Morgan Lewis

MORGAN LEWIS RETAIL ADVICE WORKING GROUP

DOL INVESTMENT ADVICE STANDARDS 4.0

October 31, 2023

REDLINE COMPARISON OF PROPOSED RULES AND EXEMPTIONS

- ***Definition of Investment Advice Fiduciary***
- ***PTE 2020-02*** **(general nondiscretionary advice)**
- ***PTE 86-128*** **(affiliated securities brokerage)**
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INTRODUCTION

On October 31, 2023, the U.S. Department of Labor ("**DOL**") proposed amendments to its definition of an investment advice fiduciary and several class prohibited transaction exemptions ("**PTEs**"). This is round four of the DOL's attempt to provide more stringent rules and requirements around the retail distribution of financial products. Similar to the 2015 rule proposal, it was announced at a White House event in conjunction with AARP by the President.

- The White House fact sheet can be found here.
- The DOL fact sheet can be found here.
- The President's remarks can be found here.

At first impression, the rule package builds on the 2020 fiduciary rule/exemption, but further incorporates elements of the 2016 fiduciary rule that was vacated by the Fifth Circuit.

We are in the process of analyzing these proposals and will follow up with you. In the meantime, the enclosed redlines identify the changes the DOL is proposing.

As always, we look forward to working with you and your teams, and we thank you for the opportunity to partner with you.

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DEFINITION OF INVESTMENT ADVICE FIDUCIARY

29 C.F.R. § 2510.3-21. Definition of "Fiduciary."

(a)-(b) [Reserved]

(c) Investment advice. (1) ~~A person shall be deemed to be rendering "investment advice" to an employee benefit plan,within the meaning~~For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act), section 4975(e)(3)(B) of the Internal Revenue Code (Code), and this paragraph, ~~only if:~~a person renders "investment advice" with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property (as defined in paragraph (f)(10) of this section) to the plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary (retirement investor), and the person satisfies paragraphs (c)(1)(i), (ii), or (iii) of this section:

~~(i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and~~

(~~ii~~i) ~~Such~~The person either directly or indirectly (e.g., through or together with any affiliate)~~—~~ has~~(A) Has~~ discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the ~~plan~~retirement investor; ~~or~~

~~(B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.~~

(ii) The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or

(iii) The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.

(iv) For purposes of this paragraph, when advice is directed to a plan or IRA fiduciary, the relevant retirement investor is both the plan or IRA and the fiduciary.

(v) Written statements by a person disclaiming status as a fiduciary under the Act, the Code, or this section, or disclaiming the conditions set forth in paragraph (c)(1)(ii) of this section, will not control to the extent they are inconsistent with the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.

(2) A person who is a fiduciary with respect to a plan or IRA by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such person does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such person from the definition of the term "party in interest" (as set forth in section 3(14)(B) of the Act) or "disqualified person" (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

(d) Execution of securities transactions. (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code, with respect to ~~an employee benefit~~a plan or an IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan or IRA in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify (A) ~~the~~The security to be purchased or sold, (B) ~~a~~A price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, et seq.), a price which is determined in accordance with Rule ~~22c-1~~22c1 under the Investment Company Act of 1940 (17 CFR 270.22c-1), (C) ~~a~~A time span during which such security may be purchased or sold (not to exceed five business days), and (D) ~~the~~The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to ~~an employee benefit~~a plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section~~,~~ shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition, of the term "party in interest" (as set forth in section 3(14)(B) of the Act) or "disqualified person" (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

~~(c) Affiliate and control. (1) For purposes of paragraphs (c) and (d) of this section, an "affiliate" of a person shall include:~~

(e) For a fee or other compensation, direct or indirect. For purposes of section 3(21)(A)(ii) of the Act and section 4975(e)(3)(B) of the Code, a person provides investment advice "for a fee or other compensation, direct or indirect," if the person (or any affiliate) receives any explicit fee or compensation, from any source, for the advice or the person (or any affiliate) receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase, sale, or holding of a security or other investment property or the provision of investment advice, including, though not limited to, commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation. A fee or compensation is paid "in connection with or as a result of" such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or the provision of advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of advice.

(f) Definitions. For purposes of this section—

(~~i~~1) ~~Any~~The term "affiliate" means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person;

any ~~(ii) Any~~ officer, director, partner, employee, representative, or relative (as defined in ~~section 3~~paragraph (~~15~~f)(12) of ~~the Act)~~this section) of such person; and ~~(iii) Any~~any corporation or partnership of which such person is an officer, director, or partner.

(2) ~~For purposes of this paragraph, the~~The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(3) The term "IRA" means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(4) The term "IRA owner" means, with respect to an IRA, either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) The term "IRA fiduciary" means a person described in section 4975(e)(3) of the Code with respect to an IRA.

(6) The term "plan" means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code.

(7) The term "plan fiduciary" means a person described in section (3)(21)(A) of the Act and/or 4975(e)(3) of the Code with respect to a plan. For purposes of this section, a participant or beneficiary of the plan who is receiving advice is not a "plan fiduciary" with respect to the plan.

(8) The term "plan participant" or "participant" means, for a plan described in section 3(3) of the Act, a person described in section 3(7) of the Act.

(9) The term "beneficiary" means, for a plan described in section 3(3) of the Act, a person described in section 3(8) of the Act.

(10) The phrase "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property" means recommendations:

(i) As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;

(ii) As to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

(iii) As to rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.

(11) The term "investment property" does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.

(12) The term “relative” means a person described in section 3(15) of the Act and section 4975(e)(6) of the Code or a brother, a sister, or a spouse of a brother or sister.

(g) Applicability. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237, transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. Accordingly, in addition to defining a “fiduciary” for purposes of section 3(21)(A)(ii) of the Act, this section applies to the parallel provision in section 4975(e)(3)(B) of the Code, which defines a “fiduciary” of a plan defined in Code section 4975 (including an IRA) for purposes of the prohibited transaction provisions in the Code. For example, a person who satisfies paragraphs (c)(1) and (e) of this section in connection with a recommendation to a retirement investor that is an employee benefit plan as defined in section 3(3) of the Act, a fiduciary of such a plan, or a participant or beneficiary of such plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to Title I of the Act.

(h) Continued applicability of State law regulating insurance, banking, or securities. Nothing in this section shall be construed to affect or modify the provisions of section 514 of Title I of the Act, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities.

PROPOSED AMENDMENT TO PTE 2020-02

Improving Investment Advice for Workers & Retirees

Section I—Transactions

(a) *In general.* ERISA Title I (Title I) and the Internal Revenue Code (the Code) prohibit fiduciaries, as defined, that provide investment advice to Plans and individual retirement accounts (IRAs) from receiving compensation that varies based on their investment advice and compensation that is paid from third parties. Title I and the Code also prohibit fiduciaries from engaging in purchases and sales with Plans or IRAs on behalf of their own accounts (principal transactions). This exemption permits Financial Institutions and Investment Professionals who provide fiduciary investment advice to Retirement Investors to receive otherwise prohibited compensation and engage in riskless principal transactions and certain other principal transactions (Covered Principal Transactions) as described below.

The exemption provides relief from the prohibitions of ERISA section 406(a)(1)(A), (D), and 406(b), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E), and (F), if the Financial Institutions and Investment Professionals provide fiduciary investment advice in accordance with the conditions set forth in Section II and are eligible pursuant to Section III, subject to the definitional terms and recordkeeping requirements in Sections IV and V.

(b) Covered transactions. This exemption permits Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, to engage in the following transactions, including as part of a rollover from a Plan to an IRA as defined in Code section 4975(e)(1)(B) or (C), as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B):

(1) The receipt of reasonable compensation; and

(2) The purchase or sale of an asset in a riskless principal transaction or a Covered Principal Transaction, and the receipt of a mark-up, mark-down, or other payment.

(c) Exclusions. This exemption does not apply if:

(1) The Plan is covered by Title I ~~of ERISA~~ and the Investment Professional, Financial Institution, or any Affiliate providing investment advice is (A) the employer of employees covered by the Plan, or (B) the Plan's named fiduciary or administrator; provided however that a named fiduciary or ~~plan~~ administrator ~~with respect to the Plan that was~~ or their Affiliate may rely on the exemption if it is: (i) selected to provide investment advice ~~to the Plan~~ by a fiduciary who is ~~not independent~~Independent of the Financial Institution, Investment Professional, and their Affiliates, or (ii) a Pooled Plan Provider (PPP) registered with the Department under 29 CFR 2510.3-44; or

~~(2) The transaction is a result of investment advice generated solely by an interactive website in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the website, without any personal interaction or advice with an Investment Professional (*i.e.*, robo-advice); or~~

(~~3~~2) The transaction ~~involves~~ the Investment Professional or Financial Institution acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ~~the regulations at 29 CFR 2510.3–21(c)(1)(i) and (ii)(B) or 26 CFR 54.4975–9(c)(1)(i) and (ii)(B) setting forth the test for fiduciary investment advice~~ERISA section 3(21)(A)(ii)) and Code section 4975(e)(3)(B).

Section II—Investment Advice Arrangement

Section II(a) requires Investment Professionals and Financial Institutions to comply with Impartial Conduct Standards, including a best interest standard, when providing fiduciary investment advice to Retirement Investors. In addition, ~~the exemption~~Section II(b) requires Financial Institutions to acknowledge fiduciary status under Title I and/or the Code, and ~~describe in writing~~provide investors with a statement of the best interest standard of care, a written description of the services they will provide and their ~~material~~ Conflicts of Interest~~. Finally,~~ , rollover disclosure (as applicable), Financial Institution, and additional disclosure with respect to Pooled Employer Plans (as applicable). Section II(c) requires Financial Institutions ~~must~~to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards when providing fiduciary investment advice to Retirement Investors ~~and~~regarding compliance with the Impartial Conduct Standards. Section II(d) requires the Financial Institution to conduct a retrospective review of compliance~~.~~ with the Impartial Conduct Standards and the policies and procedures. Section II(e) allows Financial Institutions to correct certain violations of the exemption conditions and continue to rely upon the exemption for relief.

(a) Impartial Conduct Standards. The Financial Institution and Investment Professional comply with the following "Impartial Conduct Standards":

(1) Investment advice is, at the time it is provided, in the Best Interest of the Retirement Investor. As defined in Section V(b), such advice: (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor~~,~~; and (B) does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement ~~Investor's~~Investor's interests to their own~~;~~. For example, in choosing between two investments offered and available to the Retirement Investor from the Financial Institution, it is not permissible for the Investment Professional to advise investing in the one that is worse for the Retirement Investor but better or more profitable for the Investment Professional or the Financial Institution.

(2)(A) The compensation received, directly or indirectly, by the Financial Institution, Investment Professional, their Affiliates and Related Entities for their services does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (B) as required by the ~~federal~~Federal securities laws, the Financial Institution and Investment Professional seek to obtain the best execution of the investment transaction reasonably available under the circumstances; and

(3) The Financial ~~Institution's~~Institution's and its Investment Professionals~~'~~' statements (written and oral) to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time statements are made, materially misleading. For purposes of this paragraph, the term "materially misleading" includes omitting information that is needed to prevent the statement from being misleading to the Retirement Investor under the circumstances.

(b) Disclosure. Prior to engaging in a transaction pursuant to this exemption, the Financial Institution provides the disclosures set forth in (1) ~~and~~ -(~~2~~4) to the Retirement Investor:

(1) A written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I ~~and~~, the Code, ~~as applicable, with respect to any fiduciary~~or both when making an investment ~~advice provided by the Financial Institution or Investment Professional to the Retirement Investor~~recommendation;

(2) A written statement of the Best Interest standard of care owed by the Investment Professional and Financial Institution to the Retirement Investor;

(~~2~~3) A written description of the services to be provided and the Financial ~~Institution's~~Institution's and Investment ~~Professional's~~Professional's material Conflicts of Interest that is accurate and not misleading in ~~all material respects; and~~any material respect. This description will include a statement on whether the Retirement Investor will pay for such services, directly or indirectly, including through Third-Party Payments. If, for example, the Retirement Investor will pay through commissions or transaction-based payments, the written statement must clearly disclose that fact. This statement must be written in plain English, taking into consideration a Retirement Investor's level of financial experience;

~~(3) Prior to engaging in a rollover recommended pursuant to the exemption, the Financial Institution provides the documentation of specific reasons for the rollover recommendation, required by Section II(c)(3), to the Retirement Investor.~~

(4) A written statement that the Retirement Investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present full and fair disclosure that is materially accurate in scope, magnitude, and nature, with sufficient detail to permit the Retirement Investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest, and that describes how the Retirement Investor can get the information, free of charge;

(5) Rollover disclosure. Before engaging in a rollover, or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Financial Institution and Investment Professional must consider and document the basis for their conclusions as to whether a rollover is in the Retirement Investor's Best Interest, and must provide that documentation to the Retirement Investor. Relevant factors to consider must include but are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan or account type, as applicable;

(B) the fees and expenses associated with the Plan and the recommended investment or account;

(C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and

(D) the different levels of services and investments available under the Plan and the recommended investment or account.

(6) The Financial Institution will not fail to satisfy the conditions in Section II(b) solely because it, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, provided that the Financial Institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

(7) Investment Professionals and Financial Institutions may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate.

(8) The Financial Institution is not required to disclose information pursuant to this Section II(b) if such disclosure is otherwise prohibited by law.

(c) Policies and Procedures.

(1) The Financial Institution establishes, maintains, and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards in connection with covered fiduciary advice and transactions.

(2) The Financial ~~Institutions'~~Institution's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the ~~interest~~interests of the Retirement Investor. Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable

person would conclude are likely, to result in recommendations that are not in Retirement Investors' Best Interest.

(3) ~~The Financial Institution documents the specific reasons that any recommendation to roll over assets from a Plan to another Plan or an IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (*e.g.*, from a commission-based account to a fee-based account) is in the Best Interest of the Retirement Investor.~~ Financial Institutions must provide their complete policies and procedures to the Department upon request within 10 business days of request.

(d) Retrospective Review.

(1) The Financial Institution conducts a retrospective review, at least annually, that is reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, this exemption, including the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The Financial Institution updates the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with Section II(c).

(2) The methodology and results of the retrospective review are reduced to a written report that is provided to a Senior Executive Officer.

(3) A Senior Executive Officer of the Financial Institution certifies, annually, that:

(A) The officer has reviewed the report of the retrospective review;

(B) The Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975;

(~~B~~C) The Financial Institution has ~~in place~~written policies and procedures ~~prudently designed to achieve compliance with~~that meet the conditions ~~of this exemption~~set forth in Section II(c)(1); and

(~~C~~D) The Financial Institution has in place a prudent process to modify such policies and procedures as ~~business, regulatory, and legislative changes and events dictate, and to test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with the conditions of this exemption.~~set forth in Section II(d)(1).

(4) The review, report, and certification are completed no later than six months following the end of the period covered by the review.

(5) The Financial Institution retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 10 business days of request, to the extent permitted by law including ~~12 U.S.C. 484~~12 U.S.C. 484 (regarding limitations on visitorial powers for national banks).

(e) Self-Correction. A non-exempt prohibited transaction will not occur due to a violation of the ~~exemption's~~exemption's conditions with respect to a transaction, provided:

(1) Either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses;

(2) The Financial Institution corrects the violation and notifies the Department of Labor of the violation and the correction via email to ~~*IIAWR@dol.gov*~~IIAWR@dol.gov within 30 days of correction;

(3) The correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and

(4) The Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2).

Section III—Eligibility

(a) General. Subject to the timing and scope provisions set forth in subsection (b) and the opportunity to be heard as set forth in subsection (c), an Investment Professional or Financial Institution will be ineligible to rely on the exemption ~~for 10 years following~~with respect to any transaction, if the Financial Institution, its Affiliate, or Investment Professional is described in (1) or (2):

~~(1) A conviction of any crime described in ERISA section 411 arising out of such person's provision of investment advice to Retirement Investors, unless, in the case of a Financial Institution, the Department grants a petition pursuant to subsection (c)(1) below that the Financial Institution's continued reliance on the exemption would not be contrary to the purposes of the exemption ; or~~

(1) The Investment Professional or Financial Institution has been convicted either:

(A) by a U.S. Federal or state court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A). For purposes of this section (a)(1), a person shall be deemed to have been convicted of a crime as of the "conviction date," which is the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal.

(2) ~~Receipt of~~The Investment Professional or Financial Institution has received a written ineligibility notice issued by the Department for:

(A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; ~~or (C)~~

(C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or

(D) providing materially misleading information to the Department in connection with the ~~Financial Institution's or Investment Professional's conduct under~~conditions of the exemption~~; in each case, as determined by the Department pursuant to the process described in subsection (c)~~.

(b) Timing and Scope of Ineligibility.

~~(1) An Investment Professional shall become ineligible immediately upon (A) the date of the trial court's conviction of the Investment Professional of a crime described in subsection (a)(1), regardless of whether that judgment remains under appeal; or (B) the date of the written ineligibility notice described in subsection (a)(2), issued to the Investment Professional.~~

~~(2) A Financial Institution shall become ineligible following (A) the 10th business day after the conviction of the Financial Institution or another Financial Institution in the same Controlled Group of a crime described in subsection (a)(1) regardless of whether that judgment remains under appeal, or, if the Financial Institution timely submits a petition described in subsection (c)(1) during that period, 21 days after the date of the Department's written denial of the petition; or (B) 21 days after the date of the written ineligibility notice, described in subsection (a)(2), issued to the Financial Institution or another Financial Institution in the same Controlled Group.~~

~~(3) Controlled Group. A Financial Institution is in the same Controlled Group with another Financial Institution if it would be considered in the same "controlled group of corporations"~~

~~or "under common control" with the Financial Institution, as those terms are defined in Code section 414(b) and (c), in each case including the accompanying regulations.~~

~~(4) Winding Down Period. Any Financial Institution that is ineligible will have a one year winding down period during which relief is available under the exemption subject to the conditions of the exemption other than eligibility. After the one year period expires, the Financial Institution may not rely on the relief provided in this exemption for any additional transactions.~~

(1) Ineligibility shall begin six months after:

(A) the conviction date defined in Section (a)(1);

(B) the date of the Department's written determination under Section (c)(1)(C) for a petition regarding a foreign conviction; or

(C) the date of the written ineligibility notice described in subsection (a)(2).

(2) A person shall become eligible to rely on this exemption again only upon the earliest of the following:

(A) the date of a subsequent judgment reversing such person's conviction described in (a)(1);

(B) 10 years after the person became ineligible under Section III(b)(1) or 10 years after the person was released from imprisonment as a result of a crime described in (a)(1), if later; or

(C) the date, if any, the Department grants an individual exemption (which may impose additional conditions) to the person permitting its continued reliance on this exemption notwithstanding the conviction.

(c) Opportunity to be heard.

(1) ~~Petitions under subsection (a)(1)~~Foreign Convictions.

(A) A Financial Institution, its Affiliate, or an Investment Professional that has been convicted ~~of a crime described under~~by a foreign court of competent jurisdiction as provided in subsection (a)(1) ~~or another~~(B)), the Financial Institution ~~in the same Controlled Group~~or Investment Professional may submit a petition to the Department ~~informing~~that informs the Department of the conviction and ~~seeking a~~seeks the Department's determination that the Financial ~~Institution's~~Institution's continued reliance on the exemption would not be contrary to the purposes of the exemption. Petitions must be submitted~~,~~ to the Department within 10 business days after the conviction date ~~of the conviction, to the Department~~ by email ~~at~~to IIAWR@dol.gov.

(B) Following receipt of the petition, the Department will provide the Investment Professional or Financial Institution with the opportunity to be heard~~,~~ in person

~~or~~(including by phone or videoconference), in writing, or ~~both~~a combination thereof. The opportunity to be heard ~~in person~~ will be limited to one ~~in-person~~ conference unless the Department determines in its sole discretion to allow additional conferences.

~~(C) The Department's determination as to whether to grant the petition will be based solely on its discretion. In determining whether to grant the petition, the Department will consider the gravity of the offense; the relationship between the conduct underlying the conviction and the Financial Institution's system and practices in its retirement investment business as a whole; the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy; how recent was the underlying lawsuit; remedial measures taken by the Financial Institution upon learning of the underlying conduct; and such other factors as the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption. The Department will provide a written determination to the Financial Institution that articulates the basis for the determination.~~

(C) Following the hearing, the Department will issue a written determination to the Financial Institution or Investment Professional, as applicable, articulating the basis for its determination whether or not to allow the Financial Institution or Investment Professional to continue relying on PTE 2020-02.

(2) Written ~~ineligibility notice under subsection (a)(2)~~Ineligibility Notice. Prior to issuing a written ineligibility notice, the Department will issue a written warning to the Investment Professional or Financial Institution, as applicable, identifying specific conduct implicating subsection (a)(2)~~,~~ and providing a six-month opportunity to cure. At the end of the six-month period, if the Department determines that the Investment Professional or Financial Institution has not taken appropriate action to prevent recurrence of the disqualifying conduct ~~persists~~, it will provide the Investment Professional or Financial Institution with the opportunity to be heard, in person ~~or~~(including by phone or videoconference), in writing, or ~~both~~a combination, before the Department issues the written ineligibility notice. The opportunity to be heard ~~in person~~ will be limited to one ~~in-person~~ conference unless the Department determines in its sole discretion to allow additional conferences. The written ineligibility notice will articulate the basis for the determination that the Investment Professional or Financial Institution engaged in conduct described in subsection (a)(2).

(3) Department's Considerations. For hearings under (c)(1) and (c)(2), the Department will consider: the gravity of the offense; the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy; recency of the conduct at issue; any remedial measures taken; and other factors the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption.

(d) Alternative exemptions. A Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or seek an individual prohibited transaction exemption from the

Department. To the extent an applicant seeks retroactive relief in connection with an exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in ~~29 CFR 2570.35(d)~~29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of retroactive relief.

Section IV—Recordkeeping

The Financial Institution maintains for a period of six years records demonstrating compliance with this exemption and makes such records available, to the extent permitted by law including ~~12 U.S.C. 484~~12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury.

Section V—Definitions

(a) "Affiliate" means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Investment Professional or Financial Institution. (For this purpose, "control" would mean the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the Investment Professional or Financial Institution; and

(3) Any corporation or partnership of which the Investment Professional or Financial Institution is an officer, director, or partner.

(b) Advice is in a Retirement ~~Investor's~~Investor's "Best Interest" if such advice (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and (B) does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement ~~Investor's~~Investor's interests to their own.

(c) A "Conflict of Interest" is an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor.

(d) A "Covered Principal Transaction" is a principal transaction that:

(1) For sales to a Plan or an IRA:

(A) Involves a U.S. dollar denominated debt security issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933, a U.S. Treasury Security, a debt security issued or guaranteed by a U.S. federal government agency other than the U.S. Department of the Treasury, a debt security issued or guaranteed by a government-sponsored enterprise, a municipal security, a certificate

of deposit, an interest in a Unit Investment Trust, or any investment permitted to be sold by an investment advice fiduciary to a Retirement Investor under an individual exemption granted by the Department after the effective date of this exemption that includes the same conditions as this exemption; and

(B) ~~If the recommended investment is a~~A debt security~~, the security is~~ may only be recommended ~~pursuant to~~in accordance with written policies and procedures adopted by the Financial Institution that are reasonably designed to ensure that the security, at the time of the recommendation, has no greater than moderate credit risk and sufficient liquidity that it could be sold at or near carrying value within a reasonably short period of time; and

(2) For purposes of Plan or an IRA, involves any securities or investment property.

(e) "Financial Institution" means an entity that is not ~~disqualified or barred~~suspended, barred or otherwise prohibited (including under Section III of this exemption) from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization), that employs the Investment Professional or otherwise retains such individual as an independent contractor, agent or registered representative, and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (~~15 U.S.C. 80b-1~~15 U.S.C. 80b-1 et seq.) or under the laws of the state in which the adviser maintains its principal office and place of business;

(2) A bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (~~12 U.S.C. 1813(b)(1)~~12 U.S.C. 1813(b)(1));

(3) An insurance company qualified to do business under the laws of a state, that: (A) ~~Has~~has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the ~~state's~~state's insurance commissioner within the preceding five years, and (C) is domiciled in a state whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority;

(4) A broker or dealer registered under the Securities Exchange Act of 1934 (~~15 U.S.C. 78a~~15 U.S.C. 78a et seq.); or

(5) An entity that is described in the definition of Financial Institution in an individual exemption granted by the Department after the date of this exemption that provides relief for the receipt of compensation in connection with investment advice provided by an investment advice fiduciary under the same conditions as this class exemption.

(f) For purposes of subsection I(c)(1), a fiduciary is "~~independent~~Independent" of the Financial Institution and Investment Professional if:

(~~i~~1) ~~The~~the fiduciary is not the Financial Institution, Investment Professional, or an Affiliate;

(~~ii~~2) the fiduciary does not have a relationship to or an interest in the Financial Institution, Investment Professional, or any Affiliate that might affect the exercise of the ~~fiduciary's~~fiduciary's best judgment in connection with transactions covered by the exemption; and

(~~iii~~3) the fiduciary does not receive and is not projected to receive within the current ~~federal~~Federal income tax year, compensation or other consideration for his or her own account from the Financial Institution, Investment Professional, or an Affiliate, in excess of 2% of the ~~fiduciary's~~fiduciary's annual revenues based upon its prior income tax year.

(g) "Individual Retirement Account" or "IRA" means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(h) "Investment Professional" means an individual who:

(1) Is a fiduciary of a Plan or an IRA by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the assets of the Plan or IRA involved in the recommended transaction;

(2) Is an employee, independent contractor, agent, or representative of a Financial Institution; and

(3) Satisfies the ~~federal~~Federal and state regulatory and licensing requirements of insurance, banking, and securities laws (including self-regulatory organizations) with respect to the covered transaction, as applicable, and is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization).

(i) "Plan" means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(j) A "Pooled Employer Plan" or "PEP" means a pooled employer plan described in ERISA section 3(43).

(k) A "Pooled Plan Provider" or "PPP" means a pooled plan provider described in ERISA section 3(44).

(l) "Riskless Principal Transaction" means a transaction in which a Financial Institution, after having received an order from a Retirement Investor to buy or sell an asset, purchases or sells the asset for the Financial Institution's own account to offset the contemporaneous transaction with the Retirement Investor. A Riskless Principal Transaction is not a Covered Principal Transaction.

(~~j~~m) A "Related Entity" is any party that is not an Affiliate, but which either has, or in which the Investment Professional or Financial Institution has, an interest that may affect ~~the exercise of its~~ best judgment as a fiduciary.

(~~k~~n) "Retirement Investor" means:

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

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

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

(~~l~~o) A "Senior Executive Officer" is any of the following: ~~The~~the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution.

(p) "Third-Party Payments" include sales charges when not paid directly to the Financial Institution by the Plan, from a participant or beneficiary's account, or from an IRA; gross dealer concessions; revenue sharing payments; 12b-1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration, or financial benefit provided to the Financial Institution or an Affiliate or Related Entity by a third party as a result of a transaction involving a Plan, participant or beneficiary account, or IRA.

PROPOSED AMENDMENT TO PTE 86-128

Section I—Definitions and Special Rules

The following definitions and special rules apply to this exemption:

(a) The term "person" includes the person and affiliates of the person.

(b) An "affiliate" of a person includes the following:

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

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of ERISA), brother, sister, or spouse of a brother or sister, of the person;

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

A person is not an affiliate of another person solely because one of them has investment discretion over the other's assets. The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) An "agency cross transaction" is a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

(d) The term "covered transaction" means an action described in section II (a), (b) or (c) of this exemption.

(e) The term "effecting or executing a securities transaction" means the execution of a securities transaction as agent for another person and/or the performance of clearance, settlement, custodial or other functions ancillary thereto.

(f) A plan fiduciary is independent of a person only if the fiduciary has no relationship to or interest in such person that might affect the exercise of such fiduciary's best judgment as a fiduciary.

(g) The term "profit" includes all charges relating to effecting or executing securities transactions, less reasonable and necessary expenses including reasonable indirect expenses (such as overhead costs) properly allocated to the performance of these transactions under generally accepted accounting principles.

(h) The term "securities transaction" means the purchase or sale of securities.

(i) The term "nondiscretionary trustee" of a plan means a trustee or custodian whose powers and duties with respect to any assets of the plan are limited to (1) the provision of nondiscretionary trust services to the plan, and (2) duties imposed on the trustee by any provision or provisions of the Act or the Code. The term "nondiscretionary trust services" means custodial services and services ancillary to custodial services, none of which services are discretionary. For purposes of this exemption, a person does not fail to be a nondiscretionary trustee solely by reason of having been delegated, by the sponsor of a master or prototype plan, the power to amend such plan.

Section II—Covered Transactions

Effective the later of December 18, 1986, or the date on which the Office of Management and Budget approves the information collection requests contained in this exemption under the Paperwork Reduction Act of 1980, if each condition of section III of this exemption is either satisfied or not applicable under section IV, the restrictions of section 406(b) of ERISA and the taxes imposed by sections 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (E) or (F) or the Code shall not apply to—

(a) A plan fiduciary's using its authority to cause a plan to pay a fee for effecting or executing securities transactions to that person as agent for the plan, but only to the extent that such transactions are not excessive, under the circumstances, in either amount or frequency;

(b) A plan fiduciary's acting as the agent in an agency cross transaction for both the plan and one or more other parties to the transaction; or

(c) The receipt by a plan fiduciary of reasonable compensation for effecting or executing an agency cross transaction to which a plan is a party from one or more other parties to the transaction.

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

Section III—Conditions

Except to the extent otherwise provided in section IV of this exemption, section II of this exemption applies only if the following conditions are satisfied:

(a) The person engaging in the covered transaction is not an administrator of the plan or an employer any of whose employees are covered by the plan. Notwithstanding the foregoing, this condition does not apply to a trustee that satisfies Section III(h) and (i).

(b) The covered transaction is performed under a written authorization executed in advance by a fiduciary of each plan whose assets are involved in the transaction, which plan fiduciary is independent of the person engaging in the covered transaction.

(c) The authorization referred to in paragraph (b) of this section is terminable at will by the plan, without penalty to the plan, upon receipt by the authorized person of written notice of termination. A form expressly providing an election to terminate the authorization described in paragraph (b) of this section with instructions on the use of the form must be supplied to the authorizing fiduciary no less than annually. The instructions for such form must include the following information:

(1) The authorization is terminable at will by the plan, without penalty to the plan, upon receipt by the authorized person of written notice from the authorizing fiduciary or other plan official having authority to terminate the authorization; and

(2) Failure to return the form will result in the continued authorization of the authorized person to engage in the covered transactions on behalf of the plan.

(d) Within three months before an authorization is made, the authorizing fiduciary is furnished with any reasonably available information that the person seeking authorization reasonably believes to be

necessary for the authorizing fiduciary to determine whether the authorization should be made, including (but not limited to) a copy of this exemption, the form for termination of authorization described in section III(c), a description of the person's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests.

(e) The person engaging in a covered transaction furnishes the authorizing fiduciary with either:

(1) a confirmation slip for each securities transaction underlying a covered transaction within ten business days of the securities transaction containing the information described in Rule 10b-10(a)(1-7) under the Securities Exchange Act of 1934, 17 CFR 240.10b-10; or

(2) at least once every three months and not later than 45 days following the period to which it relates, a report disclosing:

(A) A compilation of the information that would be provided to the plan pursuant to subparagraph (e)(1) of this section during the three-month period covered by the report;

(B) the total of all securities transaction related charges incurred by the plan during such period in connection with such covered transactions; and

(C) the amount of the securities transaction-related charges retained by such person and the amount of such charges paid to other persons for execution or other services. For purposes of this paragraph (e), the words "incurred by the plan" shall be construed to mean "incurred by the pooled fund" when such person engages in covered transactions on behalf of a pooled fund in which the plan participates.

(f) The authorizing fiduciary is furnished with a summary of the information required under paragraph (e)(1) of this section at least once per year. The summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following:

(1) The total of all securities transaction-related charges incurred by the plan during the period in connection with covered securities transactions.

(2) The amount of the securities transaction-related charges retained by the authorized person and the amount of these charges paid to other persons for execution or other services.

(3) A description of the person's brokerage placement practices, if such practices have materially changed during the period covered by the summary.

(4)(i) A portfolio turnover ratio, calculated in a manner which is reasonably designed to provide the authorizing fiduciary with the information needed to assist in discharging its duty of prudence. The requirements of this paragraph (f)(4)(i) will be met if the "annualized portfolio turnover ratio", calculated in the manner described in paragraph (f)(4)(ii), is contained in the summary. (ii) The "annualized portfolio turnover ratio" shall be calculated as a percentage of the plan assets consisting of securities or cash over which the authorized person had discretionary investment authority, or with respect to which such person rendered, or had any responsibility to render, investment advice (the "portfolio") at any time or times ("management period(s)") during the period covered by the report. First, the "portfolio turnover ratio" (not annualized) is obtained by dividing (A) the lesser of the aggregate dollar amounts of purchases or sales of portfolio securities during the management period(s) by (B) the monthly average of the market value of the portfolio securities during all

management period(s). Such monthly average is calculated by totaling the market values of the portfolio securities as of the beginning and end of each management period and as of the end of each month that ends within such period(s), and dividing the sum by the number of valuation dates so used. For purposes of this calculation, all debt securities whose maturities at the time of acquisition were one year or less are excluded from both the numerator and the denominator. The "annualized portfolio turnover ratio" is then derived by multiplying the "portfolio turnover ratio" by an annualizing factor. The annualizing factor is obtained by dividing (C) the number twelve by (D) the aggregate duration of the management period(s) expressed in months (and fractions thereof).

Examples of the use of this formula are provided in section V of this exemption.

(iii) The information described in this paragraph (f)(4) is not required to be furnished in any case where the authorized person has not exercised discretionary authority over trading in the plan's account during the period covered by the report. For purposes of this paragraph (f), the words "incurred by the plan" shall be construed to mean "incurred by the pooled fund" when such person engages in covered transactions on behalf of a pooled fund in which the plan participates.

(g) If an agency cross transaction to which section IV(b) does not apply is involved, the following conditions must also be satisfied:

(1) The information required under section III(d) or IV(d)(1)(B) of this exemption includes a statement to the effect that with respect to agency cross transactions the person effecting or executing the transactions will have a potentially conflicting division of loyalties and responsibilities regarding the parties to the transactions;

(2) The summary required under section III(f) of this exemption includes a statement identifying the total number of agency cross transactions during the period covered by the summary and the total amount of all commissions or other remuneration received or to be received from all sources by the person engaging in the transactions in connection with those transactions during the period;

(3) The person effecting or executing the agency cross transaction has the discretionary authority to act on behalf of, and/or provide investment advice to, either (A) one or more sellers or (B) one or more buyers with respect to the transaction, but not both.

(4) The agency cross transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available; and

(5) The agency cross transaction is executed or effected at a price that is at or between the independent bid and independent ask prices for the security prevailing at the time of the transaction.

(h) A trustee [other than a nondiscretionary trustee] may only engage in a covered transaction with a plan that has total net assets with a value of at least $50 million and in the case of a pooled fund, the $50 million requirement will be met if 50 percent or more of the units of beneficial interest in such pooled fund are held by plans having total net assets with a value of at least $50 million. For purposes of the net asset tests described above, where a group of plans is maintained by a single employer or controlled group of employers, as defined in section 407(d)(7) of the Act, the $50 million net asset

requirement may be met by aggregating the assets of such plans, if the assets are pooled for investment purposes in a single master trust.

(i) The trustee (other than a nondiscretionary trustee) engaging in a covered transaction furnishes, at least annually, to the authorizing fiduciary of each plan the following:

(1) the aggregate brokerage commissions, expressed in dollars, paid by the plan to brokerage firms affiliated with the trustee;

(2) the aggregate brokerage commissions, expressed in dollars, paid by the plan to brokerage firms unaffiliated with the trustee;

(3) the average brokerage commissions, expressed as cents per share, paid by the plan to brokerage firms affiliated with the trustee; and

(4) the average brokerage commissions, expressed as cents per share, paid by the plan to brokerage firms unaffiliated with the trustee. For purposes of this paragraph (i), the words "paid by the plan" shall be construed to mean "paid by the pooled fund" when the trustee engages in covered transactions on behalf of a pooled fund in which the plan participates.

Section IV—Exceptions from Conditions

~~(a) *Certain plans not covering employees.* Section III of this exemption does not apply to covered transactions to the extent they are engaged in on behalf of individual retirement accounts meeting the conditions of 29 CFR 2510.3-2(d), or plans, other than training programs, that cover no employees within the meaning of 29 CFR 2510.3-3.~~

(a~~b~~) *Certain agency cross transactions.* Section III of this exemption does not apply in the case of an agency cross transaction, provided that the person effecting or executing the transaction:

~~(1) Does not render investment advice to any plan for a fee within the meaning of section 3(21)(A)(ii) of ERISA with respect to the transaction;~~

(1~~2~~) is not otherwise a fiduciary who has investment discretion with respect to any plan assets involved in the transaction, see 29 CFR 2510.3-21(d); and

(2~~3~~) does not have the authority to engage, retain or discharge any person who is or is proposed to be a fiduciary regarding any such plan assets.

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

(c~~d~~) *Special rules for pooled funds.* In the case of a person engaging in a covered transaction on behalf of an account or fund for the collective investment of the assets of more than one plan (pooled fund):

(1) Sections III (b), (c) and (d) of this exemption do not apply if—

(A) The arrangement under which the covered transaction is performed is subject to the prior and continuing authorization, in the manner described in this paragraph (d)(1), of a plan fiduciary with respect to each plan whose assets are invested in the pooled fund who is independent of the person. The requirement that the authorizing fiduciary be independent of the person shall not apply in the case of a plan covering

only employees of the person, if the requirements of section IV(d)(2) (A) and (B) are met.

(B) The authorizing fiduciary is furnished with any reasonably available information that the person engaging or proposing to engage in the covered transactions reasonably believes to be necessary to determine whether the authorization should be given or continued, not less than 30 days prior to implementation of the arrangement or material change thereto, including (but not limited to) a description of the person's brokerage placement practices, and, where requested, any reasonably available information regarding the matter upon the reasonable request of the authorizing fiduciary at any time.

(C) In the event an authorizing fiduciary submits a notice in writing to the person engaging in or proposing to engage in the covered transaction objecting to the implementation of, material change in, or continuation of, the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the pooled fund, without penalty to the plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the nonwithdrawing plans. In the case of a plan that elects to withdraw under this subparagraph (d)(1)(C), the withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a plan electing to withdraw.

(D) In the case of a plan whose assets are proposed to be invested in the pooled fund subsequent to the implementation of the arrangement and that has not authorized the arrangement in the manner described in subparagraphs (d)(1) (B) and (C) of this section, the plan's investment in the pooled fund is subject to the prior written authorization of an authorizing fiduciary who satisfies the requirements of subparagraph (d)(1)(A).

(2) Section III(a) of this exemption, to the extent that it prohibits the person from being the employer of employees covered by a plan investing in a pool managed by the person does not apply if—

(A) The person is an "investment manager" as defined in section 3(38) of ERISA, and

(B) Either (i) the person returns or credits to the pooled fund all profits earned by the person in connection with all covered transactions engaged in by the person on behalf of the fund, or (ii) the pooled fund satisfies the requirements of paragraph IV(d)(3).

(3) A pooled fund satisfies the requirements of this paragraph for a fiscal year of the fund if—

(A) On the first day of such fiscal year, and immediately following each acquisition of an interest in the pooled fund during the fiscal year by any plan covering employees of the person, the aggregate fair market value of the interests in such fund of all plans covering employees of the person does not exceed twenty percent of the fair market value of the total assets of the fund; and

(B) The aggregate brokerage commissions received by the person, in connection with covered transactions engaged in by the person on behalf of all pooled funds in which a plan covering employees of the person participates, do not exceed five percent of

the total brokerage commissions received by the person from all sources in such fiscal year.

Section V—Examples Illustrating the Use of the Annualized Portfolio Turnover Ratio Described in Section III(f)(4)(ii)

(a) A, an investment manager affiliated with a brokerdealer that A uses to effect securities transactions for the accounts that it manages, exercises investment discretion over the account of plan P for the period January 1, 1987, through June 30, 1987, after which the relationship between A and P ceases. The market values of P's account with A at the relevant times (excluding debt securities having a maturity of one year or less at the time of acquisition) are:

Date	Market value ($ millions)
January 1, 1987	10.4
January 31, 1987	10.2
February 28, 1987	9.9
March 31, 1987	10.0
April 30, 1987	10.6
May 31, 1987	11.5
June 30, 1987	12.0
Sum of market value	74.6

Aggregate purchases during the 6-month period were $850,000; aggregate sales were $1,000,000, excluding in each case debt securities having a maturity of one year or less at the time of acquisition.

For purposes of section III(f)(4) of this exemption, A computes the annualized portfolio turnover as follows:

A= $850,000 (lesser of purchases or sales)

B= $10,657,143 ($74.6 million divided by 7, i.e., the number of valuation dates)

Annualizing factor = CD =12/6=2

Annualized portfolio turnover ratio=2X(850,000/10,657,143)=0.160=16.0 percent

(b) Same facts as (a), except that A manages the portfolio through July 15, 1987 and, in addition, resumes management of the portfolio on November 10, 1987 through the end of the year. The additional relevant valuation dates and portfolio values are:

Date	Market value ($ millions)
July 15, 1987	12.2
November 10, 1987	9.4
November 30, 1987	9.6
December 31, 1987	9.8
Sum of Market Values	41.0

During the periods July 1, 1987 through July 15, 1987, and November 10, 1987 through December 31, 1987, there were an additional $650,000 of purchases and $400,000 of sales. Thus, total purchases

were $1,500,000 (i.e., $850,000+$650,000) and total sales were $1,400,000 (i.e., $1,000,000+$400,000) for the management periods.

A now computes the annualized portfolio turnover as follows:

A = $1,400,000 (lesser of aggregate purchases or sales)

B = $10,509,091 ($115.6 million divided by 11)

Annualizing factor = C/ D = 12/(6.5+1.67)=1.47 annualized portfolio turnover ratio=1.47X(1,400,000/10,509,091)=0.196=19.6 percent.

Section VI—Effective Dates and Transitional Rule

(a) The effective date of Prohibited Transaction Exemption 86-128 is February 12, 1987.

(b) PTE 79-1 and PTE 84-46 are revoked effective June 1, 1987.

Section VII—Recordkeeping Requirements

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

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

(2) No party in interest, other than such plan fiduciary who is responsible for complying with this paragraph (a), will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or are not available for examination as required by paragraph (b) below; and

(b) (1) Except as provided below in subparagraph (2), or as precluded by 12 U.S.C. 484, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in the above paragraph are reasonably available at their customary location for examination during normal business hours by—

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

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

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

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

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

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

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

PROPOSED AMENDMENT TO PTE 84-24

Section I—Retroactive Application

The restrictions of sections 406(a)(1)(A) through (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in section III of this exemption in connection with purchases made before November 1, 1977, if the conditions set forth in section IV are met.

Section II—Prospective Application

~~The~~ (a) Except for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder, the restrictions of section 406(a)(1)(A) through (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in section III(a)-(f) of this exemption in connection with purchases made after October 31, 1977, if the conditions set forth in sections IV ~~and~~, V and IX are met.

(b) Effective on the date that is 60 days after the publication of a final amendment in the *Federal Register*, the restrictions of ERISA sections 406(a)(1)(D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder will not apply if the fiduciaries are Independent Producers, the transactions meet the requirements described in Section III(g), the conditions set forth in Sections VI, VII and IX are satisfied, and the Independent Producer and Insurer are not ineligible under Section VIII.

Section III—Transactions

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

(b) The receipt of a ~~sales commission by a principal underwriter~~Mutual Fund Commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company.

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

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

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a ~~master or prototype plan~~Pre-approved Plan.

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company ~~principal underwriter~~Principal Underwriter, when such investment company, ~~principal underwriter~~Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) ~~The~~the sponsorship of a ~~master or prototype~~Pre-approved plan; or (2) the provision of ~~nondiscretionary trust services~~Nondiscretionary Trust Services to the plan; or (3) both (1) and (2).

(g) The receipt, directly or indirectly, by an Independent Producer of an Insurance Sales Commission as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), regarding the purchase of a non-security annuity contract or other insurance product not regulated by the Securities and Exchange Commission (SEC) of an Insurer that is not an Affiliate, including as part of a rollover from a Plan to an IRA as defined in Code section 4975(e)(1)(B) or (C).

Section IV—Conditions With Respect to Transactions Described in Section III(a)-(f)

The following conditions apply solely to a transaction described in Section III(a)-(f):

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

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

(c) The combined total of all fees, commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company ~~principal underwriter~~Principal Underwriter:

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

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

Section V—Conditions for Transactions Described in Section III (a) Through (d)

The following conditions apply solely to a transaction described in ~~paragraphs~~subsections (a), (b), (c) or (d) of section III:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company ~~principal underwriter~~Principal Underwriter is not

(1) a trustee of the plan (other than a ~~nondiscretionary trustee~~Nondiscretionary Trustee who does not render investment advice with respect to any assets of the plan),

(2) a plan administrator (within the meaning of section 3(16)(A) of the Act and section 414(g) of the Code),

(3) a fiduciary who is ~~expressly~~ authorized ~~in writing~~ to manage, acquire, or dispose of the plan's assets ~~of the plan~~ on a discretionary basis, or

(4) for transactions described in sections III (a) through (d) entered into after December 31, 1978, an employer any of whose employees are covered by the plan. Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company ~~principal underwriter~~Principal Underwriter that is affiliated with a trustee or an investment manager (within the meaning of section VI(b)) with respect to a plan may engage in a transaction described in section III(a) through (d) of this exemption on behalf of the plan if such trustee or investment manager has no discretionary authority or control over the plan assets involved in the transaction other than as a ~~nondiscretionary trustee~~Nondiscretionary Trustee.

(b)(1) With respect to a transaction involving the purchase with plan assets of an insurance or annuity contract or the receipt of ~~a sales commission~~an Insurance Sales Commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary or IRA owner with respect to the plan prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

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

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

(C) For purchases made after June 30, 1979, a description of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended

contract in connection with the purchase, holding, exchange, termination or sale of such contract.

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

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

(A) If the person recommending securities issued by an investment company is the ~~principal underwriter~~Principal Underwriter of the investment company whose securities are being recommended, the nature of such relationship and of any limitation it places upon the ~~principal underwriter's~~Principal Underwriter's ability to recommend investment company securities;

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

(C) For purchases made after December 31, 1978, a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination or sale of such securities.

(2) Following the receipt of the information required to be disclosed in ~~paragraph~~subsection (c)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner approves the transaction on behalf of the plan. Unless facts or circumstances would indicate the contrary, such approval may be presumed if the fiduciary or IRA owner permits the transaction to proceed after receipt of the written disclosure. Such fiduciary may be an employer of employees covered by the plan, but may not be a ~~principal underwriter~~Principal Underwriter involved in the transaction. Such fiduciary may not receive, directly or indirectly

(e.g., through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

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

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

(2) The contract or security being recommended for purchase or the commission with respect thereto is materially different from that for which the approval described in ~~paragraphs~~subsections (b) and (c) of this section was obtained.

Section VI—Conditions for Transactions Described in Section III(g)

The following conditions apply solely to a transaction described in subsection (g) of section III:

(a) The Independent Producer is authorized to sell annuities from two or more unrelated Insurers.

(b) The Independent Producer and the Insurer satisfy the applicable conditions in Sections VII and IX and are not ineligible under Section VIII. The Insurer will not necessarily become a fiduciary under ERISA or the Code merely by complying with the exemption's conditions.

(c) Exclusions. The relief in Section III(g) is not available if:

(1) The Plan is covered by Title I of ERISA and the Independent Producer, Insurer, or any Affiliate is:

(A) the employer of employees covered by the Plan, or

(B) the Plan's named fiduciary or administrator; provided however that a named fiduciary or administrator or their Affiliate may rely on the exemption if it is selected to provide investment advice by a fiduciary who:

(i) is not the Insurer, Independent Producer, or an Affiliate;

(ii) does not have a relationship to or an interest in the Insurer, Independent Producer, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by the exemption;

(iii) does not receive and is not projected to receive within the current federal income tax year, compensation or other consideration for their own account from the Insurer, Independent Producer, or an Affiliate in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year; or

(iv) is not the IRA owner or beneficiary; or

(2) The Independent Producer transaction involves the Independent Producer and Insurer acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B).

Section VII—Investment Advice Arrangement

Section VII(a) requires Independent Producers to comply with Impartial Conduct Standards, including a Best Interest standard, when providing fiduciary investment advice to Retirement Investors. Section VII(b) requires Independent Producers to provide to Retirement Investors a written acknowledgement that the Independent Producer is a fiduciary under Title I of ERISA and/or the Code, a written statement of the Best Interest standard of care, a written description of the services they will provide and the products they are licensed and authorized to sell, and a written statement of their material Conflicts of Interest and the amount of the Insurance Commission that will be paid to them in connection with the purchase of the recommended annuity by a Retirement Investor. In addition, before the sale of a recommended annuity, Independent Producers must consider and document their conclusions as to whether the recommended annuity is in the Best Interest of the Retirement Investor. Independent Producers recommending a rollover must also provide additional disclosure as set forth in subsection (b), below. Section VII(c) requires Insurers to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Section VII(d) requires the Insurer to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the terms of this exemption. Section VII(e) allows Independent Producers to correct certain violations of the exemption conditions and maintain relief under the exemption. In complying with this Section VII, the Independent Producer may reasonably rely on factual representations from the Insurer, and Insurers may rely on factual representations from the Independent Producer, as long as they do not have knowledge that such factual representations are incomplete or inaccurate.

(a) Impartial Conduct Standards. (1) The Independent Producer's investment advice is, at the time it is provided, in the Retirement Investor's Best Interest. As defined in Section X(b), advice is in the Retirement Investor's Best Interest if it (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and (B) does not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the Retirement Investor's interests, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party. For example, in choosing between annuity products offered by Insurers, whose products the Independent Producer is authorized to sell, it is not permissible for the Independent Producer to recommend a product that is worse for the Retirement Investor, but better or more profitable for the Independent Producer or the Insurer; (2) The Independent Producer receives no compensation in connection with the transaction other than the Insurance Sales Commission, and the Insurance Sales Commission does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (3) The Independent

Producer's statements to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time the statements are made, materially misleading. For purposes of this subsection, the term "materially misleading" includes omitting information that is needed to make the statement not misleading in light of the circumstances under which it was made.

(b) Disclosure. Prior to engaging in a transaction described in Section III(g), the Independent Producer provides the disclosures set forth in paragraphs (1)-(5) to the Retirement Investor:

(1) A written acknowledgment that the Independent Producer is a fiduciary under Title I and the Code, as applicable, with respect to any investment recommendation provided by the Independent Producer to the Retirement Investor;

(2) A written statement of the Best Interest standard of care owed by the Independent Producer to the Retirement Investor;

(3) A written description of the services to be provided and the Independent Producer's material Conflicts of Interest that is accurate and not misleading in any material respects. The description will include the products the Independent Producer is licensed and authorized to sell. The description must inform the Retirement Investor in writing of any limits on the range of insurance products recommended. The Independent Producer must identify the specific Insurers and specific insurance products available for recommendation.

(4) A written statement of the amount of the Insurance Commission that will be paid to the Independent Producer in connection with the purchase by a Retirement Investor of the recommended annuity. The statement must disclose the amount of expected Insurance Sales Commission, expressed both in dollars and as a percentage of gross annual premium payments, if applicable, for the first year and for each of the succeeding years.

(5) A written statement that the Retirement Investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, nature with in sufficient detail to permit the Retirement Investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest, and describe how the Retirement Investor can get the information, free of charge.

(6) Before the sale of a recommended annuity, the Independent Producer considers and documents its conclusions as to whether the recommended annuity is in the Best Interest of the Retirement Investor and provides that documentation to both the Retirement Investor and to the Insurer;

(7) *Rollover disclosure.* Before engaging in a rollover or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Independent Producer must consider and document its conclusions as to whether a rollover is in the Retirement Investor's Best Interest and provide that documentation to both the

Retirement Investor and to Insurer. Relevant factors to consider must include to the extent applicable, but in any event are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan, if applicable;

(B) the comparative fees and expenses;

(C) whether an employer or other party pays for some or all administrative expenses; and

(D) the different levels of fiduciary protection, services, and investments available.

Independent Producers and Insurers may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know (or have a reason to know) that such information is incomplete or inaccurate.

(8) The Independent Producer is not required to disclose information pursuant to this Section VII(b) if such disclosure is otherwise prohibited by law.

(c) Policies and Procedures.

(1) The Insurer establishes, maintains, and enforces written policies and procedures for the review of each recommendation before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation that are prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The Insurer's prudent review of the Independent Producer's specific recommendations must be made without regard to the Insurer's own interests. An Insurer is not required to supervise an Independent Producer's recommendations to Retirement Investors of products other than annuities offered by the Insurer.

(2) The Insurer's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. The Insurer's procedures identify and eliminate quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in the Retirement Investor's Best Interest, or that subordinate the interests of the Retirement Investor to the Independent Producer's own interests, or those of the Insurer, or to make recommendations based on the Independent Producer's considerations of factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

(3) The Insurer's policies and procedures include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have failed or are likely to fail to adhere to the Impartial Conduct Standards, or who lack

the necessary education, training, or skill. A prudent process includes careful review of customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards, and must review that determination at least annually as part of the retrospective review set forth in subsection (d) below.

(4) Insurers must provide their complete policies and procedures to the Department within 10 business days of request.

(d) Retrospective Review.

(1) The Insurer conducts a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of the exemption, including the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any. The retrospective review must also include a review of Independent Producers' rollover recommendations and the required rollover disclosure.

As part of this review, the Insurer must prudently determine whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer updates the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with Section VII(c).

(2) The Insurer annually provides a written report to a Senior Executive Officer which details the review.

(3) The Insurer provides to the Independent Producer the methodology and results of the retrospective review;

(4) A Senior Executive Officer of the Insurer certifies, annually, that:

(A) The officer has reviewed the report of the retrospective review report;

(B) The Insurer has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transaction discovered by the Insurer in connection with investment advice covered under Code section 4975(e)(3)(B), advised the Independent Producer of the violation and any resulting excise taxes owed under Code section 4975, and notified the Department of Labor of the violation via email to PTE_84-24@dol.gov.

(C) The Insurer has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and

(D) The Insurer has in place a prudent process to modify such policies and procedures as set forth in Section II(d)(1).

(5) The review, report, and certification are completed no later than six months following the end of the period covered by the review.

(6) The Insurer retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 10 business days of request, to the extent permitted by law.

(e) Self-Correction. A non-exempt prohibited transaction will not occur due to a violation of the exemption's conditions with respect to a transaction, provided:

(1) Either the Independent Producer has refunded any charge to the Retirement Investor or the Insurer has rescinded a mis-sold annuity, canceling the contract and waiving the surrender charges;

(2) The Independent Producer notifies the Department of Labor of the violation and the refund or rescission via email to PTE_84-24@dol.gov within 30 days of correction;

(3) The correction occurs no later than 90 days after the Independent Producer learned of the violation or reasonably should have learned of the violation; and

(4) The Independent Producer notifies the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under Section VII(d)(2).

Section VIII—Eligibility

(a) Independent Producer. Subject to the timing and scope provisions set forth in subsection (3), and the opportunity to be heard as set forth in subsection (c), an Independent Producer will be ineligible to rely on the relief for transactions described in Section III(g), if within 10 years preceding the transaction, the Independent Producer is described in (1) or (2):

(1) The Independent Producer has been convicted either:

(A) by a U.S. federal or state court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A).

For purposes of this section (a)(1), a person shall be deemed to have been convicted of a crime as of the "conviction date," which is the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. federal or state trial court), regardless of whether that judgment remains under appeal.

(2) The Independent Producer has received a written ineligibility notice issued by the Department for:

(A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally violating, or knowingly participating in violations of, the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or

(D) providing materially misleading information to the Department in connection with the conditions of the exemption.

(3) Ineligibility shall begin six months after:

(A) the conviction date defined in Section (a)(1);

(B) the date of the Department's written determination under Section (c)(1)(C) on a petition regarding a foreign conviction; or

(C) the date of the written ineligibility notice described in subsection (a)(2).

(4) An Independent Producer shall become eligible to rely on this exemption again only upon the earliest of the following:

(A) the date of a subsequent judgment reversing such person's conviction;

(B) 10 years after the person became ineligible under Section VIII(a)(3) or 10 years after the person was released from imprisonment as a result of a crime described in (a)(1) if later; or

(C) the date, if any, the Department grants an individual exemption which may impose additional conditions) to the person permitting its continued reliance on this exemption, notwithstanding the conviction.

(b) Insurers. Subject to the timing and scope provisions set forth in subsection (3), and the opportunity to be heard as set forth in subsection (c), an entity will be ineligible to serve as an Insurer if, within the 10 years preceding the transaction:

(1) The Insurer or the Affiliate has been convicted:

(A) by a U.S. federal or state court of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A). For purposes of this Section (b)(1), a person shall be deemed to have been convicted of a crime as of the "conviction date," which is the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. federal or state trial court), regardless of whether that judgment remains under appeal.

(2) The Insurer or an Affiliate has received a written ineligibility notice issued by the Department for:

(A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally violating, or knowingly participating in violation of, the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or

(C) providing materially misleading information to the Department in connection with the conditions of the exemption.

(3) Ineligibility shall begin six months after:

(A) the conviction date as defined in Section (b)(1);

(B) the Department's written determination under Section (c)(1)(C) for a petition regarding a foreign conviction; or

(C) the date of the written ineligibility notice described in subsection (b)(2) above.

(4) An entity shall become eligible to act as an Insurer under this exemption again only upon the earliest of the following:

(A) the date of a subsequent judgment reversing such person's conviction;

(B) 10 years after the person became ineligible under Section VIII(b)(3) or 10 years after the person was released from imprisonment as a result of a crime described in (b)(1), if later; or

(C) the date, if any, the Department grants an individual exemption (which may impose additional conditions) to the person permitting its continued reliance on this exemption, notwithstanding the conviction.

(c) Opportunity to be heard. (1) Foreign Convictions.

(A) An Insurer, its Affiliate, or an Independent Producer that has been convicted by a foreign court of competent jurisdiction as provided in subsection (a)(1)(B) or (b)(1)(B), as applicable, may submit a petition to the Department that informs the Department of the conviction and seeks the Department's determination that continued reliance on the exemption would not be contrary to the purposes of the exemption. Petitions must be submitted to the Department within 10 business days after the conviction date by email at IIAWR@dol.gov.

(B) Following receipt of the petition, the Department will provide the Insurer or Independent Producer with the opportunity to be heard, in person (including by phone or videoconference), in writing, or a combination thereof. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences.

(C) Following the hearing, the Department will issue a written determination to the Insurer or Independent Producer, as applicable, articulating the basis for its determination whether or not to allow the Insurer or Independent Producer to continue relying on PTE 84-24.

(2) Written Ineligibility Notice. Prior to issuing a written ineligibility notice, the Department will issue a written warning to the Independent Producer or Insurer, as applicable, identifying specific conduct implicating subsection (a)(2) or (b)(2), as applicable, and providing a six-month opportunity to cure. At the end of the six-month period, if the Department determines that the Independent Producer or Insurer has not taken appropriate action to prevent recurrence of the disqualifying conduct, it will provide the Independent Producer or Insurer with the opportunity to be heard, in person (including by phone or videoconference), or in writing, or a combination thereof, before the Department issues the written ineligibility notice. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences. The written ineligibility notice will state the basis for the determination that the Independent Producer or Insurer engaged in conduct described in subsection (a)(2) or (b)(2), as applicable, and has not taken appropriate action to prevent recurrence of the disqualifying conduct.

(3) Department's Considerations. For hearings under (c)(1) and (c)(2), the Department will consider: the gravity of the offense; the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy; recency of the conduct at issue; any remedial measures taken; and other factors the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption.

(d) Alternative exemptions. An Insurer or Independent Producer that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or seek an individual prohibited transaction exemption from the Department.

To the extent an applicant seeks retroactive relief in connection with an exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of retroactive relief.

Section IX—Recordkeeping

~~(e) (1) In the case of any transaction described in paragraphs (a), (b), or (c) of section III, the~~(a) The insurance agent or broker (or the insurance company whose contract is being described if designated by the agent or broker), pension consultant or investment company ~~principal underwriter shall retain or cause to be retained~~Principal Underwriter, Independent Producer or Insurer must maintain the records necessary to enable the persons described in subsection (a)(2) below to determine whether the conditions of this exemption have been met with respect to a transaction for a period of six years from the date of ~~such~~the transaction~~, the following:~~ in a manner that is reasonably accessible for examination. No prohibited transaction will be considered to have occurred solely on the basis of the unavailability of such records if they are lost or destroyed due to circumstances beyond the control of the responsible party before the end of the six-year period.

~~(A) The information disclosed pursuant to paragraphs (b), (c), and (d) of this section V;~~

(1) No party, other than the party responsible for complying with this section IX, will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the excise tax imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or available for examination as required by this section IX.

(2) Except as provided in subsection (3), and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records are reasonably available at their customary location during normal business hours for examination by:

(A) Any authorized employee of the Department or the Internal Revenue Service or another state or federal regulator;

(B) Any ~~additional information or documents provided to the fiduciary described in paragraphs (b) and (c) of this section V with respect to such~~fiduciary of a Plan that engaged in a transaction pursuant to this exemption;~~ and~~

~~(C) The written acknowledgement described in paragraph (b) of this section.~~

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

(C) Any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to this exemption; or

(D) Any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

(3) ~~Notwithstanding anything to the contrary in section 504(a)(2) and (b) of the Act, such records are unconditionally available for examination during normal business hours by duly authorized employees or representatives of the Department of Labor, the Internal Revenue Service, plan participants and beneficiaries, any employer of plan participants and beneficiaries, and any employee organization any of whose members are covered by the plan.~~ None of the persons described in subsection (2)(B)-(D) above are authorized to examine records regarding a transaction involving another Retirement Investor, privileged trade secrets or privileged commercial or financial information of the Insurer, or information identifying other individuals.

(4) If a party refuses to disclose information to a person described in subsection (2)(B)-(D) above on the basis that the information is exempt from disclosure, the party must provide a written notice advising the requestor of the reasons for its refusal and that the Department may request that such information be produced to the Department by the end of the thirtieth (30th) day following the request.

(b) A party's failure to maintain the records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. Such failure does not affect the relief for other transactions if the responsible party maintains required records for such transactions in compliance with this section IV.

Section ~~VI~~X—Definitions

For purposes of this exemption~~:~~, the ~~(a) The term "principal underwriter" is defined in the same manner as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29)).~~

~~(b)~~ ~~The~~ terms "insurance agent or broker," "pension consultant," "insurance company," "investment company," and "P~~rincipal underwriter~~rincipal Underwriter" mean such persons and any A~~affiliates~~ffiliates thereof. In addition, for purposes of this exemption:

(~~c~~a) ~~The term~~ "~~affiliate~~Affiliate" of a person means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with ~~such person~~the person (For this purpose,

"control" would mean the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, ~~employee (including, in the case of principal underwriter, any registered representative thereof, whether or not such person is a common law employee of~~ such principal underwriter), or relative of any such person, or any partner in such partner, employee, or relative (as defined in ERISA section 3(15)), of the person; ~~or~~and

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

(b) Advice is in a Retirement Investor's "Best Interest" if such advice (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and (B) does not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party.

(c) A "Conflict of Interest" is an interest that might incline an Independent Producer—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor.

(d)~~The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.~~ "Independent Producer" means a person or entity that is licensed under the laws of a state to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies but is not an employee of an insurance company (including a statutory employee under Code section 3121).

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

(e) "Individual Retirement Account" or "IRA" means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(f) "Insurer" means an insurance company qualified to do business under the laws of a state, that: (A) has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding five years, (C) is domiciled in a state whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority; (D) is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory

organization), that retains the Independent Producer as an independent contractor, agent or registered representative.

(g) "Insurance Sales Commission" means a sales commission paid by the Insurance Company or an Affiliate to the Independent Producer for the service of recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees, but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees.

(~~f~~h) The term "~~master or prototype plan" means a plan which is approved by the Service under Rev. Proc. 72–7, 1972–1 C.B. 715, or Rev. Proc. 72–8, 1972–1 C.B. 716, or their successors.~~Mutual Fund Commission" means a commission or sales load paid by either the Plan or the investment company for the service of effecting or executing the purchase of investment company securities, but does not include a 12b–1 fee, revenue sharing payment, administrative fee, or marketing fee.

(~~g~~i) ~~"~~ The term "~~nondiscretionary trust services~~Nondiscretionary Trust Services" means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1).

(j) The term "~~nondiscretionary trustee~~Nondiscretionary Trustee" of a plan means a trustee whose powers and duties with respect to the plan are limited to the provision of ~~nondiscretionary trust services~~Nondiscretionary Trust Services. For purposes of this exemption, a person who is otherwise a ~~nondiscretionary trustee~~Nondiscretionary Trustee will not fail to be a ~~nondiscretionary trustee~~Nondiscretionary Trustee solely by reason of his having been delegated, by the sponsor of a ~~master or prototype plan~~Pre-approved Plan, the power to amend such plan.

(k) "Plan" means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(l) The term "Pre-approved Plan" means a plan which is approved by the Internal Revenue Service pursuant to the procedure described in Rev. Proc. 2017-44, 2017-29 I.R.B. 92, or its successors.

(m) A "Principal Underwriter" means a principal underwriter as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29)).

(n) A "Related Entity" is any party that is not an Affiliate, but in which the Independent Producer has an interest that may affect the exercise of its best judgment as a fiduciary.

(o) "Retirement Investor" means:

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

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

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

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

PROPOSED AMENDMENT TO PTE 77-4

Section I—Retroactive.

Effective January 1, 1975 until 90 days after the date of granting of this exemption, the restrictions of section 406 of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975 (c)(1) of the Code, shall not apply to the purchase or sale by an employee benefit plan of shares of an open-end investment company registered under the Investment Company Act of 1940, the investment adviser for which is also a fiduciary with respect to the plan (or an affiliate of such fiduciary) and is not an employer of employees covered by the plan, provided that the following conditions are met:

(a) The plan does not pay a sales commission in connection with such purchase or sale.

(b) The plan does not pay a redemption fee in connection with the sale by the plan to the investment company of such shares, unless (1) such redemption fee is paid only to the investment company, and (2) the existence of such redemption fee is disclosed in the investment company prospectus in effect both at the time of the purchase of such shares and at the time of such sale.

(c) The plan does not pay an investment management, investment advisory or similar fee with respect to the plan assets invested in such shares for the entire period of such investment. This condition does not preclude (1) the payment of investment advisory fees by the investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940, (2) the payment of an investment advisory fee by the plan based on total plan assets from which a credit has been subtracted representing the plan's pro rata share of investment advisory fees paid by the investment company, or (3) the purchase by the plan of shares of the investment company during any fee period for which the plan prepaid its investment management, investment advisory or similar fee, regardless of whether any part of such prepaid fee is returned to the plan, provided that no investment management, investment advisory or similar fee was or is paid by the plan for any subsequent fee period during any part of which such investment in shares of the investment company was or is retained by the plan.

Section II—Prospective.

Effective 90 days after the date of granting of this exemption the restrictions of section 406 of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply to the purchase or sale by an employee benefit plan of shares of an open-end investment company registered under the Investment Company Act of 1940, the investment adviser for which is also a fiduciary with respect to the plan (or an affiliate of such fiduciary) and is not an employer of employees covered by the plan (hereinafter referred to as "fiduciary/investment adviser"), provided that the following conditions are met:

(a) The plan does not pay a sales commission in connection with such purchase or sale.

(b) The plan does not pay a redemption fee in connection with the sale by the plan to the investment company of such shares unless (1) such redemption fee is paid only to the investment company, and (2) the existence of such redemption fee is disclosed in the investment company prospectus in effect both at the time of the purchase of such shares and at the time of such sale.

(c) The plan does not pay an investment management, investment advisory or similar fee with respect to the plan assets invested in such shares for the entire period of such investment. This condition does not preclude the payment of investment advisory fees by the investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940. This condition also does not preclude payment of an investment advisory fee by the plan based on total plan assets from which a credit has been subtracted representing the plan's pro rata share of investment advisory fees paid by the investment company. If, during any fee period for which the plan has prepaid its investment management, investment advisory or similar fee, the plan purchases shares of the investment company, the requirement of this paragraph (c) shall be deemed met with respect to such prepaid fee if, by a method reasonably designed to accomplish the same, the amount of the prepaid fee that constitutes the fee with respect to the plan assets invested in the investment company shares (1) is anticipated and subtracted from the prepaid fee at the time of payment of such fee, (2) is returned to the plan no later than during the immediately following fee period, or (3) is offset against the prepaid fee for the immediately following fee period or for the fee period immediately following thereafter. For purposes of this paragraph, a fee shall be deemed to be prepaid for any fee period if the amount of such fee is calculated as of a date not later than the first day of such period.

(d) A second fiduciary with respect to the plan, who is independent of and unrelated to the fiduciary/investment adviser or any affiliate thereof, receives a current prospectus issued by the investment company, and full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan and the investment company, including the nature and extent of any differential between the rates of such fees, the reasons why the fiduciary/investment adviser may consider such purchases to be appropriate for the plan, and whether there are any limitations on the fiduciary/investment adviser with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations. For purposes of this exemption, such second fiduciary will not be deemed to be independent of and unrelated to the fiduciary/investment adviser or any affiliate thereof if:

(1) Such second fiduciary directly or indirectly controls, is controlled by, or is under common control with the fiduciary/investment adviser or any affiliate thereof;

(2) Such second fiduciary, or any officer, director, partner, employee or relative of such second fiduciary is an officer, director, partner, employee or relative of such fiduciary/investment adviser or any affiliate thereof; or

(3) Such second fiduciary directly or indirectly receives any compensation or other consideration for his or his own personal account in connections with any transaction described in this exemption.

If an officer, director, partner, employee or relative of such fiduciary/investment adviser or any affiliate thereof is a director of such second fiduciary, and if he or she abstains from

participation in (i) the choice of the plan's investment adviser, (ii) the approval of any such purchase or sale between the plan and the investment company and (iii) the approval of any change of fees charged to or paid by the plan, then paragraph (d) (2) of this section shall not apply.

For purposes of this exemption, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual, and the term "relative" means a "relative" as that term is defined in section 3(15) of the Act (or a "member of the family" as that term is defined in section 4975(e) (6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(e) On the basis of the prospectus and disclosure referred to in paragraph (d), the second fiduciary referred to in paragraph (d) approves such purchases and sales consistent with the responsibilities obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act. Such approval may be limited solely to the investment advisory and other fees paid by the mutual fund in relation to the fees paid by the plan and need not relate to any other aspects of such investments. In addition, such approval must be either (1) set forth in the plan documents or in the investment management agreement between the plan and the fiduciary/investment adviser, (2) indicated in writing prior to each purchase or sale, or (3) indicated in writing prior to the commencement of a specified purchase or sale program in the shares of such investment company.

(f) The second fiduciary referred to in paragraph (d), or any successor thereto, is notified of any change in any of the rates of fees referred to in paragraph (d) and approves in writing the continuation of such purchases or sales and the continued holding of any investment company shares acquired by the plan prior to such change and still held by the plan. Such approval may be limited solely to the investment advisory and other fees paid by the mutual fund in relation to the fees paid by the plan and need not relate to any other aspects of such investment.

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

PROPOSED AMENDMENT TO PTE 75-1

Part I—Agency Transactions and Services.

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1954 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply—

(a) Until May 1, 1978, to the effecting of any securities transaction on behalf of an employee benefit plan by a person who is a fiduciary with respect to the plan, acting in such transaction as agent for the plan, and to the performance by such person of clearance, settlement, or custodial functions incidental to effecting such transaction, if such person ordinarily and customarily effected such securities transactions and performed such functions on May 1, 1975;

~~(b) To the effecting of any securities transaction on behalf of an employee benefit plan by a person who is a party in interest or a disqualified person with respect to such plan (other than a person who is a fiduciary with respect to the plan), acting in such transaction as agent for the plan, and to the performance by such person of clearance, settlement, or custodial functions incidental to effecting such transaction; or~~

~~(c) To the furnishing to an employee benefit plan by a person who is a party in interest or disqualified person with respect to such plan of any advice, either directly or through publications or writings, as to the value of securities or other property, the advisability of investing in, purchasing, or selling securities or other property, or the availability of securities or other property or of purchasers or sellers of securities or other property, or of any analyses or reports concerning issuers, industries, securities or other property, economic factors or trends, portfolio strategy, or the performance of accounts, under circumstances which do not make such party in interest or disqualified person a fiduciary with respect to such plan;~~

Provided that, in each instance, such transactions are effected on behalf of the plan, or such advice, analyses or reports are furnished to the plan, on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and were not, at the time such transactions were effected or at the time such advice, analyses or reports were furnished, prohibited transactions within the meaning of section 503(b) of the Code. For purposes of this exemption, the term "person" shall include such person and any affiliates of such person, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e).

Part II—Principal Transactions.

(1) The restrictions of section 406(a) of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any purchase or sale of a security between an employee benefit plan and a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government

("Government securities") and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State, and

~~(2) The restrictions of section 406(a) and 406(b) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the purchase or sale by a plan of securities issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), provided that no fiduciary with respect to the plan who makes the decision on behalf of the plan to enter into the transaction is a principal underwriter for, or affiliated with, such investment company within the meaning of sections 2(a)(29) and 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29) and 80a–2(a)(3)).~~

The exemptions set forth in (1) ~~and (2)~~ above are subject to the following conditions:

(a) In the case of such broker-dealer, it customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer.

(b) In the case of such reporting dealer or bank, it customarily purchases and sells Government securities for its own account in the ordinary course of its business and such purchase or sale between the plan and such reporting dealer or bank is a purchase or sale of Government securities.

(c) Such transaction is at least as favorable to the plan as an arm's length transaction with an unrelated party would be, and it was not, at the time of such transaction, a prohibited transaction within the meaning of section 503(b) of the Code.

(d) ~~Except with respect to transactions described in section (2) above,~~ Neither the broker-dealer, reporting dealer, bank, nor any affiliate thereof has or exercises any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

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

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

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

(f) (1) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are ~~unconditionally~~reasonably available for examination during normal business hours by

(A) Any duly authorized ~~employees of (1)~~employee or representative of the Department ~~of Labor, (2)~~or the Internal Revenue Service~~, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan. For purposes of this exemption, the terms "broker-dealer," "reporting dealer" and "bank" shall include such persons and any affiliates thereof, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(c) and 26 CFR 54.4975–9(c).~~;

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

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

(D) Any participant or beneficiary of the plan, or IRA owner, or the duly authorized representative of such participant or beneficiary; and

(2) None of the persons described in subparagraph (1)(B)-(D) above shall be authorized to examine trade secrets or commercial or financial information of the broker-dealer, reporting dealer, or bank which is privileged or confidential, or records regarding a plan or IRA other than the plan or IRA with respect to which they are the fiduciary, contributing employer, employee organization, participant, beneficiary, or IRA owner.

(3) Should such broker-dealer, reporting dealer, or bank refuse to disclose information on the basis that such information is exempt from disclosure, the broker-dealer, reporting dealer, or bank shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

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

Part III—Underwritings.

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1954 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to the purchase or other acquisition of any securities by an employee benefit plan during the existence of an underwriting or selling syndicate with respect to such securities, from any person other than a fiduciary with respect to the plan, when such a fiduciary is a member of such syndicate, provided that the following conditions are met:

(a) No fiduciary who is involved in any way in causing the plan to make the purchase is a manager of such underwriting or selling syndicate, except that this paragraph shall not apply until July 1, 1977. For purposes of this exemption, the term "manager" means any member of an underwriting or selling syndicate who, either alone or together with other members of the syndicate, is authorized to act on behalf of the members of the syndicate in connection with the sale and distribution of the securities being offered or who receives compensation from the members of the syndicate for its services as a manager of the syndicate.

(b) The securities to be purchased or otherwise acquired are—

(1) Part of an issue registered under the Securities Act of 1933 or, if exempt from such registration requirement, are (i) issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of of the United States, (ii) issued by a bank, (iii) issued by a common or contract carrier, if such issuance is subject to the provisions of section 20a of the Interstate Commerce Act, as amended, (iv) exempt from such registration requirement pursuant to a Federal statute other than the Securities Act of 1933, or (v) are the subject of a distribution and are of a class which is required to be registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), and the issuer of which has been subject to the reporting requirements of section 13 of that Act (15 U.S.C. 78m) for a period of at least 90 days immediately preceding the sale of securities and has filed all reports required to be filed thereunder with the Securities and Exchange Commission during the preceding 12 months.

(2) Purchased at not more than the public offering price prior to the end of the first full business day after the final terms of the securities have been fixed and announced to the public, except that—

(i) If such securities are offered for subscription upon exercise of rights, they are purchased on or before the fourth day preceding the day on which the rights offering terminates; or

(ii) If such securities are debt securities, they may be purchased at a public offering price on a day subsequent to the end of such first full business day, provided that the interest rates on comparable debt securities offered to the publice subsequent to such first full business day and prior to the purchase are less than the interest rate of the debt securities being purchased.

(3) Offered pursuant to an underwriting agreement under which the members of the syndicate are committed to purchase all of the securities being offered, except if—

(i) Such securities are purchased by others pursuant to a rights offering; or

(ii) Such securities are offered pursuant to an over-allotment option.

(c) The issuer of such securities has been in continuous operation for not less than three years, including the operations of any predecessors, unless—

(1) Such securities are non-convertible debt securities rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization;

(2) Such securities are issued or fully guaranteed by a person described in paragraph (b)(1)(i) of this exemption; or

(3) Such securities are fully guaranteed by a person who has issued securities described in paragraph (b)(1) (ii), (iii), (iv) or (v) and this paragraph (c).

(d) The amount of such securities to be purchased or otherwise acquired by the plan does not exceed three percent of the total amount of such securities being offered.

(e) The consideration to be paid by the plan in purchasing or otherwise acquiring such securities does not exceed three percent of the fair market value of the total assets of the plan as of the last day of the most recent fiscal quarter of the plan prior to such transaction, provided that if such consideration exceeds $1 million, it does not exceed one percent of such fair market value of the total assets of the plan.

(f) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (g) of this exemption to determine whether the conditions of this exemption have been met, except that a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six-year period.

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

If such securities are purchased by the plan from a party in interest or disqualified person with respect to the plan, such party in interest or disqualified person shall not be subject to the civil penalty which may be assessed under section 502 (i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the conditions of this exemption are not met. However, if such securities are purchased from a party in interest or disqualified person with respect to the plan, the restrictions of section 406(a) of the Act shall apply to any fiduciary with respect to the plan and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c) (1) (A) through (D) of the Code, shall apply to such party in interest or disqualified person, unless the conditions for exemption of Part II of this notice (relating to certain principal transactions) are met.

For purposes of this exemption, the term “fiduciary” shall include such fiduciary and any affiliates of such fiduciary, and the term “affiliate” shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e).

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

Part IV—Market-Making.

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1954 (the Code), by reason of section 4975(c) (1) of the Code, shall not apply to any purchase or sale of any securities by an employee benefit plan from or to a market-maker with respect to such securities who is also a fiduciary with respect to such plan, provided that the following conditions are met:

(a) The issuer of such securities has been in continuous operation for not less than three years, including the operations of any predecessors, unless—

(1) Such securities are non-convertible debt securities rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization;

(2) Such securities are issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States, or

(3) Such securities are fully guaranteed by a person described in this paragraph (a).

(b) As a result of purchasing such securities—

(1) The fair market value of the aggregate amount of such securities owned, directly or indirectly, by the plan and with respect to which such fiduciary is a fiduciary, does not exceed three percent of the fair market value of the assets of the plan with respect to which such fiduciary is a fiduciary, as of the last day of the most recent fiscal quarter of the plan prior to such transaction, provided that if the fair market value of such securities exceeds $1 million, it does not exceed one percent of such fair market value of such assets of the plan, except that this paragraph shall not apply to securities described in paragraph (a) (2) of this exemption; and

(2) The fair market value of the aggregate amount of all securities for which such fiduciary is a market-maker, which are owned, directly or indirectly, by the plan and with respect to which such fiduciary is a fiduciary, does not exceed 10 percent of the fair market value of the assets of the plan with respect to which such fiduciary is a fiduciary, as of the last day of the most recent fiscal quarter of the plan prior to such transaction, except that this paragraph shall not apply to securities described in paragraph (a) (2) of this exemption.

(c) At least one person other than such fiduciary is a market-maker with respect to such securities.

(d) The transaction is executed at a net price to the plan for the number of shares or other units to be purchased or sold in the transaction which is more favorable to the plan than that which such fiduciary, acting in good faith, reasonably believes to be available at the time of such transaction from all other market-makers with respect to such securities.

(e) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (f) of this

exemption to determine whether the conditions of this exemption have been met, except that a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six year period.

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

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

For purposes of this exemption—

(1) The term "market-maker" shall mean any specialist permitted to act as a dealer, and any dealer who, with respect to a security, holds himself out (by entering quotations in an interdealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.

(2) The term "fiduciary" shall include such fiduciary and any affiliates of such fiduciary, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e).

Part V—Extension of Credit.

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to any extension of credit to an employee benefit plan by a party in interest or a disqualified person with respect to the plan, provided that the following conditions are met:

(a) The party in interest or disqualified person:

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

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

(b) Such extension of credit:

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

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

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

(c) Notwithstanding section (a)(2), a fiduciary under ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) may receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if: ~~(c) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (d) of this exemption to determine whether the conditions of this exemption have been met, except that:~~

(1) ~~Is a broker or dealer registered under the Securities Exchange Act of 1934; and~~ The potential failure of the purchase or sale of the securities is not caused by such fiduciary or an affiliate;

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

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

(d) The ~~plan~~broker-dealer engaging in the covered transaction maintains or causes to be maintained for a period of six years from the date of such transaction in a manner that is reasonably accessible for examination, such records as are necessary to enable the persons described in paragraph (~~d~~e) of this exemption to determine whether the conditions of this exemption have been met with respect to a transaction, except that:

(1) ~~If such party in interest or disqualified person is not a fiduciary with respect to any assets of the plan, such party in interest or disqualified person~~ No party other than the broker-dealer engaging in the covered transaction shall ~~not~~ be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (~~d~~e) below; and

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

(~~d~~) ~~Notwithstanding~~ e)(1) Except as provided in paragraph (e)(2) of this exemption, and notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the

records referred to in paragraph (~~c~~d) are ~~unconditionally~~reasonably available at their customary location for examination during normal business hours by~~ duly~~:

(A) An authorized ~~employees of (1)~~employee or representative of the Department of Labor~~, (2)~~ or the Internal Revenue Service,~~ (3) plan participants and beneficiaries, (4) any~~

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

(C) Any contributing employer ~~of plan participants and beneficiaries, and (5)~~and any employee organization ~~any of~~ whose members are covered by ~~such~~a plan~~.~~ described in paragraph (e)(1)(B), or any authorized employee or representative of these entities; or

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

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

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

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

For purposes of this exemption, the terms "party in interest," ~~and~~ "disqualified person" and "fiduciary" shall include such party in interest~~ or~~, disqualified person, or fiduciary, and any affiliates thereof, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR ~~2510.3–21(e) and 26 CFR 54.4975–9(e).~~2510.3-21 and 26 CFR 54.4975-9. Also, for the purposes of this exemption, the term "IRA" means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

PROPOSED AMENDMENT TO PTE 80-83

Section I—Transactions

A. Effective January 1, 1975 the restrictions of section 406(a)(1) (A) through (D) of the Act and the taxes imposed by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to the purchase or other acquisition prior to December 1, 1980 in a public offering (defined in Section II(B)) of securities by a fiduciary on behalf of an employee benefit plan solely because the proceeds from the sale were or were to be used by the issuer of the securities to retire or reduce indebtedness owed to a party in interest with respect to the plan other than the fiduciary, *provided that* the price paid by the plan for the securities does not exceed adequate consideration as defined in section 3(18) of the Act.

B. Subject to the conditions described in section II(A), effective December 1, 1980, the restrictions of sections 406(a)(1)(A) through (D) of the Act and the taxes imposed by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to the purchase or other acquisition in a public offering (defined in section II(B)) of securities by a fiduciary on behalf of an employee benefit plan solely because the proceeds from the sale may be used by the issuer of the securities to retire or reduce indebtedness owed to a party in interest of the plan other than the fiduciary.

C. Subject to the conditions described in section II(A), effective January 1, 1975, the restrictions of sections 406(a)(1) (A) through (D) and 406(b) (1) and (2) of the Act and the taxes imposed by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the purchase or other acquisition in a public offering (defined in section II(B)) of securities by a fiduciary, which is a bank or an affiliate thereof, on behalf of an employee benefit plan solely because the proceeds from the sale may be used by the issuer of the securities to retire or reduce indebtedness owed to such fiduciary or any affiliate thereof, *provided that,* if such fiduciary of the plan knows (as defined in paragraph 7) that the proceeds of this issue will be used in whole or in part by the issuer of the securities to reduce or retire indebtedness owed to such fiducairy [fiduciary] or affiliate thereof, the transaction shall have complied with the conditions set forth in paragraph 1 through 6 below:

1. Such securities are purchased prior to the end of the first full business day after the securities have been offered to the public, except that—

a. If such securities are offered for subscription upon exercise of rights, they may be purchased on or before the fourth day preceding the day on which the rights offering terminates; or

b. If such securities are debt securities, they may be purchased on a day subsequent to the end of such first full business day, if the effective interest rates on comparable debt securities offered to the public subsequent to such first full business day and prior to the purchase are less than effective interest rate of the debt securities being purchased;

2. Such securities are offered by the issuer pursuant to an underwriting agreement under which the members of the underwriting syndicate are committed to purchase all of the securities being offered, except if the securities

a. Are purchased by others pursuant to a rights offering, or

b. Are offered pursuant to an overallotment option;

3. The issuer of such securities has been in continuous operation for not less than three years, including the operations of any predecessors, unless such securities are non-convertible debt securities rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization;

4. The amount of securities purchased or otherwise acquired on behalf of the plan by the fiduciary does not exceed three percent of the total amount of the securities being offered;

5. The consideration to be paid by any plan in purchasing or otherwise acquiring such securities does not exceed three percent of the fair market value, as of the most recent valuation date of the plan prior to such transaction, of the plan assets which are subject to the management and control of such fiduciary;

6. The total amount of securities in any single offering purchased by the fiduciary on behalf of the plan together with the total amount of such securities purchased by such fiduciary acting as a fiduciary on behalf of any other employee benefit plan subject to Title I of the Act does not exceed 10 percent of the amount of the offering;

7. As used in this section I(C), a fiduciary will be deemed to know that the proceeds of an issuance of securities will be used in whole or in part by the issuer of the securities to reduce or retire indebtedness owned to such fiduciary or an affiliate thereof, if

a. Such knowledge is actually communicated to, or

b. Information reasonably sufficient to cause belief that the proceeds will be used in whole or in part by the issuer of the securities to reduce or retire indebtedness owned to the fiduciary, or an affiliate thereof, is possessed by, the officers or employees of the fiduciary, who are authorized to be involved in carrying out the investment responsibilities, obligations, or duties of the fiduciary, or who in fact are involved in carrying out such responsibilities, obligations, or duties, regarding the purchase or other acquisition.

D. Effective January 1, 1975, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act and the taxes imposed by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the receipt by a party in interest of any of the proceeds resulting from the issuance, in a public offering (as defined in section II(B)), of securities merely because such proceeds are used by the issuer of the securities to retire or reduce indebtedness owed to the party in interest *provided that,* when such party in interest is a fiduciary acquiring such securities on behalf of a plan, such fiduciary is a bank or an affiliate thereof (as defined in section II(B)) which meets the provisions of section I(C) of this exemption.

E. Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice

within the meaning of section 3(21)(A)(ii) of ERISA or 4975(e)(3)(B) of the Code and regulations thereunder.

Section II—General Conditions

[No changes]

PROPOSED AMENDMENT TO PTE 83-1

Section I—Transactions

A. Effective January 1, 1975, the restrictions of sections 406(a) and 407 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c) (1)(A) through (D) of the Code shall not apply to the following transactions involving mortgage pool investment trusts (mortgage pools) and pass-through certificates evidencing interests therein (certificates):

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor of a mortgage pool and an employee benefit plan when the sponsor, trustee or insurer of such pool is a party in interest with respect to such plan, provided that the plan pays no more than fair market value for such certificates, and provided further that the rights and interests evidenced by such certificates are not subordinated to the rights and interests evidenced by other certificates of the same mortgage pool;

(2) The continued holding of certificates acquired pursuant to subparagraph (1), above, by an employee benefit plan.

B. Effective January 1, 1975, the restrictions of section 406(b)(1) and (2) of the Act the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to the following transactions involving mortgage pools and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor of a mortgage pool and an employee benefit plan when the sponsor, trustee or insurer of such pool is a fiduciary with respect to the plan assets invested in such certificates provided:

(a) Such sale, exchange or transfer is expressly approved by a fiduciary independent of the pool sponsor, trustee or insurer who has authority to manage and control those plan assets being invested in such certificates;

(b) The plan pays no more for the certificates than would be paid in an arm's length transaction with an unrelated party;

(c) No investment management, advisory, or underwriting fee or sales commission or similar compensation is paid to the pool sponsor with regard to such sale, exchange or transfer;

(d) The total value of certificates purchased by a plan does not exceed 25% of the amount of the issue; and

(e) At least 50% of the aggregate amount of the issue is acquired by persons independent of the pool sponsor, trustee or insurer.

C. Effective January 1, 1975, the restrictions of section 406 (a) and (b) of the Act and the Taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c) of the Code shall not apply to transactions in connection with the servicing and operation of the mortgage pool provided that:

(1) such transactions are carried out in accordance with the terms of a binding pooling and servicing agreement; and

(2) such pooling and servicing agreement is made available to investors before they purchase certificates issued by the pool.

D. Effective January 1, 1975, the restrictions or sections 406(a) and 407 of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to any transactions to which such restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or who has a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act), solely because of the ownership of a certificate evidencing an interest in a mortgage pool by such plan.

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

Section II—General Conditions

[No changes]

Section III—Definitions

[No changes]

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