NFIB

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Via www.regulations.gov
and U.S. First Class Mail

December 7, 2023

Hon. Julie A. Su, Acting Secretary of Labor
DOL/EBSA/Fiduciary RIN 1210-AC02,
Appl. D-12057/12060/12094
200 Constitution Ave. NW, Rm. N-5655
Washington, DC 20210

Dear Madam Acting Secretary:

RE:
1. DOL/EBSA Notice of Proposed Rulemaking Titled "Retirement Security Rule: Definition of an Investment Advice Fiduciary," RIN 1210-AC02, 88 *Fed. Reg.* 75890 (Nov. 3, 2023)

2. DOL/EBSA Notice Titled "Proposed Amendment to Prohibited Transaction Exemption 2020-02," Appl. No. D-12057, 88 *Fed. Reg.* 75979 (Nov. 3, 2023)

3. DOL/EBSA Notice Titled "Proposed Amendment to Prohibited Transaction Exemption 84-24," Appl. No. D-12060, 88 *Fed. Reg.* 76004 (Nov. 3, 2023)

4. DOL/EBSA Notice Titled "Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, Appl. No. D-12094, 88 *Fed. Reg.* 76032 (Nov. 3, 2023)

This letter presents comments of the National Federation of Independent Business (NFIB)[1] on the Department of Labor (Department or DOL) Employee Security Benefits Administration (EBSA) notices cited above. The Department proposes to: (1) update its regulation defining a "fiduciary" under the Employee Retirement Income Security Act (ERISA) to specify when a person who gives investment advice for compensation to an investor in a workplace retirement plan (such as a plan established under section 401(k) of the Internal Revenue Code[2] or an individual retirement account (IRA)) becomes a "fiduciary," and (2) amend several prohibited transaction exemptions applicable to such investment advice fiduciaries. For the convenience of the reader, NFIB recommendations and requests for changes to the proposed rule, exemptions, and administrative practice appear below in bold typeface.

[1] NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that the governments of the United States and the fifty States hear the voice of small business as they formulate public policies. Some small and independent businesses, including NFIB members, obtain investment advice and some provide it, and some small and independent businesses are independent insurance agents representing multiple insurance companies.

[2] 26 U.S.C. 401(k).

1. Statutory Background

Section 404 of ERISA assigns fiduciary duties[3] to certain persons that have functions related to employee benefit plans[4] such as retirement plans. Section 406 of ERISA prohibits such persons from engaging in, or authorizing the plan to engage in, certain transactions that involve conflicts of interest,[5] but section 408(a) of ERISA grants the Secretary of Labor authority to grant prohibited transaction exemptions (PTEs).[6] Anyone associated with an employee retirement plan needs to know whether he or she has fiduciary duties for the plan and, if so, the scope of transactions prohibited to the fiduciary with respect to the plan.

Section 3(21)(A) of ERISA defines "fiduciary" as follows:

> (21)(A) . . . , a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. . . .[7]

Section 505 of ERISA authorizes the Secretary of Labor to issue regulations to implement the provisions of ERISA, including regulations to "define accounting, technical and trade terms used in such provisions . . . ."[8] The Secretary has exercised that authority to define the noun "fiduciary."[9] The notice of proposed rulemaking cited above proposes to amend the definition

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[3] 29 U.S.C. 1104(a)(1) ("(1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man 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; (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the documents and instruments governing the plan . . . .").

[4] See section 4 of ERISA, 29 U.S.C. 1003, regarding employee benefit plan coverage by ERISA.

[5] 29 U.S.C. 1106. For example, the section prohibits a fiduciary from causing the plan to engage in a sale of property between the plan and a party in interest and prohibits a fiduciary from dealing with the assets of the plan in the fiduciary's own interest.

[6] 29 U.S.C. 1108(a) ("The Secretary shall establish an exemption procedure for purposes of this subsection. . . . The Secretary may not grant an exemption under this subsection unless he finds that such exemption is--(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan. . . .").

[7] 29 U.S.C. 1002(21).

[8] 29 U.S.C. 1135. By virtue of the Secretary's authority under section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1, the Secretary of Labor's regulatory definition of "fiduciary" also applies to section 4975(e)(3)(B) of the Internal Revenue Code, 26 U.S.C. 4975(e)(3)(B), relating to a tax on prohibited transactions.

[9] 29 CFR 2510.3-21.

of "fiduciary" with respect to persons providing investment advice related to workplace retirement plans.

2. Comments on Notice of Proposed Rulemaking Titled "Retirement Security Rule: Definition of an Investment Advice Fiduciary"

Section 3(21)(A) of ERISA includes among those defined as a "fiduciary" with respect to a plan a person who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so[.]" The Department proposes to make a fiduciary of a person who, for compensation, gives any retirement investor "investment advice," defined as:

> (c) *Investment advice.* (1) 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, 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:
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> (i) The person either directly or indirectly (e.g., through or together with any affiliate) 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 retirement investor;
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> (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
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> (iii) The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.[10]

Context (i) above, making a "fiduciary" of a person who, for compensation, makes an investment recommendation to a retirement investor, and has discretionary authority or control to buy or sell investments for the investor, is a bright-line, objective rule. People in the investment recommendation business know when their clients have given them authority to buy and sell investments for the client on their own (usually by written agreement).

Context (iii) above, making a "fiduciary" of a person who, for compensation, makes an investment recommendation to a retirement investor and says the person is a fiduciary in so

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[10] Proposed 29 CFR 2510.3-21, 88 *Fed. Reg.* at 75977, cols. 2 and 3.

doing also is a bright-line, objective rule. People who make an investment recommendation and say to their clients that they are doing so as a fiduciary are aware that they have made that representation or acknowledgment and should expect their clients to rely on it.

Context (ii) above, however, is not a bright-line, objective rule. A person who, for compensation, makes investment recommendations to investors on a regular basis as part of the person's business would, to be sure, know that the person makes such recommendations on a regular basis as part of the person's business. But, after that, the rule becomes murkier. To apply the rule in context (ii) requires determining that the "circumstances" indicate that the recommendation "is based on the particular needs or individual circumstances of the retirement investor" and that the recommendation "may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest." But situations may arise in which an advice-giver thinks he or she is making generalized comments about the status of markets and the outlook for categories of securities and the retirement investor thinks that the advice-giver has made a recommendation based on the retirement investor's particular needs or individual circumstances. Also, situations may arise in which an advice-giver thinks he or she is making generalized comments about the status of markets and the merits of the advice-giver's company's investment products, and the retirement investor thinks that the advice-giver has made a recommendation that purchasing the company's investment products is in the retirement investor's best interest. In such situations, interpretation of the proposed rule's use of the phrase "circumstances indicating" matters greatly, and it is unclear to whom the Department means the circumstances indicate: to the advice-giver, the retirement investor, or the Department of Labor. Perhaps the Department intends for "circumstances indicating" to be judged from the retirement investor's point of view, as the preamble makes clear that the Department's objective is to protect retirement investors.[11] But putting an advice-giver at the mercy of a misunderstanding by a retirement investor is inappropriate (and may even deny due process in the enforcement of the rule). The rule should make clear that the Department of Labor will use an objective, reasonable person standard in determining what the circumstances indicate. And such a reasonable person standard is consistent with the Department's statement that it seeks to honor the "reasonable expectations" of retirement investors.[12] **Accordingly, NFIB recommends and requests that the Department of Labor revise its proposed 29 CFR 2510-3.21(c)(1)(ii) to read:**

> **(ii) The person either directly or indirectly (e.g., through or together with any affiliate) (A) makes investment recommendations to investors on a regular basis as a part of the person's business, and (B) makes an investment recommendation to a retirement investor in circumstances in which a reasonable retirement investor would understand the recommendation as (1) made based on the particular needs or individual circumstances of the retirement investor, and (2) given for the retirement investor to rely on as in the retirement investor's best interest.**

Proposed 29 CFR 2510.3-21(c)(1)(v) states:

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[11] 88 *Fed. Reg.* 75890, cols. 2-3 (". . . [T]he proposal better reflects the text and the purposes of the statute and better protects the interests of retirement investors . . . .").

[12] 88 *Fed. Reg.* 75890, col. 3.

> (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.[13]

The proposed rule that oral communications, marketing materials, or other interactions will always prevail over a written statement in the case of a conflict is misplaced and will generate confusion unnecessarily. The proposed rule should not focus on the formats of communications or whether they are mutually consistent. The proposed rule should focus on whether the person is, in fact, a fiduciary or not under proposed 29 CFR 2510.3-21, and, if the person is a fiduciary, then no statement, whatever its format, disclaiming fiduciary status should have any effect. **Accordingly, NFIB recommends and requests that the Department of Labor revise proposed section 29 CFR 2510.3-21(c)(1)(v) to read:**

> **(v) No statement by a person disclaiming status as a fiduciary in rendering investment advice to a retirement investor shall be of any force or effect if the person qualifies as a fiduciary under this section in rendering such advice.**

3. Comments on Proposed Amendment to Prohibited Transaction Exemption 2020-02

The proposed amendment to PTE 2020-02 requires a Financial Institution or Investment Professional, when relying on PTE 2020-02 to escape the prohibition on a transaction involving a conflict of interest, to provide investment advice that "is, at the time it is provided, in the Best Interest of the Retirement Investor."[14] Section V(b) of proposed PTE 2020-02 defines "Best Interest" as follows:

> (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 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 interests to their own.[15]

Retention of the Best Interest standard in proposed PTE 2020-02 to protect retirement investors is crucial to maintaining public confidence in the Department's exercise of authority to grant exemptions from the statutory conflict of interest prohibitions. **NFIB recommends and requests that the Department of Labor retain compliance with the Best Interest standard as a condition for qualification for exemption under proposed PTE 2020-02.**

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[13] 88 *Fed. Reg.* at 75977, col. 3.

[14] 88 *Fed. Reg.* at 76000, col. 1.

[15] 88 *Fed. Reg.* at 76002, col. 3.

Current PTE 2020-02 provides that the exemption does not apply if: "(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)[.]"[16] The Department proposes to remove from PTE 2020-02 this robo-advice exclusion from the exemption.

As long as the computer-generated investment advice adheres to the Best Interest standard, the exemption appropriately protects the interest of the investor. But there is no human involved in giving the investment advice, so no one has a chance of detecting deviation from the Best Interest standard except the investor, who is not well-positioned to detect accidental or intentional mis-programming that favors the economic interest of the Financial Institution or a third-party over the interest of the investor. The Department of Labor should require each institution using robo-advice to include in its retrospective reviews a review of the programming of, and the investment advice of, its robo-advice capability, to ensure that robo-advice capability as it actually operates adheres to the Best Interest standard. **Accordingly, NFIB recommends and requests that the Department of Labor amend section II(d) of the Department's proposed PTE 2020-02 by striking "and" at the end of section II(d)(3)(C), striking the period at the end of section II(d)(3)(D) and substituting "; and", and adding at the end thereof the following new section II(d)(3)(E): "(E) The Financial Institution has reviewed the programming of, and investment advice of, its robo-advice capabilities, if any, and has determined that (i) the programming for the robo-advice capabilities is designed to give investment advice that is in the Best Interest of the Retirement Investor, and (ii) the investment advice given was, in fact, in the Best Interest of the Retirement Investor."**

4. Comments on Proposed Amendment to Prohibited Transaction Exemption 84-24

Under the proposed amendment to PTE 84-24, an Independent Producer (an independent insurance agent representing multiple insurance companies) relying on PTE 84-24 to escape the prohibition on a transaction involving a conflict of interest (such as arises from the payment to the agent from the insurance company whose annuity or investment company securities product the agent sells to a retirement investor) must, under all circumstances, provide investment advice that "is, at the time it is provided, in the Retirement Investor's Best Interest."[17] Section X(b) defines "Best Interest" as follows:

> (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

[16] Section I(c)(2) of PTE 2020-02, 85 *Fed. Reg.* at 82863, col. 1.

[17] 88 *Fed. Reg.* at 76027, col. 3.

subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party.[18]

Retention of the Best Interest standard in proposed PTE 84-24 to protect retirement investors is crucial to maintaining public confidence in the Department's exercise of authority to grant exemptions from the statutory conflict of interest prohibitions. **NFIB recommends and requests that the Department of Labor retain compliance with the Best Interest standard as a condition for qualification for exemption under proposed PTE 84-24.**

The disclosure requirements for an Independent Producer under proposed section VII(b) of PTE 84-24 are substantial, but disclosures (b)(1) through (b)(5) lend themselves to disclosure through standard forms or forms easily generated by computer with a minimum of input from the Independent Producer or the Retirement Investor. However, disclosures (b)(6) and (b)(7) require documentation of a particularized assessment of the Best Interest of the Retirement Investor:

(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. [19]

To comport with the definition of Best Interest in section X of proposed PTE 84-24, the documentation for disclosures (b)(6) and (b)(7) must reflect the Independent Producer's conclusions reached based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. The Department of Labor would not accept as sufficient documentation of the Independent Producer's conclusions a boilerplate statement that "Based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, I have concluded that it is in the Investor's Best Interest to purchase Insurance Product X and I have recommended such purchase to the Investor." At the same time, the Department of Labor should not require an Independent Producer, in documenting conclusions as to Best Interest, to write an extensive document detailing every aspect of each Retirement Investor and each transaction and every thought

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[18] 88 *Fed. Reg.* 76031, col. 2.

[19] 88 *Fed. Reg.* at 76028, cols. 2-3 (emphasis added). The reference is to the first proposed section VII(b)(6). **As a technical correction of apparent misnumbering, NFIB recommends and requests that the Department of Labor renumber the second proposed VII(b)(6) as VII(b)(8) and the proposed VII(b)(8) as VII(b)(9).**

the Independent Producer had on each aspect. Such a detailed documentation requirement would place an extraordinary burden on a small business Independent Producer who has few resources and staff to assist with such a documentation requirement, drive up costs across the board for Independent Producers (and therefore often drive up prices for Retirement Investors), and discourage Independent Producers from making it a part of their businesses to help Retirement Investors with small transactions. The Department of Labor should apply a standard of reasonableness for the depth of detail of, and amount of, information required in documentation of Best Interest conclusions. **Accordingly, NFIB recommends and requests that the Department of Labor add at the end of section VII(b) of proposed PTE 84-24 the following new paragraph:**

> **"(10) The depth of detail of, and the amount of, information required to document conclusions under subsections (b)(6) and (b)(7) shall be what a reasonable Investment Producer would provide in the circumstances. In enforcing paragraphs (6), (7), and (10) of this subsection VII(b), the Department of Labor shall take appropriate account of the minimal resources and staff available to a small business Independent Producer (defined as an Independent Producer with twenty employees or fewer) to produce, provide, and retain documentation."**

5. Comments on Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128

The Department of Labor proposes a uniform amendment to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128[20] to conform them to the Department's proposed PTE 2002-02.[21] The Department of Labor also proposes various "administrative amendments" to the five PTEs.[22]

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[20] 88 *Fed. Reg.* at 76033, cols. 1 and 2 ("PTE 75–1 provides an exemption for broker-dealers, reporting dealers, and banks to engage in certain classes of transactions with employee benefit plans and IRAs. . . . PTE 77–4 provides relief for a plan's or IRA's purchase or sale of open-end investment company shares where the investment adviser for the open-end investment company is also a fiduciary to the plan or IRA; PTE 80–83 provides relief for a fiduciary causing a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary or an affiliate; PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates; and PTE 86–128 provides an exemption for certain types of fiduciaries to use their authority to cause a plan or IRA to pay a fee to the fiduciary, or its affiliate, for effecting or executing securities transactions as agent for the plan. . . .") (footnotes omitted).

[21] 88 *Fed. Reg.* 76034, col. 2 (". . . [T]o ensure a universal standard of care for the provision of investment advice that is based on the conditions of PTE 2020–02, the Department is proposing to amend PTEs 75–1 Parts III & IV, 77–4, 80–83, 83–1, and 86–128 to include the following statement: '*Exception.* No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.' As a result of this amendment, investment advice fiduciaries would instead rely on the amended PTE 2020–02 for exemptive relief for covered investment advice transactions. By providing exemptive relief for fiduciary investment advice transactions under one exemption, PTE 2020–02, retirement investors would receive consistent protections when receiving investment advice from investment professionals such that a level playing regulatory playing field [sic] would apply regardless of the investment product the advisor recommends.").

[22] 88 *Fed. Reg.* at 76034, col. 2.

Separate from the content of the five current PTEs and proposed amendments to them, the effort to review the PTEs and proposed amendments reveals a serious shortcoming in the Department of Labor's publications practices.

DOL/EBSA makes prohibited transaction exemptions available on its website.[23] But a review of the class PTEs on the website reveals that many PTEs are in piecemeal form, with the original document having been amended one or more times, but with no apparent consolidation of the original documents with all the amendments into a current text. Several of the five PTEs above are examples of piecemeal PTEs.[24]

Many sources of law apply to retirement investment, including but not limited to ERISA, retirement-relevant provisions of the Internal Revenue Code, regulations issued to implement both, exemptions to prohibited transactions, agency interpretations of all the foregoing, and judicial construction and application of all the foregoing. Small businesses cannot afford the lawyers, accountants, and clerks that larger companies use to decipher complex regulations and implement costly business systems necessary to comply with the regulations. Small businesses mostly engage in do-it-yourself compliance, in which a business owner trying to keep the business afloat attempts to keep up with regulations as much as the owner can. For small business investment advice fiduciaries -- and, frankly, for the benefit of all in the business of investment advising -- the Department of Labor should publish, and keep up to date, on its website the current (that is, with all amendments incorporated) texts of its prohibited transaction exemptions. A federal agency that seeks to enforce its body of administrative issuances on the American public should do everything it reasonably can to make sure that the public can easily find those issuances, and attempt in good faith to understand and comply with them, before enforcers darken their doors. **Accordingly, NFIB recommends and requests that the Department of Labor publish and keep up to date on its website the current text, with all amendments incorporated, of each Prohibited Transaction Exemption in force.**

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In promulgating regulations and prohibited transaction exemptions to govern the giving of investment advice to retirement investors in a (generally) free market, the Department of Labor must both protect the interests of retirement investors and keep the burdens and costs of business compliance with the Department's regulations and exemptions reasonable. As the Department considers the comments it receives and develops the final rule and exemptions, the Department should keep both objectives in mind.

Sincerely,

David S. Addington
Executive Vice President and General Counsel

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[23] See https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions (visited November 25, 2023).

[24] See footnotes 2, 6, 7, and 8, 88 *Fed Reg.* at 76033, cols. 1 and 2.