investment advice to retail retirement investors.[2]

In order to protect the interests of the plan participants and beneficiaries, IRA owners, and plan fiduciaries, the exemption requires the Financial Institution to acknowledge fiduciary status for itself and its Advisers. The Financial Institutions and Advisers must adhere to basic standards of impartial conduct. In particular, under this standards-based approach, the Adviser and Financial Institution must give prudent advice that is in the customer's best interest, avoid misleading statements, and receive no more than reasonable compensation. Additionally, Financial Institutions generally must adopt policies and procedures reasonably designed to mitigate any harmful impact of conflicts of interest, and disclose basic information about their conflicts of interest and the cost of their advice. Level Fee Fiduciaries that receive only a level fee in connection with advisory or investment management services are subject to more streamlined conditions, including a written statement of fiduciary status, compliance with the standards of impartial conduct, and, as applicable, documentation of the specific reason or reasons for the recommendation of the Level Fee arrangements.

If advice is provided to an IRA investor or a non-ERISA plan, the Financial Institution must set forth the standards of fiduciary conduct and fair dealing in an enforceable contract with the investor. The contract creates a mechanism for IRA investors to enforce their rights and ensures that they will have a remedy for advice that does not honor their best interest. In this way, the contract gives both the individual adviser and the financial institution a powerful incentive to ensure advice is provided in accordance with fiduciary norms, or risk litigation, including class litigation, and liability and associated reputational risk.

This principles-based approach aligns the adviser's interests with those of the plan participant or IRA owner, while leaving the individual adviser and employing firm with the flexibility and discretion necessary to determine how best to satisfy these basic standards in light of the unique attributes of their business. The Department is similarly publishing amendments to existing exemptions for a wide range of fiduciary advisers to ensure adherence to these basic standards of fiduciary conduct. In addition, the Department is publishing a new exemption for ''principal transactions'' in which advisers sell certain investments to plans and IRAs out of their own inventory, as well as an amendment to an existing exemption that would permit advisers to receive compensation for extending credit to plans or IRAs to avoid failed securities transactions.

This broad regulatory package aims to require advisers and their firms to give advice that is in the best interest of their customers, without prohibiting common compensation arrangements by allowing such arrangements under conditions designed to ensure the adviser is acting in accordance with fiduciary norms and basic standards of fair dealing. The new exemptions and amendments to existing exemptions are published elsewhere in today's edition of the **Federal Register**.

Some comments urged the Department to publish yet another proposal before moving to publish a final rule. As noted elsewhere, the proposal published in the **Federal Register** on April 20, 2015 (2015 Proposal)[3] benefitted from comments received on an earlier proposal issued in 2010 (2010 Proposal),[4] and this final rule reflects the Department's careful consideration of the extensive comments received on the 2015 Proposal. The Department believes that the changes it has made in response to those comments are consistent with reasonable expectations of the affected parties and, together with the prohibited transaction exemptions being finalized with this rule, strike an appropriate balance in addressing the need to modernize the fiduciary rule with the various stakeholder interests. As a result, the Department does not believe a third proposal and comment period is necessary. To the contrary, after careful consideration of the public comments and in light of the importance of the final rule's consumer protections and the significance of the continuing monetary harm to retirement investors without the rule's changes, the Department has determined that it is important for the final rule to become effective on the earliest possible date. Making the rule effective will provide certainty to plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners that the new protections afforded by the final rule are now officially part of the law and regulations governing their investment advice providers. Similarly, the financial services providers and other affected service providers will also have certainty that the rule is final and that will remove uncertainty as an obstacle to allocating capital and resources toward transition and longer term compliance adjustments to systems and business practices.

To the extent the public comments were based on concerns about compliance and interpretive issues arising after publication of the final rule, the Department fully intends to support advisers, plan sponsors and fiduciaries, and other affected parties with extensive compliance assistance activities. The Department routinely provides such assistance following its issuance of highly technical or significant guidance. For example, the Department's compliance assistance Web page, at *http://www.dol.gov/ebsa/compliance_assistance.html,* provides a variety of tools, including compliance guides, tips, and fact sheets, to assist parties in satisfying their ERISA obligations. Recently, the Department added broad assistance for regulated parties on the Affordable Care Act regulations, at *www.dol.gov/ebsa/healthreform/.* The Department also intends to be accessible to affected parties who wish to contact the Department with individual questions about the final rule. For example, this final rule specifically provides directions on contacting the Department for further information about the final rule. See ''For Further Information Contact'' at the beginning of this Notice. Although the Department expects advisers and firms to make reasonable and good faith efforts to comply with the rule and applicable exemptions, the Department expects to initially emphasize these sorts of compliance assistance activities as opposed to using investigations and enforcement actions as a primary implementation tool as employee benefit plans, plan sponsors, plan fiduciaries, advisers, firms and other affected parties make the transition to the new regulatory regime.

B. Summary of the Major Provisions of the Final Rule

After careful consideration of the issues raised by the written comments and hearing testimony and the extensive public record, the Department is adopting the final rule contained herein.[5] The final rule contains modifications to the 2015 Proposal to address comments seeking clarification

[2] For purposes of the exemption, retail investors generally include individual plan participants and beneficiaries, IRA owners, and plan fiduciaries not described in section 2510.3–21(c)(1)(i) of this rule (banks, insurance carriers, registered investment advisers, broker-dealers, or independent fiduciaries that hold, manage, or control $50 million or more).

[3] 80 FR 21928 (Apr. 20, 2015).

[4] 75 FR 65263 (Oct. 22, 2010).

[5] ''Comments'' and ''commenters'' as used in this Notice generally include written comments, petitions and hearing testimony.

of certain provisions in the proposal and delineating the differences between the final rule's operation in the plan and IRA markets. The final rule amends the regulatory definition of fiduciary investment advice in 29 CFR 2510.3–21 (1975) to replace the restrictive five-part test with a new definition that better comports with the statutory language in ERISA and the Code.[6] Similar to the proposal, the final rule first describes the kinds of communications that would constitute investment advice and then describes the types of relationships in which such communications give rise to fiduciary investment advice responsibilities.

Specifically, paragraph (a)(1) of the final rule provides that person(s) render investment advice if they provide for a fee or other compensation, direct or indirect, certain categories or types of advice. The listed types of advice are—

- A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation 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.
- A recommendation 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.,* brokerage versus advisory); or recommendations with respect to rollovers, distributions, or transfers from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made.

Paragraph (a)(2) establishes the types of relationships that must exist for such recommendations to give rise to fiduciary investment advice responsibilities. The rule covers: Recommendations by person(s) who represent or acknowledge that they are acting as a fiduciary within the meaning of the Act or the Code; advice rendered pursuant to a written or verbal agreement, arrangement, or understanding that the advice is based on the particular investment needs of the advice recipient; and recommendations directed to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

Paragraph (b)(1) describes when a communication, based on its context, content, and presentation, would be viewed as a ''recommendation,'' a fundamental element in establishing the existence of fiduciary investment advice. Paragraph (b)(1) provides that ''recommendation'' means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action. The determination of whether a ''recommendation'' has been made is an objective rather than subjective inquiry. In addition, the more individually tailored the communication is to a specific advice recipient or recipients about, for example, a security, investment property, or investment strategy, the more likely the communication will be viewed as a recommendation. Providing a selective list of securities as appropriate for an advice recipient would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Furthermore, a series of actions, directly or indirectly (*e.g.,* through or together with any affiliate), that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate. It also makes no difference whether the communication was initiated by a person or a computer software program.

Paragraph (b)(2) sets forth non-exhaustive examples of certain types of communications which generally are not ''recommendations'' under that definition and, therefore, are not fiduciary communications. Although the proposal classified these examples as ''carve-outs'' from the scope of the fiduciary definition, they are better understood as specific examples of communications that are non-fiduciary because they fall short of constituting ''recommendations.'' The paragraph describes general communications and commentaries on investment products such as financial newsletters, which, with certain modifications, were identified as carve-outs under paragraph (b) of the 2015 Proposal, certain activities and communications in connection with marketing or making available a platform of investment alternatives that a plan fiduciary could choose from, and the provision of information and materials that constitute investment education or retirement education. With respect to investment education in particular, the final rule expressly describes in detail four broad categories of non-fiduciary educational information and materials, including (A) plan information, (B) general financial, investment, and retirement information, (C) asset allocation models, and (D) interactive investment materials. Additionally, in response to comments on the proposal, the final rule allows educational asset allocation models and interactive investment materials provided to participants and beneficiaries in plans to reference specific investment alternatives under conditions designed to ensure the communications are presented as hypothetical examples that help participants and beneficiaries understand the educational information and not as investment recommendations. The rule does not, however, create such a broad safe harbor from fiduciary status for such ''hypothetical'' examples in the IRA context for reasons described below.

Paragraph (c) describes and clarifies conduct and activities that the Department determined should not be considered investment advice activity, even if the communications meet the regulation's definition of ''recommendation'' and satisfy the criteria established by paragraph (a). As noted in the proposal, the regulation's general definition of investment advice, like the statute, sweeps broadly, avoiding the weaknesses of the 1975 regulation. At the same time, however, as the Department acknowledged in the proposal, the broad test could sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships. Thus, included in paragraph (c) is a revised version of the ''counterparty'' carve-out from the proposal that excludes from fiduciary investment advice communications in arm's length transactions with certain plan fiduciaries who are licensed financial professionals (broker-dealers, registered investment advisers, banks, insurance companies, etc.) or plan fiduciaries who have at least $50 million under management. Other exclusions in the final rule include a revised version of the swap transaction carve-out in the proposal, and an expanded version of the carve-out in the proposal for plan sponsor employees.

Because the proposal referred to all of the instances of non-fiduciary communications set forth in (b)(2) and

[6] For purposes of readability, this rulemaking republishes 29 CFR 2510.3–21 in its entirety, as revised, rather than only the specific amendments to this section.

(c) as ''carve-outs,'' regardless of whether the communications would have involved covered recommendations even in the absence of a carve-out, a number of commenters found the use of the term confusing. In particular, they worried that the provisions could be read to create an implication that any communication that did not technically meet the conditions of a specific carve-out would automatically meet the definition of investment advice. This was not the Department's intention, however, and the Department no longer uses the term ''carve-out'' in the final regulation. Even if a particular communication does not fall within any of the examples and exclusions set forth in (b)(2) and (c), it will be treated as a fiduciary communication only if it is an investment ''recommendation'' of the sort described in paragraphs (a) and (b)(1). All of the provisions in paragraphs (b) and (c) continue to be subject to conditions designed to draw an appropriate line between fiduciary and non-fiduciary communications and activities, consistent with the statutory text and purpose.

Except for minor clarifying changes, paragraph (d)'s description of the scope of the investment advice fiduciary duty, and paragraph (e) regarding the mere execution of a securities transaction at the direction of a plan or IRA owner, remained mostly unchanged from the 1975 regulation. Paragraph (f) also remains unchanged from the two prior proposals and articulates the application of the final rule to the parallel definitions in the prohibited transaction provisions of Code section 4975. Paragraph (g) includes definitions. Paragraph (h) describes the effective and applicability dates associated with the final rule, and paragraph (i) includes an express provision acknowledging the savings clause in ERISA section 514(b)(2)(A) for state insurance, banking, or securities laws.

In the Department's view, this structure is faithful to the remedial purpose of the statute, but avoids burdening activities that do not implicate relationships of trust.

As noted elsewhere, in addition to the final rule in this Notice, the Department is simultaneously publishing a new Best Interest Contract Exemption and a new Exemption for Principal Transactions, and revising other exemptions from the prohibited transaction rules of ERISA and the Code.

C. Benefit-Cost Assessment

Tax-preferred retirement savings, in the form of private-sector, employer-sponsored retirement plans, such as 401(k) plans, and IRAs, are critical to the retirement security of most U.S. workers. Investment professionals play an important role in guiding their investment decisions. However, these professional advisers often are compensated in ways that create conflicts of interest, which can bias the investment advice that some render and erode plan and IRA investment results.

Since the Department issued its 1975 rule, the retirement savings market has changed profoundly. Individuals, rather than large employers, are increasingly responsible for their investment decisions as IRAs and 401(k)-type defined contribution plans have supplanted defined benefit pensions as the primary means of providing retirement security. Financial products are increasingly varied and complex. Retail investors now confront myriad choices of how and where to invest, many of which did not exist or were uncommon in 1975. These include, for example, market-tracking, passively managed and so-called ''target-date'' mutual funds; exchange traded funds (ETFs) (which may be leveraged to multiply market exposure); hedge funds; private equity funds; real estate investment trusts (both traded and non-traded); various structured debt instruments; insurance products that offer menus of direct or formulaic market exposures and guarantees from which consumers can choose; and an extensive array of derivatives and other alternative investments. These choices vary widely with respect to return potential, risk characteristics, liquidity, degree of diversification, contractual guarantees and/or restrictions, degree of transparency, regulatory oversight, and available consumer protections. Many of these products are marketed directly to retail investors via email, Web site pop-ups, mail, and telephone. All of this creates the opportunity for retail investors to construct and pursue financial strategies closely tailored to their unique circumstances—but also sows confusion and increases the potential for very costly mistakes.

Plan participants and IRA owners often lack investment expertise and must rely on experts—but are unable to assess the quality of the expert's advice or guard against conflicts of interest. Most have no idea how advisers are compensated for selling them products. Many are bewildered by complex choices that require substantial financial expertise and welcome advice that appears to be free, without knowing that the adviser is compensated through indirect third-party payments creating conflicts of interest or that opaque fees over the life of the investment will reduce their returns. The consequences are growing as baby boomers retire and move money from plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs, where both good and bad investment choices are more numerous and much advice is conflicted. These rollovers are expected to approach $2.4 trillion cumulatively from 2016 through 2020.[7] Because advice on rollovers is usually one-time and not ''on a regular basis,'' it is often not covered by the 1975 standard, even though rollovers commonly involve the most important financial decisions that investors make in their lifetime. An ERISA plan investor who rolls her retirement savings into an IRA could lose 6 to 12 and possibly as much as 23 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial adviser.[8] Timely regulatory action to redress advisers' conflicts is warranted to avert such losses.

In the retail IRA marketplace, growing consumer demand for personalized advice, together with competition from online discount brokerage firms, has pushed brokers to offer more comprehensive guidance services rather than just transaction support. Unfortunately, their traditional compensation sources—such as brokerage commissions, revenue shared by mutual funds and funds' asset managers, and mark-ups on bonds sold from their own inventory—can introduce acute conflicts of interest. What is presented to an IRA owner as trusted advice is often paid for by a financial product vendor in the form of a sales commission or shelf-space fee, without adequate counter-balancing consumer protections to ensure that the advice is in the investor's best interest.

[7] Cerulli Associates, ''Retirement Markets 2015.''

[8] For example, an ERISA plan investor who rolls $200,000 into an IRA, earns a 6 percent nominal rate of return with 2.3 percent inflation, and aims to spend down her savings in 30 years, would be able to consume $11,034 per year for the 30-year period. A similar investor whose assets underperform by 0.5, 1, or 2 percentage points per year would only be able to consume $10,359, $9,705, or $8,466, respectively, in each of the 30 years. The 0.5 and 1 percentage point figures represent estimates of the underperformance of retail mutual funds sold by potentially conflicted brokers. These figures are based on a large body of literature cited in the 2015 NPRM Regulatory Impact Analysis, comments on the 2015 NPRM Regulatory Impact Analysis, and testimony at the DOL hearing on conflicts of interest in investment advice in August 2015. The 2 percentage point figure illustrates a scenario for an individual where the impact of conflicts of interest is more severe than average. For details, see U.S. Department of Labor, Fiduciary Investment Advice Regulatory Impact Analysis, (2016), Section 3.2.4 at *www.dol.gov/ebsa.*