



## **DEPARTMENT OF LABOR**

### **Employee Benefits Security Administration**

#### **29 CFR Part 2510**

#### **RIN 1210-AB79**

#### **Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement**

#### **Investment Advice; Best Interest Contract Exemption (Prohibited Transaction**

#### **Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets**

#### **Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs**

#### **(Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions**

#### **75-1, 77-4, 80-83, 83-1, 84-24 and 86-128.**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Proposed rule; extension of applicability date.

**SUMMARY:** This document proposes to extend for 60 days the applicability date defining who is a “fiduciary” under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code of 1986 (Code), and the applicability date of related prohibited transaction exemptions including the Best Interest Contract Exemption and amended prohibited transaction exemptions (collectively PTEs) to address questions of law and policy. The final rule, entitled Definition of the Term “Fiduciary;” Conflict of Interest Rule - Retirement Investment Advice, was published in the Federal Register on April 8, 2016, became effective on June 7, 2016, and has an applicability date of April 10, 2017. The PTEs also have applicability dates of April 10, 2017. The President by Memorandum to the Secretary of Labor, dated February 3, 2017, directed the Department of Labor to examine whether the final fiduciary rule may adversely affect the ability of

Americans to gain access to retirement information and financial advice, and to prepare an updated economic and legal analysis concerning the likely impact of the final rule as part of that examination. This document invites comments on the proposed 60-day delay of the applicability date, on the questions raised in the Presidential Memorandum, and generally on questions of law and policy concerning the final rule and PTEs. The proposed 60-day delay would be effective on the date of publication of a final rule in the Federal Register.

**DATES:** Comments on the proposal to extend the applicability dates for 60 days should be submitted to the Department on or before [INSERT DATE THAT IS 15 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments regarding the examination described in the President’s Memorandum, generally and with respect to the specific areas described below, should be submitted to the Department on or before [INSERT DATE THAT IS 45 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Luisa Grillo-Chope, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), (202) 693–8825. (Not a toll-free number).

**ADDRESSES:** You may submit comments, identified by RIN 1210-AB79, by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Email: [EBSA.FiduciaryRuleExamination@dol.gov](mailto:EBSA.FiduciaryRuleExamination@dol.gov). Include RIN 1210-AB79 in the subject line of the message.

Mail: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, Attention: Fiduciary Rule Examination.

Instructions: All submissions must include the agency name and Regulatory Identification Number (RIN) for this rulemaking. Persons submitting comments electronically are encouraged to submit only by one electronic method and not to submit paper copies. Comments will be available to the public, without charge, online at [www.regulations.gov](http://www.regulations.gov) and [www.dol.gov/ebsa](http://www.dol.gov/ebsa) and at the Public Disclosure Room, Employee Benefits Security Administration, U.S. Department of Labor, Suite N-1513, 200 Constitution Avenue NW, Washington, DC 20210.

WARNING: Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records and are posted on the Internet as received, and can be retrieved by most internet search engines.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

On April 8, 2016, the Department of Labor (Department) published a final regulation defining who is a “fiduciary” of an employee benefit plan under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) as a result of giving investment advice to a plan or its participants or beneficiaries. The final rule also applies to the definition of a “fiduciary” of a plan (including an individual retirement account (IRA)) under section 4975(e)(3)(B) of the Internal Revenue Code of 1986 (Code). The final rule treats persons who provide investment advice or

recommendations for a fee or other compensation with respect to assets of a plan or IRA as fiduciaries in a wider array of advice relationships than was true of the prior regulatory definition (the 1975 Regulation).<sup>1</sup>

On this same date, the Department published two new administrative class exemptions from the prohibited transaction provisions of ERISA (29 U.S.C. 1106), and the Code (26 U.S.C. 4975(c)(1)), as well as amendments to previously granted exemptions. The exemptions and amendments (collectively Prohibited Transaction Exemptions or PTEs) would allow, subject to appropriate safeguards, certain broker-dealers, insurance agents and others that act as investment advice fiduciaries, as defined under the final rule, to continue to receive a variety of forms of compensation that would otherwise violate prohibited transaction rules, triggering excise taxes and civil liability.

By Memorandum dated February 3, 2017, the President directed the Department to conduct an examination of the final rule to determine whether the rule may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this examination, the Department was directed to prepare an updated economic and legal analysis concerning the likely impact of the final rule, which shall consider, among other things:

- Whether the anticipated applicability of the final rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;

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<sup>1</sup> The 1975 Regulation was published as a final rule at 40 FR 50842 (Oct. 31, 1975).

- Whether the anticipated applicability of the final rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
- Whether the final rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

The President directed that if the Department makes an affirmative determination as to any of the above three considerations or the Department concludes for any other reason after appropriate review that the final rule is inconsistent with the priority of the Administration “to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies,” then the Department shall publish for notice and comment a proposed rule rescinding or revising the final rule, as appropriate and as consistent with law. The President’s Memorandum was published in the Federal Register on February 7, 2017 at 82 FR 9675.

#### **B. Regulatory Impact Analysis**

The Department is proposing to delay the applicability date of the final rule and PTEs for 60 days. The Department invites comments on the proposal to extend the applicability date of the final rule and PTEs for 60 days.<sup>2</sup> For this purpose, the comment period will end on [INSERT DATE 15 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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<sup>2</sup> The Department would also treat Interpretative Bulletin 96-1 as continuing to apply during any extension of the applicability date of the final rule.

There are approximately 45 days until the applicability date of the final rule and the PTEs. The Department believes it may take more time than that to complete the examination mandated by the President's Memorandum. Additionally, absent an extension of the applicability date, if the examination prompts the Department to propose rescinding or revising the rule, affected advisers, retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one. This could unnecessarily disrupt the marketplace, producing frictional costs that are not offset by commensurate benefits. This proposed 60-day extension of the applicability date aims to guard against this risk. The extension would make it possible for the Department to take additional steps (such as completing its examination, implementing any necessary additional extension(s), and proposing and implementing a revocation or revision of the rule) without the rule becoming applicable beforehand. In this way, advisers, investors and other stakeholders would be spared the risk and expenses of facing two major changes in the regulatory environment. The negative consequence of avoiding this risk is the potential for retirement investor losses from delaying the application of fiduciary standards to their advisers.

#### **1. Executive Order 12866 Statement**

This proposed extension of the applicability date of the final rule and related exemptions is an economically significant regulatory action within the meaning of section 3(f)(1) of Executive Order 12866, because it would likely have an effect on the economy of \$100 million in at least one year. Accordingly, the Department has considered the costs and benefits of the proposed extension, and the Office of Management and Budget (OMB) has reviewed the proposed extension.

The Department's regulatory impact analysis (RIA) of the final rule and related exemptions predicted that resultant gains for retirement investors would justify compliance costs. The analysis estimated a portion of the potential gains for IRA investors at between \$33 billion and \$36 billion over the first 10 years. It predicted, but did not quantify, additional gains for both IRA and ERISA plan investors. The analysis predicted \$16 billion in compliance costs over the first 10 years, \$5 billion of which are first-year costs.

By deferring the rules' and related exemptions' applicability for 60 days, this proposal could delay its predicted effects, and give the Department time to make at least a preliminary determination whether it is likely to make significant changes to the rules and exemptions. The nature and magnitude of any such delay of the effects is highly uncertain, as some variation can be expected in the pace at which firms move to comply and mitigate advisory conflicts and at which advisers respond to such mitigation and adjust their recommendations to satisfy impartial conduct standards. Notwithstanding this uncertainty, some delay of the predicted effects seems likely, and seems likely to generate economically significant results. Moreover, the economic effects may be partially dependent on what action the Department ultimately takes, and in the shorter term, what the public anticipates the Department may do. Such delay could lead to losses for retirement investors who follow affected recommendations, and these losses could continue to accrue until affected investors withdraw affected funds or reinvest them pursuant to new recommendations.<sup>3</sup> As an illustration, a 60-day delay in the

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<sup>3</sup> While losses would cease to accrue after the funds are re-advised or withdrawn, afterward the losses would not be recovered, and would continue to compound, as the accumulated losses would have reduced the asset base that is available later for reinvestment or spending.

commencement of the potential investor gains estimated in the RIA published on April 8, 2016, and referenced above, could lead to a reduction in those estimated gains of \$147 million in the first year and \$890 million over 10 years using a three percent discount rate. The equivalent annualized estimates are \$104 million using a three percent discount rate and \$87 million using a seven percent discount rate.

The estimates of potential investor losses presented in this illustration are derived in the same way as the estimates of potential investor gains that were presented in the RIA of the final rule and exemptions. Both make use of empirical evidence that front-end-load mutual funds that share more of the load with distributing brokers attract more flows but perform worse.<sup>4</sup>

Relative to the actual impact of the proposed delay on retirement investors, which is unknown, this illustration is uncertain and incomplete. The illustration is uncertain because it assumes that the final rule and exemptions would entirely eliminate the negative effect of load-sharing on mutual fund selection, and that the proposed delay would leave that negative effect undiminished for an additional 60 days. If some of that negative effect would remain under the final rule, and/or if market changes in anticipation of the final rule have already diminished that negative effect, then the impact of the proposed delay would be smaller than illustrated here. The illustration is incomplete because it represents only one negative effect (poor mutual fund selection) of one source of conflict (load sharing), in one market segment (IRA investments in front-load mutual funds). Not included are additional potential negative effects of the proposed delay that would be associated with other sources of potential conflicts, such as revenue sharing, or

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<sup>4</sup> The methodology is detailed in Appendix B of the RIA.

mark-ups in principal transactions, other effects of conflicts such as excessive or poorly timed trading, and other market segments susceptible to conflicts such as annuity sales to IRA investors and advice rendered to ERISA-covered plan participants or sponsors. The Department invites comments on these points and on the degree to which they may cause the illustration to overstate or understate the potential negative effect of the proposed delay on retirement investors. And if some entities are subject to the current regulation, but might not be subject to the same sort of regulation under a revised proposal, the industry might avoid additional costs now that would otherwise become sunk costs. A 60-day delay could defer or reduce start-up compliance costs, particularly in circumstances where more gradual steps toward preparing for compliance are less expensive. However, due to lack of systematic evidence on the portion of compliance activities that have already been undertaken, thus rendering the associated costs sunk, the Department is unable to quantify the potential change in start-up costs that would result from a delay in the applicability date. The Department requests comment, including data that would contribute to estimation of such impacts. Beyond start-up costs, the delay would likely relieve industry of relevant day-to-day compliance burdens; using the inputs and methods that appear in the April 2016 RIA, the Department estimates associated savings of \$42 million during those 60 days. The equivalent annualized values are \$8 million using a three percent discount rate and \$9 million using a seven percent discount rate.

These savings are substantially derived from foregone on-going compliance requirements related to the transition notice requirements for the Best Interest Contract Exemption, data collection to demonstrate satisfaction of fiduciary requirements, and

retention of data to demonstrate the satisfaction of conditions of the exemption during the Transition Period. Estimates are derived from the “Data Collection,” “Record Keeping (Data Retention),” and “Supervisory, Compliance, and Legal Oversight” categories discussed in section 5.3.1 of the final RIA and reductions in the number of the transition notices that will be delivered.

The Department also considered the possible impact of a longer extension of the applicability date. Under the RIA published on April 8, 2016, a 180-day delay in the application of the fiduciary standards and conditions set forth in the rule and exemptions would reduce the same portion of potential investor gains from the rule by \$441 million in the first year and \$2.7 billion over 10 years, while relieving industry of 180 days of day-to-day compliance burdens, worth an estimated \$126 million.

The costs and benefits of this proposal are highly uncertain, and may vary widely depending on several variables, including the eventual results of the Department’s examination of the final rule and exemptions pursuant to the Presidential Memorandum, and the amount of time that will be required to complete that review and, if appropriate, rescind or revise the rule. The Department invites comments as to whether the benefits of the proposed 60-day delay, including the potential reduction in transition costs should the Department ultimately revise or rescind the final rule, justify its costs, including the potential losses to affected retirement investors. The Department also invites comments on whether it should delay applicability of all, or only part, of the final rule’s provisions and exemption conditions. For example, under an alternative approach, the Department could delay certain aspects (e.g., notice and disclosure provisions) while permitting others (e.g., the impartial conduct standards set forth in the exemptions) to become

applicable on April 10, 2017. The Department also invites comments regarding whether a different delay period would best serve the interests of investors and the industry.

## **2. Paperwork Reduction Act**

The PRA (Public Law 104-13) prohibits federal agencies from conducting or sponsoring a collection of information from the public without first obtaining approval from the Office of Management and Budget (OMB). See 44 U.S.C. 3507. Additionally, members of the public are not required to respond to a collection of information, nor be subject to a penalty for failing to respond, unless such collection displays a valid OMB control number. See 44 U.S.C. 3512.

OMB has approved information collections contained in the final fiduciary rule and new and amended PTEs. The Department is not modifying the substance of the information collection requests (ICRs) at this time; therefore, no action under the PRA is required. The information collections will become applicable at the same time the rule and exemptions become applicable. The information collection requirements contained in the final rule and exemptions are discussed below.

*Final Rule:* The information collections in the final rule are approved under OMB Control Number 1210-0155. Paragraph (b)(2)(i) requires that certain “platform providers” provide disclosure to a plan fiduciary. Paragraph (b)(2)(iv)(C) and (D) require asset allocation models to contain specific information if they furnish and provide certain specified investment educational information. Paragraph (c)(1) requires a disclosure to be provided by a person to an independent plan fiduciary in certain circumstances for them to be deemed not to be an investment advice fiduciary. Finally, paragraph (c)(2) requires certain counterparties, clearing members and clearing

organizations to make a representation to certain parties so they will not be deemed to be investment advice fiduciaries regarding certain swap transactions required to be cleared under provisions of the Dodd-Frank Act.

For a more detailed discussion of the information collections and associated burden, see the Department's PRA analysis at 81 FR 20946, 20994.

*PTE 2016-01, the Best Interest Contract Exemption:* The information collections in PTE 2016-01, the Best Interest Contract Exemption, are approved under OMB Control Number 1210-0156. The exemption requires disclosure of material conflicts of interest and basic information relating to those conflicts and the advisory relationship (Sections II and III), contract disclosures, contracts and written policies and procedures (Section II), pre-transaction (or point of sale) disclosures (Section III(a)), web-based disclosures (Section III(b)), documentation regarding recommendations restricted to proprietary products or products that generate third party payments (Section (IV)), notice to the Department of a Financial Institution's intent to rely on the exemption, and maintenance of records necessary to prove that the conditions of the exemption have been met (Section V). Finally, Section IX provides a transition period under which relief from these prohibitions is available for Financial Institutions and advisers during the period between the applicability date and January 1, 2018 (the "Transition Period"). As a condition of relief during the Transition Period, Financial Institutions must provide a disclosure with a written statement of fiduciary status and certain other information to all retirement investors (in ERISA plans, IRAs, and non-ERISA plans) prior to or at the same time as the execution of recommended transactions. For a more detailed discussion of the

information collections and associated burden, see the Department's PRA analysis at 81 FR 21002, 21071.

*PTE 2016-02, the Prohibited Transaction Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption):* The information collections in PTE 2016-02, the Principal Transactions Exemption, are approved under OMB Control Number 1210-0157. The exemption requires Financial Institutions to provide contract disclosures and contracts to Retirement Investors (Section II), adopt written policies and procedures (Section IV), make disclosures to Retirement Investors and on a publicly available Web site (Section IV), maintain records necessary to prove they have met the exemption conditions (Section V), and provide a transition disclosure to Retirement Investors (Section VII).

For a more detailed discussion of the information collections and associated burden, see the Department's PRA analysis at 81 FR 21089, 21129.

*Amended PTE 75-1:* The information collections in Amended PTE 75-1 are approved under OMB Control Number 1210-0092. Part V, as amended, requires that prior to an extension of credit, the plan must receive from the fiduciary 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. It also requires broker-dealers engaging in the transactions to maintain records demonstrating compliance with the conditions of the PTE.

For a more detailed discussion of the information collections and associated burden, see the Department's PRA analysis at 81 FR 21139, 21145. The Department concluded that the ICRs contained in the amendments to Part V impose no additional burden on respondents.

*Amended PTE 86–128:* The information collections in Amended PTE 86-128 are approved under OMB Control Number 1210-0059. As amended, Section III of the exemption requires Financial Institutions to make certain disclosures to plan fiduciaries and owners of managed IRAs in order to receive relief from ERISA's and the Code's prohibited transaction rules for the receipt of commissions and to engage in transactions involving mutual fund shares. Financial Institutions relying on either PTE 86–128 or PTE 75–1, as amended, are required to maintain records necessary to demonstrate that the conditions of these exemptions have been met.

For a more detailed discussion of the information collections and associated burden, see the Department's PRA analysis at 81 FR 21181, 21199.

*Amended PTE 84–24:* The information collections in Amended PTE 84-24 are approved under OMB Control Number 1210-0158. As amended, Section IV(b) of PTE 84-24 requires Financial Institutions to obtain advance written authorization from an independent plan fiduciary or IRA holder and furnish the independent fiduciary or IRA holder with a written disclosure in order to receive commissions in conjunction with the purchase of Fixed Rate Annuity Contracts and Insurance Contracts. Section IV(c) of PTE 84-24 requires investment company Principal Underwriters to obtain approval from

an independent fiduciary and furnish the independent fiduciary with a written disclosure in order to receive commissions in conjunction with the purchase by a plan of securities issued by an investment company Principal Underwriter. Section V of PTE 84-24, as amended, requires Financial Institutions to maintain records necessary to demonstrate that the conditions of the exemption have been met.

For a more detailed discussion of the information collections and associated burden, see the Department's PRA analysis at 81 FR 21147, 21171.

### **3. Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.) or any other laws. Unless the head of an agency certifies that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis (IRFA) describing the rule's impact on small entities and explaining how the agency made its decisions with respect to the application of the rule to small entities. Small entities include small businesses, organizations and governmental jurisdictions.

The Department has determined that this rulemaking will have a significant economic impact on a substantial number of small entities, and hereby provides this IRFA. As noted above, the Department is proposing regulatory action to delay the applicability of the final fiduciary rule and exemptions. The proposed regulation is intended to reduce any unnecessary disruption that could occur in the marketplace if the

applicability date of the final rule and exemptions occurs while the Department examines the final rule and exemptions as directed in the Presidential Memorandum.

The Small Business Administration (SBA) defines a small business in the Financial Investments and Related Activities Sector as a business with up to \$38.5 million in annual receipts. The Department examined the dataset obtained from SBA which contains data on the number of firms by NAICS codes, including the number of firms in given revenue categories. This dataset allowed the Department to estimate the number of firms with a given NAICS code that falls below the \$38.5 million threshold to be considered a small entity by the SBA. However, this dataset alone does not provide a sufficient basis for the Department to estimate the number of small entities affected by the rule. Not all firms within a given NAICS code would be affected by this rule, because being an ERISA fiduciary relies on a functional test and is not based on industry status as defined by a NAICS code. Further, not all firms within a given NAICS code work with ERISA-covered plans and IRAs.

Over 90 percent of broker-dealers (BDs), registered investment advisers (RIAs), insurance companies, agents, and consultants are small businesses according to the SBA size standards (13 CFR 121.201). Applying the ratio of entities that meet the SBA size standards to the number of affected entities, based on the methodology described at greater length in the RIA of the final fiduciary duty rule, the Department estimates that the number of small entities affected by this proposed rule is 2,438 BDs, 16,521 RIAs, 496 insurers, and 3,358 other ERISA service providers. For purposes of the RFA, the Department continues to consider an employee benefit plan with fewer than 100

participants to be a small entity. The 2013 Form 5500 filings show nearly 595,000 ERISA covered retirement plans with less than 100 participants.

Based on the foregoing, the Department estimates that small entities would save approximately \$38 million in compliance costs due to the proposed 60-day delay of the applicability date for the final fiduciary rule and exemptions.<sup>5</sup> These cost savings are substantially derived from foregone on-going compliance requirements related to the transition notice requirements for the Best Interest Contract Exemption, data collection to demonstrate satisfaction of fiduciary requirements, and retention of data to demonstrate the satisfaction of conditions of the exemption during the Transition Period. The Department invites comments regarding this assessment.

#### **4. Congressional Review Act**

The proposed rule is subject to the Congressional Review Act (CRA) provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and, if finalized, would be transmitted to Congress and the Comptroller General for review.

#### **5. Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. For

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<sup>5</sup> This estimate includes savings from notice requirements. Savings from notice requirements include savings from all firms because it is difficult to break out cost savings only from small entities as defined by SBA.

purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposal does not include any federal mandate that we expect would result in such expenditures by state, local, or tribal governments, or the private sector. The Department also does not expect that the proposed rule will have any material economic impacts on State, local or tribal governments, or on health, safety, or the natural environment.

## **6. Reducing Regulation and Controlling Regulatory Costs**

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment, or otherwise promulgates, a new regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. OMB's interim guidance, issued on February 2, 2017, explains that for Fiscal Year 2017 the above requirements only apply to each new "significant regulatory action that imposes costs." OMB has determined that this proposed rule does not impose costs that would trigger the above requirements of Executive Order 13771.

## **C. Examination of Fiduciary Rule and Exemptions**

As noted above, pursuant to the President's Memorandum, the Department is now examining the fiduciary duty rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of

this examination, the Department will prepare an updated economic and legal analysis concerning the likely impacts of the rule.

The Department's April 2016 regulatory impact analysis of the final rule and related exemptions found that conflicted advice was widespread, causing harm to plan and IRA investors, and that disclosing conflicts alone would not adequately mitigate the conflicts or remedy the harm. The analysis concluded that by extending fiduciary protections the new rule would mitigate advisory conflicts and deliver gains for retirement investors.

The analysis cited economic evidence that advisory conflicts erode retirement savings. This evidence included:

- statistical comparisons finding poorer risk-adjusted investment performance in more conflicted settings;
- experimental and audit studies revealing problematic adviser conduct;
- studies detailing gaps in consumers' financial literacy, errors in their financial decision-making, and the inadequacy of disclosure as a consumer protection;
- federal agency reports documenting abuse and investors' vulnerability;
- a 2015 study by the President's Council of Economic Advisers that attributed annual IRA investor losses of \$17 billion to advisory conflicts;
- economic theory that predicts harmful market failures due to the information asymmetries that are present when ordinary investors rely on advisers who are far more expert than them, but highly conflicted; and
- overseas experience with harmful advisory conflicts and responsive reforms.

The analysis estimated that advisers' conflicts arising from load sharing on average cost their IRA customers who invest in front-end-load mutual funds between 0.5 percent and 1.0 percent annually in estimated foregone risk-adjusted returns, which the analysis concluded to be due to poor fund selection. The Department estimated that such underperformance could cost IRA investors between \$95 billion and \$189 billion over the next 10 years. The analysis further estimated that the final rule and exemptions would potentially reduce these losses by between \$33 billion and \$36 billion over 10 years. Investors' gains were estimated to grow over time, due both to net inflows and compounding of returns. According to the analysis, these estimates reflect only part of the potential harm from advisers' conflicts and the likely benefits of the new rule and exemptions. The analysis estimated that complying with the new rule would cost \$16 billion over ten years, mainly reflecting the cost of consumer protections attached to the exemptions. The Department invites comment on whether the projected investor gains could be offset by a reduction in consumer investment, if consumers have reduced access to retirement savings advice as a result of the final rule, and whether there is any evidence of such reduction in consumer investment to date.

With respect to topics now under examination pursuant to the President's Memorandum, the analysis anticipated that the rule would have large and far-reaching effects on the markets for investment advice and investment products. It examined a variety of potential and anticipated market impacts. Such market impacts would extend beyond direct compliance activities and related costs, and beyond mitigation of existing advisory conflicts and associated changes in affected investment recommendations. It concluded that the final rule and exemptions would move markets toward a more optimal

mix of advisory services and financial products. The Department invites comments on whether the final rule and exemptions so far have moved markets or appear likely to move markets in this predicted direction.

The analysis examined the likely impacts of the final rule and exemptions on small investors. It concluded that quality, affordable advisory services would be available to small plans and IRA investors under the final rule and exemptions. Subsection 8.4.5 reviewed ongoing and emerging innovation trends in markets for investment advice and investment products. The analysis indicated that these trends have the potential to deliver affordable, quality advisory services and investment products to all retirement investors, including small investors, and that the final rule and exemptions would foster competition to innovate in consumers' best interest. The Department invites comments on the emerging and expected effects of the final rule and exemptions on retirement investors' access to quality, affordable investment advice services and investment products, including small investors' access.

The Department invites comments that might help inform updates to its legal and economic analysis, including any issues the public believes were inadequately addressed in the RIA and particularly with respect to the issues identified in the President's Memorandum.

For more detailed information, commenters are directed to the final rule and final new and amended PTEs published in the Federal Register on April 8, 2016, at 81 Fed. Reg. pages 20946 through 21221, and to the Department's Full Report Regulatory Impact Analysis for Final Rule and Exemptions (RIA), and the additional RIA documents posted

on the Department's website at [www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2](http://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2).

The Department invites comments on market responses to the final rule and the PTEs to date, and on the costs and benefits attached to such responses. Some relevant questions include,

- Do firms anticipate changes in consumer demand for investment advice and investment products? If so, what types of changes are anticipated, and how will firms respond?
- Are firms making changes to their target markets? In particular, are some firms moving to abandon or deemphasize the small IRA investor or small plan market segments? Are some aiming to expand in that segment? What effects will these developments have on different customer segments, especially small IRA investors and small plans?
- Are firms making changes to their line-ups of investment products, and/or to product pricing? What are those changes, what is the motivation behind them, and will the changes advance or undermine firms' abilities to serve their customers' needs?
- Are firms making changes to their advisory services, and/or to the pricing of those services? Are firms changing the means by which customers pay for advisory services, and by which advisers are compensated? For example, are firms moving to increase or reduce their use of commission arrangements, asset-based fee arrangements, or other arrangements? With respect to any

such changes, what is the motivation behind them, and will these changes advance or undermine firms' abilities to serve their customers' needs?

- Has implementation or anticipation of the rule led investors to shift investments between asset classes or types, and/or are such changes expected in the future? If so, what mechanisms have led or are expected to lead to these changes? How will the changes affect investors?
- Has implementation or anticipation of the rule led to increases or reductions in commissions, loads, or other fees? Have firms changed their minimum balance requirements for either commission-based or asset-based fee compensation arrangements?
- Has implementation or anticipation of the rule led to changes in the compensation arrangements for advisory services surrounding the sale of insurance products such as fixed-rate, fixed-indexed, and variable annuities?
- For those firms that intend to make use of the Best Interest Contract Exemption, what specific policies and procedures have been considered to mitigate conflicts of interest and ensure impartiality? How costly will those policies and procedures be to maintain?
- What innovations or changes in the delivery of financial advice have occurred that can be at least partially attributable to the rule? Will those innovations or changes make retirement investors better or worse off?
- What changes have been made to investor education both in terms of access and content in response to the rule and PTEs, and to what extent have any changes helped or harmed investors?

- Have market developments and preparation efforts since the final rule and PTEs were published in April 2016 illuminated whether or to what degree the final rule and PTEs are likely to cause an increase in litigation, and how any such increase in litigation might affect the prices that investors and retirees must pay to gain access to retirement services? Have firms taken steps to acquire or increase insurance coverage of liability associated with litigation? Have firms factored into their earnings projections or otherwise taken specific account of such potential liability?
- The Department's examination of the final rule and exemptions pursuant to the Presidential Memorandum, together with possible resultant actions to rescind or amend the rule, could require more time than this proposed 60-day extension would provide. What costs and benefit considerations should the Department consider if the applicability date is further delayed, for 6 months, a year, or more?
- Class action lawsuits may be brought to redress a variety of claims, including claims involving ERISA-covered plans. What can be learned from these class action lawsuits? Have they been particularly prone to abuse? To what extent have class action lawsuits involving ERISA claims led to better or worse outcomes for plan participants? What other impacts have these class action lawsuits had?
- Have market developments and preparation efforts since the final rule and PTEs were published in April 2016 illuminated particular provisions that could be amended to reduce compliance burdens and minimize undue

disruptions while still accomplishing the regulatory objective of establishing an enforceable best interest conduct standard for retirement investment advice and empowering Americans to make their own financial decisions, save for retirement and build individual wealth?

- How has the pattern of market developments and preparation efforts occurring since the final rule and exemptions were published in April, 2016, compared with the implementation pattern prior to compliance deadlines in other jurisdictions, such as the United Kingdom, that have instituted new requirements for investment advice? What does a comparison of such patterns indicate about the Department's prospective estimates of the rule's and exemptions' combined impacts?
- Have there been new insights from or into academic literature on contracts or other sources that would aid in the quantification of the rule's and exemptions' effectiveness at ensuring advisers' adherence to a best interest standard? If so, what are the implications for revising the Best Interest Contract Exemption or other regulatory or exemptive provisions to more effectively ensure adherence to a best interest standard?
- To what extent have the rule's and exemptions' costs already been incurred and thus cannot, at this point in time, be lessened by regulatory revisions or delays? Can the portion of costs that are still avoidable be quantified or otherwise characterized? Are the rule's intended effects entirely contingent upon the costs that have not yet been incurred, or will some portion be

achieved as a result of compliance actions already taken? How will they be achieved and will they be sustained?

- Have there been changes in the macroeconomy since early 2016 that would have implications for the rule's and exemptions' impacts (for example, a reduction in the unemployment rate, likely indicating lower search costs for workers who seek new employment within or outside of the financial industry)?
- What do market developments and preparation efforts that have occurred since the final rule and exemptions were published in April, 2016—or new insights into other available evidence—indicate regarding the portion of rule-induced gains to investors that consist of benefits to society (most likely, resource savings associated with reduced excessive trading and reduced unsuccessful efforts to outperform the market) and the portion that consists of transfers between entities in society?
- In response to the approaching applicability date of the rule, or other factors, has the affected industry already responded in such a way that if the rule were rescinded, the regulated community, or a subset of it, would continue to abide by the rule's standards? If this is the case, would the rule's predicted benefits to consumers, or a portion thereof, be retained, regardless of whether the rule were rescinded? What could ensure compliance with the standards if they were no longer enforceable legal obligations?

Upon completion of its examination, the Department may decide to allow the final rule and PTEs to become applicable, issue a further extension of the applicability

date, propose to withdraw the rule, or propose amendments to the rule and/or the PTEs. In addition to any other comments, the Department specifically requests comments on each of these possible outcomes. The comment period for the broader purpose of examining the final rule and exemptions in response to the President’s Memorandum will end on [INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

### **List of Proposed Amendments to Prohibited Transaction Exemptions**

For the reasons set forth above, the Department is proposing to amend the Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); and Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128, as follows:

- The Best Interest Contract Exemption (PTE 2016-01) (81 FR 21002 (April 8, 2016), as corrected at 81 FR 44773 (July 11, 2016)) is amended by removing the date “April 10, 2017” and adding in its place “June 9, 2017” as the *Applicability date* in the introductory **DATES** section and in Section IX of the exemption.
- The Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02) (81 FR 21089 (April 8, 2016), as corrected at 81 FR 44784 (July 11, 2016)), is amended by removing the date “April 10, 2017” and adding in its place “June 9,

- 2017” as the *Applicability date* in the introductory **DATES** section and in Section VII of the exemption.
- Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (49 FR 13208 (April 3, 1984), as corrected 49 FR 24819 (June 15, 1984), as amended 71 FR 5887 (February 3, 2006), and as amended 81 FR 21147 (April 8, 2016)) is amended by removing the date “April 10, 2017” and adding in its place “June 9, 2017” as the *Applicability date* in the introductory **DATES** section.
  - Prohibited Transaction Exemption 86-128 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) and as amended at 81 FR 21181 (April 8, 2016)) and 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, Parts I and II (40 FR 50845 (October 31, 1975), as amended at 71 FR 5883 (February 3, 2006), and as amended at 81 FR 21181 (April 8, 2016)) are amended by removing the date “April 10 2017” and adding in its place “June 9, 2017” as the *Applicability date* in the introductory **DATES** section.
  - 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, Parts III and IV, (40 FR 50845 (October 31, 1975), as amended at 71 FR 5883 (February 3, 2006), and as amended at

81 FR 21208 (April 8, 2016); Prohibited Transaction Exemption 77-4, Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans, 42 FR 18732 (April 8, 1977), as amended at 81 FR 21208 (April 8, 2016); 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, 45 FR 73189 (November 4, 1980), as amended at 67 FR 9483 (March 1, 2002) and as amended at 81 FR 21208 (April 8, 2016); and Prohibited Transaction Exemption 83-1 Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, 48 FR 895 (January 7, 1983), as amended at 67 FR 9483 (March 1, 2002) and as amended at 81 FR 21208 (April 8, 2016) are each amended by removing the date “April 10, 2017” and adding in its place “June 9, 2017” as the *Applicability date* in the introductory **DATES** section.

- Prohibited Transaction Exemption (PTE) 75-1, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, Part V, 40 FR 50845 (October 31, 1975), as amended at 71 FR 5883 (February 3, 2006) and as amended at 81 FR 21139 (April 8, 2016), is amended by removing the date “April 10, 2017” and adding in its place “June 9, 2017” as the *Applicability Date* in the introductory **DATES** section.

This document serves as a notice of pendency before the Department of proposed amendments to these PTEs.

## **List of Subjects in 29 CFR Parts 2510 and 2550**

Employee benefit plans, Exemptions, Fiduciaries, Investments, Pensions, Prohibited transactions, Reporting and recordkeeping requirements, and Securities.

For the reasons set forth above, the Department proposes to amend part 2510 of subchapter B of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

### **SUBCHAPTER B—DEFINITIONS AND COVERAGE UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974**

#### **PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER**

1. The authority citation for part 2510 continues to read as follows:

AUTHORITY: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor’s Order 1-2011, 77 FR 1088; Secs. 2510.3-21, 2510.3-101 and 2510.3-102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237. Section 2510.3-38 also issued under Pub. L. 105-72, Sec. 1(b), 111 Stat. 1457 (1997).

#### **§ 2510.3-21 [Amended]**

2. Section 2510.3-21 is amended by extending the expiration date of paragraph (j) to June 9, 2017, and by removing the date “April 10, 2017” and adding in its place “June 9, 2017” in paragraphs (h)(2), (j)(1) introductory text, and (j)(3).

Signed at Washington, DC, this 27<sup>th</sup> day of February, 2017.

Timothy D. Hauser,  
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Administration, Department of Labor.

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