



Executive Compensation and Benefits Alert

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Department of Labor Proposes New Fiduciary Regulation and Prohibited Transaction Exemption Relief for Investment Advice Fiduciaries

On April 20, 2015, more than three years after withdrawing a similar proposal that was staunchly opposed by the financial services industry, the U.S. Department of Labor (DOL) published in the Federal Register a proposed regulation (the Proposed Regulation) that would establish a new framework for determining whether a person is a fiduciary with respect to an ERISA-covered employee benefit plan (a Plan) or an individual retirement account or similar tax-favored savings account (an IRA) as a result of providing investment advice for a fee or other compensation (an Investment Advice Fiduciary).¹ The Proposed Regulation, if adopted, is expected to extend fiduciary status to many investment professionals, including broker-dealers, insurance agents, pension consultants and appraisal firms, that do not consider themselves to be fiduciaries under current law.

In addition, the DOL proposed granting two exemptions from the prohibited transaction rules under ERISA and the Internal Revenue Code. The first of these exemptions (the Best Interest Contract Exemption) would allow Investment Advice Fiduciaries in the retail market to receive commissions, 12b-1 fees and revenue sharing payments in connection with investments made by Plan and IRA clients as long as they acknowledge their fiduciary status and agree to comply with certain standards of conduct designed to ensure that their advice is in the best interest of such clients.² The second exemption (the Principal Transactions Exemption) would, subject to certain conditions, permit an Investment Advice Fiduciary to engage in purchases and sales of certain debt securities, as principal, with Plans and IRAs.³ The DOL also proposed amendments to several existing exemptions covering a range of transactions with Investment Advice Fiduciaries.⁴

Fiduciary Status Under ERISA and the Internal Revenue Code

Under ERISA and the Internal Revenue Code, a person will be considered a fiduciary with respect to a Plan or IRA as a result of engaging in certain specified activities. In the investment context, a person will be considered a fiduciary with respect to a Plan or IRA to the extent such person exercises any authority or control over the management or disposition of the assets of the Plan or IRA or renders investment advice for a direct or indirect fee or other compensation with respect to such assets.⁵ A fiduciary with respect to a Plan is subject to certain duties imposed under ERISA. These include a duty of loyalty, which requires the fiduciary to act solely in the interest of Plan participants and beneficiaries, and a duty of care, which requires the fiduciary to act with the same care,

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skill and diligence that a prudent expert would use under similar circumstances. A Plan fiduciary that breaches any of its duties under ERISA is personally liable to the Plan for any resulting losses, and ERISA authorizes the DOL, as well as any Plan fiduciary, participant or beneficiary, to bring a civil action against a fiduciary to recover such losses on behalf of the Plan.

The protections described above are generally not available to IRAs, which with limited exceptions are not subject to ERISA. Both ERISA and the Internal Revenue Code, however, contain prohibited transaction rules that prohibit specific acts of fiduciary self-dealing. These rules prevent a fiduciary from using any of its authority as a fiduciary to cause a Plan or IRA to either (i) pay additional compensation to the fiduciary, any affiliate of the fiduciary or any other person in which the fiduciary has an interest that may affect the exercise of its best judgment as a fiduciary (a related party) or (ii) enter into a transaction if the fiduciary or any affiliate or related party will receive compensation from a third party in connection with the transaction. As a result, an Investment Advice Fiduciary, its affiliates and related parties are generally prohibited from receiving certain types of fees and compensation common in the retail market, such as brokerage or insurance commissions, 12b-1 fees and revenue sharing payments, in connection with investment transactions entered into by Plans or IRA clients in accordance with their investment advice unless a prohibited transaction exemption is available. An Investment Advice Fiduciary is also generally prohibited from engaging in principal transactions, such as purchases or sales, with any Plan or IRA if it is providing investment advice to the Plan or IRA in connection with the transaction. An Investment Advice Fiduciary that engages in a non-exempt prohibited transaction with a Plan or IRA may be required to disgorge any compensation or other consideration received in connection with the transaction and may also be subject to liability for prohibited transaction excise taxes under the Internal Revenue Code and civil penalties under ERISA.

The current test for determining whether a person is an Investment Advice Fiduciary is contained in regulations that were issued in 1975.⁶ Under this five-part test, a person who is not otherwise a fiduciary with respect to a Plan or IRA will be considered an Investment Advice Fiduciary if (i) such person renders advice to the Plan or IRA as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property, (ii) such advice is given on a regular basis, (iii) such advice is given pursuant to a mutual agreement, arrangement or understanding with the Plan or IRA, or a fiduciary thereof, that (iv) the advice will serve as a primary basis for investment decisions with respect to assets of the Plan or IRA and (v) the advice will be individualized based on the particular needs of the Plan or IRA.

In justifying the issuance of the Proposed Regulation, the DOL highlighted what it perceived as certain shortcomings with the current test, including the requirement that investment advice be furnished on a regular basis. The DOL noted that this requirement would exempt from fiduciary status any person who provided investment advice with respect to assets of a Plan or IRA on a one-off basis, irrespective of the importance of the transaction for which the advice was sought. The DOL also noted that the requirement of a mutual agreement that the advice would serve as a primary basis for investment decisions had allowed many investment professionals to avoid fiduciary status through the use of “fine print disclaimers” whose significance was often lost on Plan participants and IRA owners. More generally, the DOL cited the need to provide additional fiduciary protections and safeguards as a result of the shift away from professionally managed defined benefit plans, which were the norm in 1975, to defined contribution plans and IRAs that increasingly placed the responsibility for investing retirement assets on individuals who lacked investment expertise.

Overview of Proposed Regulation

Under the Proposed Regulation, a person will be considered an Investment Advice Fiduciary if such person provides investment advice, as described below, directly to a Plan (or a Plan fiduciary, participant or beneficiary) or to an IRA (or its beneficial owner) in exchange for any direct or indirect fee or other compensation,⁷ and either:

- such person represents or acknowledges that it is acting as a fiduciary with respect to such advice; or
- the advice is rendered pursuant to a written or verbal agreement, arrangement or understanding with the advice recipient that the advice is individualized to, or specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the Plan or IRA.

Unlike the current regulations, the Proposed Regulation does not require that investment advice be furnished on a regular basis, or that the adviser and advice recipient mutually agree that the advice furnished will serve as a primary basis for investment decisions. The Proposed Regulation does, however, retain a provision contained in the current regulation that confirms that a broker-dealer will not be deemed a fiduciary merely as a result of executing securities transactions on behalf of a Plan or IRA pursuant to specific instructions from an unaffiliated fiduciary.

Definition of Investment Advice

Subject to the carve-outs described below, the Proposed Regulation defines investment advice to include:

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- any recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property of a Plan or IRA;
- any recommendation as to the management of securities or other property of a Plan or IRA, including the exercise of voting or other ownership rights;
- any recommendation as to the advisability of taking a distribution of any benefit;
- any recommendation concerning the investment of securities or other property to be rolled over or otherwise distributed from a Plan or IRA;
- any recommendation concerning the selection of an investment manager or Investment Advice Fiduciary with respect to assets of a Plan or IRA; and
- any appraisal, fairness opinion or similar statement, whether verbal or written, concerning the value of securities or other property that is provided in connection with a specific transaction or transactions involving the acquisition, disposition or exchange of such securities or other property by a Plan or IRA.

Exclusions From Definition of Investment Advice

The following recommendations, communications and appraisals are expressly carved out from the definition of investment advice:

- subject to certain conditions described below, advice provided by a counterparty (or its representative) to a fiduciary representing a Plan in connection with an arm's-length sale, purchase, loan or bilateral contract between the Plan and the counterparty (the Seller's Carve-Out);
- advice provided by a counterparty to a Plan fiduciary in connection with a swap or security-based swap transaction between the Plan and the counterparty that is governed by provisions of the Commodity Exchange Act or Securities Exchange Act;
- advice provided to a Plan fiduciary by an employee of any employer or organization sponsoring the Plan, provided the employee receives no compensation in connection with the advice beyond the employee's normal compensation for work performed for the employer or employee organization;
- the marketing or provision of an investment platform to a participant-directed individual account Plan by a platform provider, if the platform provider discloses in writing to the Plan fiduciary that it is not undertaking to provide impartial investment advice or give advice in a fiduciary capacity;
- the identification by a platform provider of investment alternatives that meet objective criteria specified by the Plan fiduciary and the provision of objective financial data by a platform

provider regarding investment alternatives available on the platform;

- an appraisal, fairness opinion or statement of value provided (i) to an employee stock ownership plan regarding employer securities, (ii) to an investment fund in which more than one unaffiliated Plan has an investment, or which holds "plan assets" of more than one unaffiliated Plan or (iii) solely for purposes of complying with reporting and disclosure requirements under applicable law or any applicable self-regulatory organization rule or regulation; and
- investment education materials furnished to a Plan (or a Plan fiduciary, participant or beneficiary) or an IRA (or its beneficial owner) that do not address specific investment products or alternatives or specific distribution options available under the Plan or IRA.

Seller's Carve-Out

The Seller's Carve-Out will apply to advice provided by a counterparty to a Plan fiduciary in connection with an arm's-length transaction if the following requirements are satisfied:

- the fiduciary is independent of the counterparty;
- the counterparty knows or reasonably believes that the fiduciary has sufficient expertise to prudently evaluate the transaction;
- the counterparty does not receive a fee or other compensation directly from the Plan or the fiduciary for the provision of investment advice in connection with the transaction; and
- the counterparty either (i) knows or reasonably believes that the fiduciary manages at least \$100 million in Plan assets and informs the fiduciary that it is not undertaking to provide impartial investment advice or give advice in a fiduciary capacity or (ii) obtains from the fiduciary written representations to the effect that (A) the fiduciary exercises authority or control over the management or disposition of the Plan's assets, (B) the Plan has 100 or more participants and (C) the fiduciary will not rely on the counterparty to act in the Plan's best interests, provide impartial investment advice or give advice in a fiduciary capacity.

The DOL has requested that comments be submitted addressing whether the Seller's Carve-Out should be expanded to include advice given directly to Plan participants and beneficiaries and IRA owners.

Coordination With Other Federal Agencies

In the preamble to the Proposed Regulation, the DOL noted that in the course of developing the Proposed Regulation and related exemptions, it had consulted with the staff of the Securities

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Exchange Commission (SEC) and Commodities Futures Trading Commission (CFTC) regarding whether these proposals would create an undue compliance burden for investment advisers and broker-dealers who provide investment advice or conflict with their obligations under other federal laws. The DOL further noted that it would continue to consult with the SEC and CFTC in order to minimize, to the extent possible, any conflicting or duplicative provisions among ERISA, the Internal Revenue Code and federal securities laws. However, the DOL cautioned that because of differences between the governing statutes, it was not able to make the duties imposed on Investment Advice Fiduciaries under ERISA and the Internal Revenue Code identical to those imposed on investment advisers under the federal securities laws.

Overview of Proposed Exemptions

The proposed Best Interest Contract Exemption and Principal Transactions Exemption are designed to allow investment professionals that would become Investment Advice Fiduciaries under the Proposed Regulation to continue operating under existing business models while ensuring that the interests of their Plan and IRA clients are protected. Many investment professionals, particularly in the retail market, rely on commission- or revenue sharing-based compensation structures that would not be available to Investment Advice Fiduciaries without the relief proposed under the Best Interest Contract Exemption. Also, many broker-dealers that currently sell debt securities out of their own inventory to Plans and IRAs would be prohibited from doing so in the event they became Investment Advice Fiduciaries without the relief proposed under the Principal Transactions Exemption. As discussed below, in exchange for the added flexibility these exemptions would provide, Investment Advice Fiduciaries would need to agree by contract to comply with certain standards of conduct when providing investment advice which would require them to act in the best interest of their Plan and IRA clients.

Best Interest Contract Exemption

Subject to certain exclusions and conditions described below, the Best Interest Contract Exemption would permit the following persons to receive compensation — including commissions, 12b-1 fees and revenue sharing payments — for services rendered in connection with any purchase, sale or holding of an asset by a retirement investor acting upon the recommendation of an Investment Advice Fiduciary:

- the individual acting as the Investment Advice Fiduciary with respect to the retirement investor (the Adviser);
- the registered investment adviser, bank, insurance company or registered broker-dealer that employs the Adviser or retains the Adviser as an independent contractor, agent or registered representative (the Financial Institution); and

- any affiliate of the Adviser or Financial Institution or other related party.

A “retirement investor” is defined for purposes of the exemption as (i) a participant or beneficiary of a Plan that provides for participant-directed investments; (ii) the beneficial owner of an IRA; and (iii) the sponsor (or any employee, officer or director thereof) of a non-participant-directed Plan with fewer than 100 participants, provided the sponsor has the authority to make investment decisions for the Plan.

An “asset” is defined for purposes of the exemption to include only the following investment products:

- bank deposits and certificates of deposit;
- insurance contracts, annuity contracts and guaranteed investment contracts;
- interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs and exchange-traded funds;
- corporate bonds offered pursuant to a registration statement under the Securities Act of 1933 (the Securities Act);
- U.S. treasury securities and U.S. agency debt securities; and
- exchange-traded equity securities (other than a security future or a put, call, straddle or other option to buy or sell an equity security).

Excluded Transactions. The Best Interest Contract Exemption would not apply to any transaction involving a Plan for which the Adviser, Financial Institution or any affiliate is (i) an employer of employees covered under the Plan or (ii) a named fiduciary or plan administrator with respect to the Plan, unless the Adviser and Financial Institution were selected to provide investment advice by an independent Plan fiduciary. Nor would the exemption apply to any transaction where the Adviser exercises authority or control over the management or disposition of the Plan or IRA assets involved in the transaction.

The exemption also would not apply to the receipt of compensation in connection with a transaction in which the Adviser is acting for its own account or for the account of the Financial Institution or any affiliate, or any transaction that results from “robo advice” generated by an interactive website using computer software-based models or applications.

Conditions for Relief. The Best Interest Contract Exemption would apply to the receipt of compensation by an Adviser, a Financial Institution or any affiliate or other related party in connection with a non-excluded transaction, provided the following conditions are satisfied:

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- the Financial Institution notifies the DOL's Employee Benefits Security Administration of its intention to rely on the exemption;
 - the Adviser and Financial Institution enter into a written contract with the retirement investor that contains certain specified provisions, as described below; and
 - the Adviser and Financial Institution comply with certain disclosure and recordkeeping requirements, as described below.

Additional conditions apply if the Financial Institution makes only a limited range of assets available to an Adviser for purchase, sale or holding by the retirement investors.

Required Contract Provisions. Under the exemption, the contract among the Adviser, the Financial Institution and the retirement investor is required to contain the following provisions:

- a statement that the Adviser and Financial Institution are fiduciaries under ERISA or the Internal Revenue Code, or both, with respect to any investment recommendation to the retirement investor;
- an agreement by the Adviser and Financial Institution to comply with certain standards of conduct (the Impartial Conduct Standards), as described below, when providing investment advice to the retirement investor;
- warranties by the Adviser and Financial Institution relating to compliance with applicable federal and state laws and the adoption of written policies and procedures designed to mitigate the impact of conflicts of interest;
- disclosures identifying material conflicts of interest applicable to the Adviser and Financial Institution and any compensation to be received from third parties;
- a provision identifying the address of a webpage that discloses the compensation arrangements entered into by the Adviser and the Financial Institution, as described below; and
- a notice informing the retirement investor of its right to obtain complete information about the fees currently associated with the assets in which it is invested.

In addition, the contract cannot include any exculpatory provisions that limit the liability of the Adviser or Financial Institution for a violation of the contracts terms, or any provisions waving or qualifying the retirement investor's (or related Plan or IRA's) right to bring or participate in a class action.

Impartial Conduct Standards. Under the exemption, the Adviser and Financial Institution must agree to comply with the following Impartial Conduct Standards when providing investment advice to a retirement investor:

- the Adviser and Financial Institution will provide investment advice that is in the best interest of the retirement investor;
- the Adviser and Financial Institution will not recommend to a retirement investor that it purchase, sell or hold an asset if the total amount of compensation the Adviser, the Financial Institution, their affiliates and related parties expect to receive as a result of the purchase, sale or holding of the asset would exceed reasonable compensation; and
- the Adviser and Financial Institution will not make any misleading statements about the assets, fees, material conflicts of interest and any other matters relevant to a retirement investor's investment decisions.

Investment advice will be in the best interest of a retirement investor if the advice is furnished in a manner consistent with the duty of loyalty and duty of care imposed on fiduciaries under ERISA. Accordingly, the investment advice must be prudent and must be determined without regard to any financial or other interests the Adviser, the Financial Institution or any Related Parties may have in the transaction. The Impartial Conduct Standards would therefore extend to IRAs some of the fiduciary protections available to Plans under ERISA. In addition, because the standards are required to be incorporated into a written agreement, a retirement investor, including an IRA owner that is unable to bring a civil action under ERISA, would have a contractual remedy in the event the Adviser or Financial Institution failed to adhere to the Impartial Conduct Standards.

Disclosure and Recordkeeping Requirements. The exemption requires the Adviser and Financial Institution to make the following disclosures:

- prior to executing a purchase of assets on behalf of a retirement investor, the Adviser is required to furnish to the retirement investor a chart that provides, with respect to each asset recommended, the total cost to the retirement investor for one-, five- and 10-year investment periods, assuming an investment of the dollar amount recommended by the Adviser and an investment performance based on reasonable assumptions that are disclosed;
- within 45 days after the end of each year, the Adviser or Financial Institution is required to furnish to the retirement investor a disclosure identifying each asset purchased or sold during the preceding year, the sale or purchase price for each asset, the total amount of fees and expenses paid by the retirement investor with respect to each asset, and the total amount of compensation received by the Adviser and Financial Institution as a result of the retirement investor's purchase, holding or sale of each asset; and
- the Financial Institution is required to main a webpage that is freely accessible to the public which displays (i) the direct and

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indirect compensation payable to the Adviser, the Financial Institution and any affiliate for services provided in connection with each asset or class of assets currently available to purchase, hold or sell through the Adviser or Financial Institution (or that have been purchased, held or sold by retirement investors during the preceding year), (ii) the source of the compensation and (iii) how the compensation varies within and among classes.

The DOL has published a model transaction disclosure chart and a model website disclosure.⁸

In addition to the disclosure requirements, the Best Interest Contract Exemption requires a Financial Institution to maintain, for a period of six years, the records necessary for representatives of the DOL, the IRS and any retirement investor (including any Plan sponsor, fiduciary, representative or beneficiary, and any IRA owner) to determine whether the conditions have been met. Subject to certain restrictions on access to privileged information, the Financial Institution is required to make the records unconditionally available at its customary location for examination by such representatives during normal business hours.

Principal Transactions Exemption

Subject to certain exclusions and conditions described below, the Principal Transactions Exemption would permit an Adviser or related Financial Institution to purchase or sell certain debt securities for the account of the Financial Institution or an affiliate from or to a Plan or IRA where the purchase or sale results from the Adviser's provision of investment advice to the Plan or IRA (each such purchase or sale, a principal transaction). The exemption would also permit the Adviser or Financial Institution to receive a markup, markdown or other payment for themselves of any affiliate in connection with a principal transaction.

As proposed, the exemption would only apply to purchases and sales of debt securities that are (i) U.S. dollar-denominated securities issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act, (ii) U.S. agency securities or (iii) U.S. Treasury securities. In the preamble to the Principal Transactions Exemption, the DOL explained its decision to limit relief to purchases and sales of certain debt securities, noting that principal transactions between a fiduciary and a Plan or IRA involve a potentially severe conflict of interest on the part of the fiduciary. However, because particular bond issues might be sold by a limited number of financial institutions, the DOL determined that Plans and IRAs may face reduced choices in the market for debt securities without an exemption. In contrast, the DOL noted that equity securities were widely available through agency transactions that did not present the same conflict-of-interest issues associated with principal

transactions. The DOL did, however, request public comment on whether the exemption should be expanded to cover other securities commonly held by Plans and IRAs.

Excluded Transactions. The Principal Transactions Exemption would not apply to principal transactions involving a Plan for which the Adviser, the Financial Institution or any affiliate is (i) an employer of employees covered under the Plan or (ii) a named fiduciary or plan administrator with respect to the Plan, unless the Adviser and Financial Institution were selected to provide investment advice by an independent Plan fiduciary. Nor would the exemption apply to principal transactions where the Adviser has authority or control over the management or disposition of the Plan or IRA assets involved in the transaction.

Conditions for Relief. In order for the exemption to apply to a principal transaction, the following conditions would need to be satisfied:

- the principal transaction is not part of an agreement, arrangement or understanding designed to evade compliance with ERISA or the Internal Revenue Code, or to otherwise impact the value of the debt securities;
- the debt securities are purchased or sold for cash at a price that (i) the Adviser and Financial Institution reasonably believe to be at least as favorable to the Plan or IRA as a price available in a transaction that is not a principal transaction and (ii) is at least as favorable to the Plan or IRA as two contemporaneous price quotes obtained from ready and willing counterparties unaffiliated with the Adviser and Financial Institution; and
- the debt securities purchased or sold (i) are not issued by the Financial Institution or any affiliate, (ii) are not being purchased from an underwriting syndicate in which the Financial Institution or any affiliate is a member, and (iii) have no more than a moderate credit risk and have sufficient liquidity to be sold at or near fair market value within a reasonably short period of time.

In addition, the Adviser and Financial Institution would need to enter into a written contract with the Plan fiduciary (or, in the case of a participant-directed plan, the Plan participant or beneficiary) or IRA owner that incorporates substantially the same terms required under the Best Interest Contract Exemption, including an acknowledgement by the Adviser and Financial Institution of their fiduciary status and an agreement to comply with the Impartial Conduct Standards, and that does not contain exculpatory provisions or provisions waiving or limiting the Plan or IRA's right to participate in class actions. The contract would also need to document the Plan or IRA investor's affirmative written consent, on a prospective basis, to principal transactions and inform the investor of its right to terminate such consent at any time without penalty.

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The Financial Institution would also be subject to recordkeeping requirements identical to those imposed under the Best Interest Contract Exemption, and the Adviser and Financial Institution would be required to satisfy extensive disclosure requirements, including:

- disclosing to the Plan or IRA investor, either orally in writing, prior to each principal transaction the price quotes obtained from unaffiliated counterparties and the markup, markdown or other payment that will be charged in connection with the transaction;
- providing a written confirmation of each principal transaction; and
- providing a written disclosure within 45 days after the end of each year that lists each principal transaction engaged in during the preceding year, and provides for each transaction the price at which the debt securities were purchased or sold and the applicable markup, markdown or other payment charged in connection with the transaction.

Potential Exemption for High-Quality Low-Fee Investments

Although not included among the proposed exemptions, the DOL is considering issuing a separate exemption that would permit Advisers, Financial Institutions, their affiliates and related parties to receive compensation in connection with investments in certain high-quality low-fee investments, such as investments in mutual funds. As envisioned by the DOL, the exemption would provide relief comparable to that provided under the Best Interest Contract Exemption, but the relief would be subject to fewer conditions due to the minimal risk of abuse to Plans and IRAs. In particular, the exemption would not require Advisers and Financial Institutions to comply with the Impartial Conduct

Standards or adopt anti-conflict policies and procedures. The DOL has requested that comments be submitted addressing whether it should propose such an exemption and, if so, how the exemption should be structured.

Proposed Amendments to Existing Exemptions

In addition to the proposed exemptions discussed above, the DOL has proposed amendments to several class exemptions that currently cover transactions with Investment Advice Fiduciaries. The proposed amendments would, among other things, (i) remove provisions granting relief for transactions involving Investment Advice Fiduciaries and IRAs that duplicate the relief provided under the Best Interest Contract Exemption, (ii) require fiduciaries relying on the exemptions to comply with the Impartial Conduct Standards, and (iii) revise recordkeeping requirements to reflect the recordkeeping provisions contained in the newly proposed exemptions. Please refer to the attached chart for a summary of the proposed amendments.

Comment Period and Effective Date

The DOL has established a 75-day comment period, commencing on the date of publication in the Federal Register, for the Proposed Regulation, the proposed exemptions and the proposed amendments to existing exemptions. The DOL intends to hold a public hearing on its proposals within 30 days of the close of the comment period. The Proposed Regulation would become effective 60 days after it is published in final form in the Federal Register. However, the DOL has proposed that compliance with the final regulation would not be required until eight months after publication. The DOL has also proposed that the Best Interest Contract Exemption and Principal Transactions Exemption would become available on the date the requirements of the final regulation become applicable.

¹ Definition of the Term "Fiduciary"; Conflict of Interest Rule — Retirement Investment Advice: Proposed Rule, 80 Fed. Reg. 21,928 (April 20, 2015).

² Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21,960 (April 20, 2015).

³ Proposed Class Exemption for Principal Transactions in Certain Debt Securities Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, 80 Fed. Reg. 21,989 (April 20, 2015).

⁴ Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters, 80 Fed. Reg. 22,010 (April 20, 2015); Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks,

80 Fed. Reg. 22,021 (April 20, 2015); Proposed Amendment to Prohibited Transaction Exemption (PTE) 75-1, Part V, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 80 Fed. Reg. 22,004 (April 20, 2015); Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1, 80 Fed. Reg. 22,035 (April 20, 2015).

⁵ ERISA § 3(21)(A); Internal Revenue Code § 4975(e)(3).

⁶ See 29 C.F.R. § 2510.3-21(c); 26 C.F.R. § 54.4975-9(c).

⁷ Under the Proposed Regulation, fees and other compensation include brokerage fees, mutual fund sales commissions and insurance sales commissions, as well as compensation received by any affiliate of the adviser that is connected to the transaction for which the advice was provided. See DOL Prop. Reg. § 2510.3-21(f)(6), 80 Fed. Reg. 21,928, 21,960 (April 20, 2015).

⁸ See Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21,960, 21,989 (April 20, 2015).

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Summary of Proposed Amendments to Existing Prohibited Transaction Class Exemptions

Class Exemption	Relief Provided	Proposed Amendment
PTE 75-2, Part I(b)	Permits a party in interest or disqualified person (other than a fiduciary) to (i) effect any securities transaction on behalf of a Plan or IRA, (ii) act as agent for the Plan or IRA in connection with the transaction and (iii) perform clearance, settlement or custodial functions incidental to effecting such transaction.	Part I(b) would be deleted. Comparable relief would be available under statutory exemptions that permit services to be furnished to a Plan or IRA under a reasonable contract or arrangement.
PTE 75-2, Part I(c)	Permits a party in interest or disqualified person to furnish investment advice, analyses or reports, either directly or through publications, to a Plan or IRA under circumstances that do not make the party in interest or disqualified person an Investment Advice Fiduciary with respect to such Plan or IRA.	Part I(c) would be deleted. Comparable relief would be available under statutory exemptions that permit services to be furnished to a Plan or IRA under a reasonable contract or arrangement.
PTE 75-2, Part II(1)	Permits the purchase or sale of securities between a Plan or IRA and a registered broker-dealer, a reporting dealer who makes primary markets in U.S. government securities or a U.S.-regulated bank.	Part II(1) would be redesignated as Part II, and the record-keeping requirements under Part II would be revised to require the broker-dealer engaging in a covered transaction, as opposed to the Plan or IRA, to maintain the records.
PTE 75-2, Part II(2)	Permits the purchase or sale of mutual fund shares by a Plan or IRA, including purchases or sales between a Plan or IRA and a broker-dealer (other than a principal underwriter of the mutual fund or an affiliate) who makes the decision on behalf of the Plan or IRA to enter into the transaction.	Part II(2) would be deleted and a comparable exemption with additional safeguards would be incorporated into PTE 86-128.
PTE 75-1, Part III	Permits a fiduciary to cause a Plan or IRA to purchase securities from a member of an underwriting syndicate other than a fiduciary, when the fiduciary is also a member of the syndicate.	The exemption would be amended to require a fiduciary engaging in a covered transaction to comply with the Impartial Conduct Standards.
PTE 75-1, 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.	The exemption would be amended to require a fiduciary engaging in a covered transaction to comply with the Impartial Conduct Standards.
PTE 75-1, Part V	Permits a registered broker-dealer to extend credit to a Plan or IRA in connection with the purchase or sale of securities, provided the broker-dealer either (i) is not a fiduciary with respect to the investment of the Plan assets involved in the transaction or (ii) receives no interest or other consideration in connection with the extension of credit.	Part V would be amended to (i) permit, subject to certain conditions, a broker-dealer that is an Investment Advice Fiduciary to 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 and (ii) require the broker-dealer engaging in a covered transaction, rather than the Plan or IRA, to maintain records of the covered transaction.
PTE 77-4	Permits a Plan or IRA to purchase or sell shares of a mutual fund where the investment adviser of the mutual fund or an affiliate is fiduciary with respect to the Plan or IRA.	The exemption would be amended to require a fiduciary engaging in a covered transaction to comply with the Impartial Conduct Standards.
PTE 80-83	Permits a fiduciary to cause a Plan or IRA to purchase securities in a public offering where the proceeds from the offering may be used by the issuer to retire or reduce indebtedness owed to the fiduciary or an affiliate.	The exemption would be amended to require a fiduciary engaging in a covered transaction to comply with the Impartial Conduct Standards.

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Class Exemption	Relief Provided	Proposed Amendment
PTE 83-1	Permits the sale, exchange or transfer of pass-through certificates evidencing interests in mortgage pools between the sponsor of the mortgage pool and a Plan or IRA in connection with the initial issuance of the certificates when the sponsor, trustee, or insurer of the pool is a fiduciary with respect to the assets of the Plan or IRA invested in the certificates.	The exemption would be amended to require a fiduciary engaging in a covered transaction to comply with the Impartial Conduct Standards.
PTE 84-24	Permits an insurance agent, insurance broker, pension consultant or principal underwriter of a mutual fund, including certain fiduciaries, to effect the purchase of an insurance or annuity contract or mutual fund shares on behalf of a Plan or IRA and receive sales commissions in connection with the purchase.	The exemption would be amended to (i) eliminate relief for transactions involving the purchase by an IRA of mutual fund shares or an annuity contract that is a security under federal securities laws; (ii) require insurance agents, insurance brokers, pension consultants, insurance companies and mutual fund principal underwriters that are fiduciaries engaging in covered transactions to comply with the Impartial Conduct Standards; (iii) add definitions for “insurance commissions” and “mutual fund commissions” that describe the types of compensation that may be received under the exemption; and (iv) require a fiduciary to maintain records of each covered transaction.
PTE 86-128	Permits certain fiduciaries to (i) use their authority to cause a Plan or IRA to pay a fee to the fiduciary or its affiliates for effecting or executing securities transactions; and (ii) act as agent for both a Plan or IRA and for the counterparty in an “agency cross transaction” and receive reasonable compensation from the counterparty.	The exemption would be amended to (i) eliminate relief for transactions involving IRAs where the fiduciary engaging in the transaction is an Investment Advice Fiduciary; (ii) extend conditions for relief, including disclosure, written authorization and reporting requirements, to transactions involving IRAs; (iii) require any fiduciary that engages in covered transactions to comply with the Impartial Conduct Standards; (iv) extend relief to the payment of compensation to entities unaffiliated with the fiduciary but with respect to which the fiduciary has an interest that may affect the exercise of its best judgment as a fiduciary (related entities); (v) clarify the application of the exemption to discretionary trustees; (vi) add a new defined term (commission) that describes the types of compensation a fiduciary, its affiliates and other related persons may receive under the exemption; (vii) provide new relief that would permit certain fiduciaries to act as principals in selling mutual fund shares to Plans and IRAs and receive commissions for doing so; and (viii) require fiduciaries to maintain records of each covered transaction.

Executive Compensation and Benefits Alert

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