the exemption to maintain records necessary to enable certain persons (described in proposed Section VII(b)) to determine whether the conditions of this exemption have been met. The proposed recordkeeping requirement is consistent with the recordkeeping provisions contained in other existing class exemptions as well as the recordkeeping provisions of proposed amendments to PTEs 84–24 and 2020–02, which are published separately in this issue of the **Federal Register**.

Executive Order 12866 and 13563 Statement

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 costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, as amended by Executive Order 14094, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive order 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 $200 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; (2) creating a 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 legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order. It has been determined that this proposal is ''significant regulatory action'' within the scope of section 3(f)(1) of the Executive order. Therefore, the Department has provided an assessment of the proposal's potential costs, benefits, and transfers, and OMB has reviewed this proposed amendment pursuant to the Executive order.

Paperwork Reduction Act Statements

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and Federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). 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 information collection requests (ICRs) included in the proposed amendments to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128. To obtain a copy of the ICRs, contact the PRA addressee shown below or go to *https://www.RegInfo.gov.* The Department has submitted a copy of the amendments to the 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 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 electronically delivered responses).

Commenters may send their views on the Department's PRA analysis in the same way they send comments in response to these proposed rules (for example, through the *www.regulations.gov* website), including as part of a comment responding to the broader proposal. Comments are due by January 2, 2024 to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210, or *ebsa.opr@dol.gov.* ICRs also are available at *https://www.RegInfo.gov* (*https://www.reginfo.gov/public/do/PRAMain*).

Amendments to PTE 75–1

The Department proposes to amend PTE 75–1, Part V, to include a new disclosure requirement requiring the plan or IRA to receive a written disclosure of certain terms before the extension of credit. The disclosure must include the rate of interest or other fees that will be charged on such extension of credit, and the method of determining the balance upon which interest will be charged. The plan or IRA must additionally be provided with prior written disclosure of any changes to these terms. The Department believes that it is a usual and customary business practice to maintain records required to demonstrate compliance with disclosure distribution regulations mandated by the Securities and Exchange Commission (SEC). The Department believes that this new disclosure requirement is consistent with the disclosure requirement mandated by the SEC in 17 CFR 240.10b–16(1) for margin transactions. Therefore, the Department concludes that this requirement produces no additional burden to the public.

The Department is also amending PTE 75–1, Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRAs to financial institutions. The amended class exemption requires as a condition for relief that financial institutions engaging in the exempted transactions (rather than the plans or IRAs) to retain or cause to be maintained all records pertaining to such transactions for six years and provide access to the records upon request to the specified parties.

Finally, the Department is proposing to amend PTE 75–1 Parts III and IV, which currently provide relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions.

Broker-dealers registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), reporting dealers, and banks are eligible to rely on the exemption. According to the SEC, approximately 3,508 broker-dealers were SEC-registered as of December 2021.[15] Not all broker-dealers perform services for employee benefit plans. In 2021, 54 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[16] Assuming the percentage of broker-dealers provide advice to retirement plans is the same as the percent of investment advisers providing services to plans, the Department estimates 54 percent, or 1,894 broker-dealers, would be affected by PTE 75–1.

According to the Federal Deposit Insurance Corporation, there are 4,096 commercial banks as of March 31, 2023.[17] If one-half of these banks (about 2,048) and 54 percent of broker-dealers (about 1,894 broker-dealers) relied on this exemption, there would be approximately 3,942 respondents.[18]

Recordkeeping Requirements

The Department has assumed that financial service providers that transact with employee benefit plans will maintain these records on behalf of their client plans. Because of the sophisticated nature of financial service providers and the regulation of the securities industry by State and federal government, and by self-regulatory organizations, the Department has assumed that the records required by this class exemption are the same records kept in the normal course of business, or in compliance with other requirements. The Department requests comment on this assumption.

The Department has estimated that the additional time needed to maintain records for the financial institutions to be consistent with the exemption will be four hours per entity annually at a wage rate of $190.63 per hour.[19] Thus, the Department estimates it would take 15,768 hours at an equivalent cost of $3,005,854 to maintain the records and make the records available for inspection.[20]

TABLE 1—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH RECORDKEEPING

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Manager	15,768	$3,005,854	15,768	$3,005,854
Total	15,768	3,005,854	15,768	3,005,854

Summary

In sum, the Department estimates the total burden hours for the amended PTE 1975–1 is 15,768 hours at a total equivalent burden cost of $3,005,854. The total cost burden is estimated to be de minimis. The Department assumes that required records are maintained by the relevant affected entities, the broker-dealers and banks. Thus, there are no additional tasks performed outside of those performed by the brokerage firms/banks.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Exemption 75–1 (Security Transactions with Broker-Dealers, Reporting Dealers and Banks).

OMB Control Number: 1210–0092.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 3,942.

Estimated Number of Annual Responses: 3,942.

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

Estimated Total Annual Burden Hours: 15,768 hours.

Estimated Total Annual Burden Cost: $0.

Amendments to PTE 86–128

The Department is proposing to amend Section VI of PTE 86–128 to require financial institutions to maintain or cause to be maintained for six years the records necessary for the Department, IRS, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether conditions of this exemption have been met.

In addition, the amendment would impose conditions on IRAs. Section III of the class exemption imposes the following requirements on fiduciaries of employee benefit plans that effect or execute securities transactions and the independent plan fiduciaries authorizing the plan or IRA to engage in the transactions with the investment advice provider (''authorizing fiduciary'') under the conditions contained in the exemption:

(1) The authorizing fiduciary must provide the investment advice provider with an advance written authorization for the transactions;

(2) The investment advice provider must provide the authorizing fiduciary with information necessary to determine whether an authorization should be made, including a copy of the exemption, a form for termination, a description of the investment advice provider's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests;

(3) The investment advice provider must provide the authorizing fiduciary with a termination form, at least annually, explaining that the authorization is terminable at will, without penalty to the plan, and that failure to return the form will result in continued authorization for the

[15] Estimates based on SEC's FOCUS filings and SEC's Form ADV filings.

[16] Cerulli Associates, *U.S. RIA Marketplace 2022,* Exhibit 5.10, Part 1, The Cerulli Report.

[17] Federal Insurance Deposit Corporation, *Quarterly Banking Profile,* Statistics at a Glance- as of March 31, 2023, *https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf.*

[18] Reporting dealers covered by the exemption are not accounted for separately because they are banks and security brokerages that trade in U.S. Government Securities; thus, reporting dealers are already accounted for in the number of broker-dealer firms and banks. The New York Federal Reserve Bank reported 21 primary dealers on March 21, 2013. *http://www.newyorkfed.org/markets/pridealers_current.html.*

[19] Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[20] The burden is estimated as follows: (3,942 financial institutions × 4 hours) = 15,768 hours. A labor rate of $190.63 is used for a financial manager. The labor rate is applied in the following calculation: (3,942 × 4 hours) × $190.63 = $3,005,854.

investment advice provider to engage in securities transactions on behalf of the plan or IRA;

(4) The investment advice provider must provide the authorizing fiduciary with either (a) a confirmation slip for each individual securities transaction within 10 days of the transaction containing the information described in Rule 10b–10(a)(1–7) under the Securities Exchange Act of 1934, 17 CFR 240.10b–10 or (b) a quarterly report containing certain financial information including the total of all transaction-related charges incurred by the plan or IRA;

(5) The investment advice provider must provide the authorizing fiduciary with an annual summary of the confirmation slips or quarterly reports, containing all security transaction-related charges, the brokerage placement practices (if changed), and a portfolio turnover ratio;

(6) An investment advice provider who is a discretionary trustee must provide the authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis.

Using data from 2021 Form 5500, the Department estimates that 1,257 unique plans hired service providers denoting on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 also reported that they provided investment management services or received investment management fees paid directly or indirectly by the plan.[21] Based on these values, the Department estimates on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate. The Department requests comment on how many plans have discretionary fiduciaries with full discretionary control and how many would continue to rely on PTE 1986–128 under the proposed amendments.

The Department estimates that of the estimated 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.[22] Based on these assumptions, the Department estimates that 75 plans would be affected by the proposed amendments to PTE 1986–128.[23]

The Department lacks reliable data on the number of managed IRAs that would experience such a transaction in a given year. The Department estimates that there are 10,000 managed IRAs. The Department also does not have data on the number of new IRA accounts that are opened each year. However, in 2022, of the 67.8 million IRA owners, 1.4 million, or approximately 2.1 percent, opened an IRA for the first time.[24] Inferring from this statistic, the Department estimates that 2.1 percent of IRA accounts are new each year. The Department acknowledges that some IRA owners may have multiple IRAs, and as such, this statistic may underestimate the percentage of new IRAs opened.[25] This results in an estimate of 210 IRAs that are new accounts or new financial advice relationships.[26]

The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption. For the purposes of this analysis, the Department assumes that the number of discretionary fiduciaries relying on the exemption is equal to the estimated number of broker-dealers estimated to be affected by the amendments to PTE 2020–02, or 1,894 investment advice providers.[27]

The Department requests comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data.

The following wage rates are assumed: an in-house rate of $159.34 for legal professionals and $63.45 for clerical staff.[28] In addition, the Department assumes that 100 percent of plans will use electronic means to deliver the required information with no associated cost burden. The Department also assumes that 94.2 percent of IRAs and financial institutions will use electronic means to deliver the required information with no associated cost burden.[29] The Department assumes that is similar to the percent receiving electronically under the Department's 2020 electronic disclosure safe harbor.[30] The Department requests comments on these assumptions.

Recordkeeping Requirement

The Department is proposing to amend Section VI to require financial institutions to maintain or cause to be maintained for six years the records necessary for the Department, IRS, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether conditions of this exemption have been met.

Each of the 1,894 investment advice providers 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 at an hourly rate of $190.63 to organize and collate the documents. This results in 947 hours of burden at an equivalent cost of $180,527.[31] The recordkeeping requirement will also require 15 minutes of clerical time at an hourly rate of $63.45 to prepare and send the documents for inspection, resulting in 474 hours of burden at an equivalent cost of $30,044.[32]

In total, the recordkeeping requirement is expected to impose an hour burden of 1,421 hours with an equivalent cost of $210,571.

[21] Estimates based on 2021 Form 5500 data.

[22] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[23] The number of new plans is estimated as: 1,000 plans × 7.5 percent of plans are new = 75 new plans.

[24] Cerulli Associates, *U.S. Retirement End-Investor 2023: Fostering Comprehensive Relationships,* The Cerulli Report.

[25] The Department lacks data on the number of IRA owners that own multiple IRAs. To provide scope of magnitude, one source reported that in 2019, 19 percent of IRA owners contributed to both a traditional IRA and Roth IRA. (*See* Investment Company Institute, *The Role of IRAs in U.S. Households' Saving for Retirement, 2020,* 27(1) *ICI Research Perspective,* (2021).) This statistic does not account for individuals who own multiple IRAs of each type or those who did not contribute in 2019, but it provides a lower bound.

[26] (10,000 managed IRAs × 2.1 percent of IRAs are new) = 210 IRAs.

[27] Estimates are based on the SEC's FOCUS filings and Form ADV filings for broker-dealers.

[28] Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[29] The Department estimates approximately 94.2 percent of retirement investors receive disclosures electronically. This is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2 percent) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36 percent).

[30] 85 FR 31884 (May 27, 2020).

[31] The burden is estimated as follows: [(1,894 investment advice providers × 30 minutes) ÷ 60 minutes] = 947 hours. A labor rate of $190.63 is used for a financial manager. The labor rate is applied in the following calculation: [(1,894 investment advice providers × 30 minutes) ÷ 60 minutes] × $190.63 per hour = $180,527.

[32] The burden is estimated as follows: 1,894 investment advice providers × 15 minutes = 474 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(1,894 investment advice providers × 15 minutes) ÷ 60 minutes] × $63.45 per hour = $30,044.

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH RECORDKEEPING

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Manager	947	$180,527	947	$180,527
Clerical	474	30,044	474	30,044
Total	1,421	210,571	1,421	210,571

Written Authorization From the Authorizing Fiduciary to the Broker-Dealer

Authorizing fiduciaries of new plans and IRAs entering into a relationship with an investment advice provider are required to provide the investment advice provider with an advance written authorization to perform transactions for the plan or IRA. The Department estimates that there are approximately 285 plans and IRAs that are new or that enter new arrangements each year.[33] Therefore, the Department estimates that approximately 285 authorizing fiduciaries are expected to send an advance written authorization. It is assumed that a legal professional will spend 15 minutes per plan reviewing the disclosures and preparing an authorization form. This results in an hour burden of 71 hours with an equivalent cost of $11,353.[34]

To produce and distribute the authorization, the Department assumes that 100 percent of plans and 94.2 percent of IRAs will use traditional electronic methods at no additional burden, and the remaining 5.8 percent of IRAs will be mailed. The Department assumes that clerical staff will spend 5 minutes preparing and sending the authorization, resulting in an hour burden of approximately 24 hours with an equivalent cost of $1,507.[35] It is assumed that the authorization will be two pages and paper authorizations will cost $0.76 each, which results in a cost burden of $9.[36]

In total, the written authorization requirement is expected to result in a total hour burden of 95 hours with an equivalent cost of $12,860 and a total cost burden of $9.

TABLE 3—HOUR BURDEN, EQUIVALENT COST, POSTAGE AND MATERIAL COST ASSOCIATED WITH THE WRITTEN AUTHORIZATION

Activity	Year 1				Subsequent years			
	Burden hours	Equivalent burden cost	Pages	Material cost	Burden hours	Equivalent burden cost	Pages	Material cost
Legal	71	$11,353	0	$0	71	$11,353	0	$0
Clerical	24	1,507	2	9	24	1,507	2	9
Total	95	12,860	2	9	95	12,860	2	9

Provision of Materials for Evaluation of Authorization of Transaction

Prior to a written authorization being made, the authorizing fiduciary must be provided by the financial institution with a copy of the exemption, a form for termination of authorization, a description of broker's placement practices, and any other reasonably available information. This information is assumed to be readily available.

To produce and distribute the materials, the Department assumes that 94.2 percent of financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the materials. The Department estimates that a clerical staff member will spend five minutes to prepare and distribute the required information to the authorizing fiduciary. This information will be sent to the 285 plans and IRAs entering into an agreement with a financial institution, and based on the above, the Department estimates that this requirement results in an hour burden of 24 hours with an equivalent cost of $1,507.[37] It is assumed that this information will be seven pages and paper distribution will cost $1.01 each, which results in a cost burden of about $17.[38]

In total, the written authorization requirement is expected to result in a total hour burden of 24 hours with an equivalent cost of $1,507 and a total cost burden of $17.

[33] 75 plans + 210 IRAs = 285 plans and IRAs that are new or that enter new arrangements each year.

[34] The burden is estimated as follows: [(285 plans and IRAs × 15 minutes per plan or IRA) ÷ 60 minutes] = 71 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(285 plans and IRAs × 15 minutes per plan or IRA) ÷ 60 minutes] × $159.34 per hour = $11,353.

[35] The burden is estimated as follows: [(285 plans or IRAs × 5 minutes per plan or IRA) ÷ 60 minutes] = 24 hours; A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(285 plans or IRAs × 5 minutes per IRA) ÷ 60] × $63.45 = $1,507.

[36] The burden is estimated as follows: (2 pages × $0.05 per page) + $0.66 for postage = $0.76; The mailing rate is applied in the following calculation: (210 authorizations for IRAs × 5.8 percent paper) × $0.76 = $9.

[37] The burden is estimated as follows: [[(75 plans × 5 minutes per plan) ÷ 60 minutes] + [(210 IRAs × 5 minutes per IRA) ÷ 60 minutes] = 24 hours; A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: {[(75 plans × 5 minutes per plan) ÷ 60 minutes] × $63.45} + [{(210 IRAs × 5 minutes per IRA) ÷ 60 minutes] × $63.45} = $1,507.

[38] The burden is estimated as follows: 7 pages × $0.05 per page + $0.66 for postage = $1.01; The mailing rate is applied in the following calculation: (75 plans × 5.8 percent paper × $1.01) + (210 materials packages for IRAs × 5.8 percent paper × $1.01) = $17.

TABLE 4—HOUR BURDEN, EQUIVALENT COST, POSTAGE AND MATERIAL COST ASSOCIATED WITH PROVISION OF MATERIALS FOR TRANSACTION AUTHORIZATION

	Year 1				Subsequent years			
Activity	Burden hours	Equivalent burden cost	Pages	Material cost	Burden hours	Equivalent burden cost	Pages	Material cost
Clerical	24	$1,507	7	$17	24	$1,507	7	$17
Total	24	1,507	7	17	24	1,507	7	17

Provision of an Annual Termination Form

Each authorizing fiduciary must be supplied annually with a form expressly providing an election to terminate the written authorization. It is assumed that legal professionals with each of the 1,894 investment advice providers will spend on average 15 minutes preparing the termination forms, which results in an hour burden of 474 hours with an equivalent cost of $75,447.[39]

To produce and distribute the termination form to the 10,000 IRAs and 1,000 plans, the Department assumes that 94.2 percent of financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the termination forms. The Department estimates that clerical staff will spend five minutes per plan or IRA preparing and distributing the termination forms resulting in an hour burden of 917 hours with an equivalent cost of $58,163.[40] It is assumed that the form will be two pages, so paper copies will cost $0.76 each, which results in a cost burden of approximately $485.[41]

In total, providing the annual termination form is expected to impose an hour burden of 1,391 hours with an equivalent cost of $133,610 and a total cost burden of $485.

TABLE 5—HOUR BURDEN, EQUIVALENT COST, POSTAGE AND MATERIAL COST ASSOCIATED WITH PROVISION OF THE ANNUAL TERMINATION FORM

	Year 1				Subsequent years			
Activity	Burden hours	Equivalent burden cost	Pages	Material cost	Burden hours	Equivalent burden cost	Pages	Material cost
Legal	474	$75,447	0	$0	474	$75,447	0	$0
Clerical	917	58,163	2	485	917	58,163	2	485
Total	1,391	133,610	2	485	1,391	133,610	2	485

Transaction Reporting

The investment advice provider engaging in a covered transaction must furnish the authorizing fiduciary with either a conformation slip for each securities transaction or a quarterly report containing specified information. As discussed above, the provision of the confirmation already is required under SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending conformation slips, no additional hour and cost burden will occur.

Annual Statement

In addition to the transaction reporting requirement, investment advice providers are required to send an annual report to each of the 11,000 authorizing fiduciaries[42] containing the same information as the quarterly report and also containing all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio. Collecting and generating the information required for the annual report is reported as a cost burden. Postage cost is not included here as it is assumed that the annual statement will be sent with the annual termination form and postage costs are accounted for there. It is assumed that the annual statement will be five pages, and the paper and print costs are $0.25 each.[43] Therefore, the overall cost burden for the paper and print costs are about $160.[44]

In addition, it is assumed that the information that must be sent annually could be sent together; therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement. Therefore, no additional hour burden has been reported.

In total, providing the annual statement is expected to impose a total cost burden of $160.

[39] The burden is estimated as follows: [(1,894 investment advice providers × 15 minutes per financial institution) ÷ 60 minutes] = 474 hours; A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,894 investment advice providers × 15 minutes per financial institution) ÷ 60 minutes] × $159.34 per hour = $75,447.

[40] The burden is estimated as follows: [(1,000 plans × 5 minutes per plan) ÷ 60 minutes] + [(10,000 IRAs × 5 minutes per IRA) ÷ 60 minutes] = 917 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: {[(1,000 plans × 5 minutes per plan) ÷ 60 minutes] × $63.45} + {[(10,000 IRAs × 5 minutes per IRA) ÷ 60 minutes] × $63.45} = $58,163.

[41] The burden is estimated as follows: 2 pages × $0.05 per page + $0.66 for postage = $0.76. The mailing rate is applied in the following calculation: (1,000 plans × 5.8 percent paper × $0.76) + (10,000 IRAs × 5.8 percent paper × $0.76) = $485.

[42] 1,000 plans + 10,000 IRAs = 11,000 plans and IRAs.

[43] 5 pages × $0.05 per page = $0.25.

[44] (11,000 plans and IRAs × 5.8 percent paper × $0.25) = $160.

TABLE 6—HOUR BURDEN, EQUIVALENT COST, POSTAGE AND MATERIAL COST ASSOCIATED WITH THE ANNUAL STATEMENT

	Year 1				Subsequent years			
Activity	Burden hours	Equivalent burden cost	Pages	Material cost	Burden hours	Equivalent burden cost	Pages	Material cost
Clerical	0	$0	5	$160	0	$0	5	$160
Total	0	0	5	160	0	0	5	160

Report of Commissions Paid

A discretionary trustee must provide an authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis. The collecting and generation of the information for the quarterly report is reported as a cost burden. The clerical hour burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually.

A financial institution who is a discretionary trustee must provide each of the 11,000 authorizing fiduciaries with an annual report showing commissions paid to affiliated and non-affiliated brokers, on both a total dollar and a cents-per-share basis. As the report is sent annually, it is assumed that it could be sent with the transaction report, therefore postage costs are not counted here. The Department estimates that 94.2 percent of financial institutions will use traditional electronic methods at no additional burden, while the remaining 5.8 percent of financial institutions will mail the annual reports. It is assumed that the report will be two pages, and the paper and print costs are $0.10 each.[45] Therefore, the overall cost burden of the paper and print costs is $64.[46]

Financial institutions are required to report specific transaction fees and information to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. It is assumed that it costs the financial institution $3.30 per plan or IRA to track this information.[47] With approximately 11,000 affected plans and IRAs, this results in a cost burden of approximately $36,300 annually.[48]

In total, providing the report is expected to impose a total cost burden of $36,364.[49]

TABLE 7—HOUR BURDEN, EQUIVALENT COST, POSTAGE AND MATERIAL COST ASSOCIATED WITH THE REPORT OF COMMISSIONS PAID

	Year 1				Subsequent years			
Activity	Burden hours	Equivalent burden cost	Pages	Material cost	Burden hours	Equivalent burden cost	Pages	Material cost
Clerical	0	$0	2	$36,364	0	$0	2	$36,364
Total	0	0	2	36,364	0	0	2	36,364

Summary

In total, the conditions of this exemption will result in the production of 33,570 disclosures.[50] The Department assumes that 100 percent of plans will use electronic methods to distribute the required information, at de minimis burden. The Department also assumes that 94.2 percent of IRAs and financial institutions will use electronic methods to distribute the required information, at de minimis burden, while 1,943 [51] disclosures will be on paper. Production and distribution of disclosures will result in an overall hour burden of 2,929 hours with an equivalent cost of $358,548 and an overall cost burden of $37,034.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision to an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: PTE 86–128 (Securities Broker-Dealers).

OMB Control Number: 1210–0059.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 2,179.

Estimated Number of Annual Responses: 33,570.

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

Estimated Total Annual Burden Hours: 2,929 hours.

Estimated Total Annual Burden Cost: $37,034.

Amendments to PTE 77–4, 80–83 and PTE 83–1

The Department has determined that PTE 77–4 and PTE 80–83 do not have information collections impacted by the removal of advice from the exemption. There is no paperwork burden related to PTE 83–1.

[45] 2 pages × $0.05 per page = $0.10.

[46] (11,000 plans and IRAs × 5.8 percent paper × $0.10) = $64.

[47] This estimate is based on information from a Request for Information and from industry sources.

[48] (11,000 plans and IRAs × $3.30) = $36,300.

[49] This estimate is calculated as: $64 + $36,300 = $36,364.

[50] The total number of disclosures is calculated in the following manner: 285 (Written authorization disclosures) + 285 (Provision of materials for evaluation of authorization of transaction) + 11,000 (Annual termination form) + 11,000 (Annual Statement) + 11,000 (Report of Commissions Paid) = 33,570 disclosures.

[51] The total number of paper disclosures is calculated in the following manner: (210 Written authorization disclosures for IRAs × 5.8 percent paper) + (285 Provision of materials for evaluation of authorization of transaction × 5.8 percent paper) + (11,000 Annual termination form × 5.8 percent paper) + (11,000 Annual Statement × 5.8 percent paper) + (11,000 Report of Commissions Paid × 5.8 percent paper) = 1,943 disclosures.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [52] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[53] Under section 603 of the RFA, agencies must submit an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This proposed amended exemption, along with related amended exemptions and a proposed rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this proposed amendment on small entities is included in the IRFA for the entire project, which can be found in the related notice of proposed rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [54] requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposed amended exemption does not include any Federal mandate that will result in such expenditures.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this proposed class exemption has federalism implications because it has no substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of Government.

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 act prudently and discharge his or her duties respecting the 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 the proposed exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), 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 the Plan and IRA owners; (3) If granted, the proposed exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and (4) The proposed exemption, if granted, is 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 Prohibited Transaction Exemption 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

The Department proposes to amend Prohibited Transaction Exemption 75–1 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).

I. PTE 75–1, Part I, *Agency transactions and services,* subparts (b) and (c), are revoked in their entirety.

II. Part II, *Principal transactions,* the first sentence of subpart (2) is revoked; the sentence beginning ''The exemptions set forth in (1) and (2) is designated as Part II(2) and amended to read, ''The exemption set forth in (1) above is subject to the following conditions:'' and new section II(2)(d) is revised to delete the phrase ''Except with respect to transactions described in section (2) above,''.

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

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

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

(f)(1) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are

[52] 5 U.S.C. 601 *et seq.*

[53] 5 U.S.C. 601(2), 603(a); see also 5 U.S.C. 551.

[54] Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

reasonably 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 IRA owner, 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, or records regarding a plan or IRA other than the plan or IRA with respect to which they are the fiduciary, contributing employer, employee organization, participant, beneficiary, or IRA owner.

(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.

(4) Failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It does not affect the relief for other transactions.

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

IV. Part III, *Underwritings,* is amended by inserting a new section III(h) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section and regulations thereunder.

V. Part IV, Market-making, is amended by inserting a new section IV(g) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

VI. Part V, Extension of Credit, is amended by replacing Sections (c) and (d) with the following: (c) Notwithstanding section (a)(2), a fiduciary under 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 caused 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 (e)(3) will be considered satisfied if the plan or IRA receives the disclosure described in Securities Exchange Act Rule 10b–16; [55]

(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 in a manner that is reasonably accessible for examination, 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 with respect to a transaction, 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)(1) Except as provided in paragraph (e)(2) of this exemption, and 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 reasonably available at their customary location for examination during normal business hours by:

(A) An authorized employee or representative of the Department of Labor or the Internal Revenue Service,

(B) Any fiduciary of a plan that engaged in a transaction pursuant to this exemption, or any authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by a plan described in paragraph (e)(1)(B), or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of a plan described in paragraph (e)(1)(B), IRA owner or the authorized representative of such participant, beneficiary or owner.

(2) None of the persons described in paragraph (e)(1)(B)–(D) of this exemption are authorized to examine records regarding a recommended transaction involving another investor, or privileged trade secrets or privileged commercial or financial information, of the broker-dealer engaging in the covered transaction, or information identifying other individuals.

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

(4) Failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It does not affect the relief for other transactions.

For purposes of this exemption, the terms ''party in interest,'' ''disqualified person'' and ''fiduciary'' shall include such party in interest, disqualified

[55] 17 CFR 240.10b–16.

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 and 26 CFR 54.4975–9. Also, for the purposes of this exemption, the term ''IRA'' means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

Prohibited Transaction Exemption 77–4, Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans

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).

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

Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of section 3(21)(A)(ii) of ERISA or 4975(e)(3)(B) of the Code and regulations thereunder.

Prohibited Transaction Exemption 80–83, Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds To Reduce or Retire Indebtedness to Parties in Interest

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).

I. A new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of section 3(21)(A)(ii) of ERISA or 4975(e)(3)(B) of the Code and regulations thereunder.

Prohibited Transaction Exemption 83–1, Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts

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).

I. A new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of section 3(21)(A)(ii) of ERISA or 4975(e)(3)(B) of the Code and regulations thereunder.

Prohibited Transaction Exemption 86–128, Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers

The Department proposes to amend Prohibited Transaction Exemption 86–128 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).

I. New sections II(d) is inserted as follows:

(d) *Exception.* No relief from the restrictions of ERISA 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

II. Section IV(a) is deleted.

III. Section IV(b) is redesignated as Section IV(a), and IV(a)(1) is deleted and Sections IV(b)(2) and (3) are redesignated as Sections IV(b)(1) and (2).

IV. Section IV(c) is redesignated as Section IV(b) and is amended to read:

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

V. The following is added to the end of Section III(a)

''Notwithstanding the foregoing, this condition does not apply to a trustee that satisfies Section III(h) and (i).''

VI. New Section VII is inserted as follows:

Section VII. Recordkeeping Requirements

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

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

(2) No party in interest, other than such plan fiduciary who is responsible for complying with this paragraph (a), will 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 applicable, 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), or as precluded by 12 U.S.C. 484, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in the above paragraph are reasonably available at their customary location for examination during normal business hours by—

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

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

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

(D) Any participant or beneficiary of the plan or the authorized representative of such participant or beneficiary.

(2) None of the persons described in subparagraph (1)(B)–(D) above are authorized to examine privileged trade secrets or privileged commercial or financial information of such fiduciary or are authorized to examine records regarding a plan or IRA other than the plan or IRA with which they are the fiduciary, contributing employer, employee organization, participant, beneficiary or IRA owner.

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

(4) Failure to maintain the required records necessary to determine whether

the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It does not affect the relief for other transactions.

Signed at Washington, DC, this 24th day of October, 2023.

Lisa M. Gomez,

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

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