

## Publications

## DOL Final Fiduciary Rule Released

## ATTORNEYS &amp; PROFESSIONALS

**Jon Breyfogle**[jbreyfogle@groom.com](mailto:jbreyfogle@groom.com)

202-861-6641

**Jennifer Eller**[jeller@groom.com](mailto:jeller@groom.com)

202-861-6604

**Michael Kreps**[mkreps@groom.com](mailto:mkreps@groom.com)

202-861-5415

**Jason Lee**[jlee@groom.com](mailto:jlee@groom.com)

202-861-6649

**David Levine**[dlevine@groom.com](mailto:dlevine@groom.com)

202-861-5436

**Thomas Roberts**[troberts@groom.com](mailto:troberts@groom.com)

202-861-6616

**George Sepsakos**[gsepsakos@groom.com](mailto:gsepsakos@groom.com)

202-861-0182

**Kevin L. Walsh**[kwash@groom.com](mailto:kwash@groom.com)

202-861-6645

**Brigen Winters**[bwinters@groom.com](mailto:bwinters@groom.com)

202-861-6618

## PUBLISHED

04/24/2024

## SOURCE

Groom Publication

On April 23, 2024, the Department of Labor (“DOL”) released its new fiduciary investment advice definition in a package titled the “Retirement Security Rule” (the “2024 Package”). The 2024 Package is made up of four different components and represents a continuation of DOL’s efforts to expand the types of interactions between retirement savers and financial professionals that are subject to ERISA’s rules. In 2016, DOL issued a regulatory package with similar aims which was vacated by the U.S. Court of Appeals for the Fifth Circuit.

As of now, the 2024 Package is scheduled to take effect September 23, 2024. On that date, the revised definition will take effect as will the changes to all of the exemptions except for PTE 2020-02 and PTE 84-24. For PTEs 2020-02 and 84-24, there will be an additional one year transition period where exemptive relief will require a written acknowledgement of fiduciary status and compliance with impartial conduct standards. We anticipate litigation challenging the 2024 Package and that DOL will receive requests to delay its implementation.

The four components of the 2024 Package are:

- A [regulation](#) re-defining who is a “fiduciary” by reason of providing investment advice to a plan, including an IRA, under 29 CFR 2510.3-21;
- Amendments to [Prohibited Transaction Exemption 2020-02](#) (“PTE 2020-02”), which provides exemptive relief for eligible investment advice fiduciaries, if certain conditions are met;
- Amendments to [PTE 84-24](#), currently the primary source of prohibited transaction exemptive relief for the sale of insurance and annuity products to ERISA plans and IRAs; and

- Amendments to [PTEs 77-4, 75-1, 80-83, 83-1 and 86-128](#) that would eliminate the ability of investment advice fiduciaries to rely on the exemptions and would make other changes to PTEs 75-1 and 86-128.

Below, we have highlighted a few key provisions of the 2024 Package. We will be sending more detailed analysis early next week. In addition, we will be hosting a webinar on May 1, 2024 at 3:00 pm ET. For the latest information and for redlines, please visit our hub: [www.groom.com/resource-hub/investment-advice/](http://www.groom.com/resource-hub/investment-advice/)

## 2024 Definition:

A recommendation provider is a fiduciary if:

- They make a recommendation of any securities transaction or other investment transaction or investment strategy,
- The recommendation provider receives a fee, and
- Either:
  - The recommender provides professional investment recommendations to investors on a regular basis as part of their business, and
  - Circumstances indicate that the recommendation
    - Is based on a review of the retirement investors' individual needs or individual circumstances;
    - Reflects the application of the recommender's professional or expert judgment; and
    - May be relied upon by the retirement investor as intended to advance the retirement investor's best interest.
- Or:
  - The recommender represents or acknowledges that they are acting as an ERISA fiduciary with respect to a recommendation.

The text of the 2024 definition includes a clarifying provision describing certain communications that do not give rise to the provision of fiduciary investment advice as follows:

- A salesperson's recommendation of a product when the salesperson does not represent or acknowledge fiduciary status and where the circumstances would not cause a reasonable person to believe that the salesperson's recommendation is based upon the individual's circumstances or that it may be relied upon as advancing his or her best interests.
- Investment education or providing investment information is not advice.
- Disclaimers are still not controlling to the extent they are inconsistent with other oral or written communications, marketing materials, other laws, or interactions.

"Recommendations" include:

- Advising on the 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;
- Advising on 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
- Recommending 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.

"Retirement Investor" includes

- Plans, plan participants, beneficiaries, IRAs, IRA owners and beneficiaries, and plan fiduciaries with discretionary authority.
- It does not include ERISA fiduciaries who themselves only provide investment advice.

## Reaction:

- The final definition is substantially broader than the 1975 rule, however, it is significantly narrower than DOL's 2023 proposal (the "Proposal").
- As an example, DOL has recognized that a variety of sales activity does not give rise to fiduciary status. This is clearest in the way the final definition excludes communications with advice fiduciaries. This opens up a range of possibilities for interactions amongst sophisticated parties to remain non-fiduciary in nature in a way that may not have been possible under the Proposal.
- In the coming days, we will continue to analyze the full scope of the revised definition.

## PTE 2020-02:

PTE 2020-02's structure remains largely consistent with what was adopted in 2020. There are a handful of significant changes. The amendments:

- Adopt terminology that is more in line with SEC's Regulation Best Interest such as a "Care Obligation" and "Loyalty Obligation" rather than "best interest standard" though the substance is not greatly changed. DOL has described these standards as, "consistent with the requirements of the SEC's Regulation Best Interest and the fiduciary obligations of investment advisors under the Advisers Act."
- Permit more flexibility on the timing of the provision of required disclosures to allow distribution at the time the Financial Institution becomes entitled to compensation as a result of the recommendation.
- Prohibit conditional fiduciary acknowledgements.
- Allow pooled plan and robo-adviser providers to use PTE 2020-02.
- Broaden the disqualification provisions to include affiliate convictions and foreign convictions.
- Require reporting non-exempt prohibited transactions to the IRS and the payment of any
- excise taxes.
- Expressly require the application of the Care Obligation and Loyalty Obligation to account type recommendations
- Allow non-bank custodians for HSAs to utilize the exemption.

## Reaction:

- PTE 2020-02 was made more restrictive; however, it was not modified as much as had been proposed.
- While most of the changes added burdens, *e.g.*, expanded disqualification provisions, DOL did respond to some industry requests for more flexibility *e.g.*, timing of disclosures.
- The disqualification provisions are much more in line with QPAM and could result in the same need for individual 2020-02 exemptions.
- The new IRS reporting and excise tax payment provisions may be a cause for concern for those who are already using PTE 2020-02. Excise taxes are a key enforcement mechanism.

## PTE 84-24:

Consistent with the DOL's 2023 amendment proposal, the final PTE 84-24 amendment considerably narrows the community of insurance professionals eligible for exemptive relief for the receipt of compensation in connection with the recommendation of insurance and annuity products.

- Only “Independent Producers” (defined as persons who are licensed under the laws of a state to sell, solicit, or negotiate insurance contracts, including annuities, and that sell to Retirement Investors products of multiple unaffiliated insurance companies but are not an employees of an insurance company) are covered, and
- Only recommendations of non-securities products are covered.
  - As was the case in the Proposal, recommendations of variable annuity and other securities products are ineligible under the final PTE 84-24 amendment, as are recommendations made by insurers and their employees (including career agents that are statutory employees).

In a significant change from the proposal, however, the final PTE 84-24 amendment dramatically expands the types of compensation available to Independent Producers under the exemption.

- The final amendment scraps the 2023 proposal’s narrow allowance for the receipt of “Insurance Commissions” (defined to mean a sales commission paid by the insurance company, and explicitly excluding revenue sharing payments, administrative fees, marketing payments and other amounts paid by parties other than the insurer).
- Instead, the final amendment covers the receipt of “reasonable compensation,” both cash and non-cash from any and all sources, subject to compliance with the exemption’s Impartial Conduct Standards and other applicable conditions.

## Reaction:

By expanding the scope of compensation available under PTE 84-24, DOL has removed one of the primary drawbacks to the use of PTE 84-24 by an Independent Producer relative to PTE 2020-02 under the 2023 proposal.

- For the IMO/FMO community in particular this change is a positive development, as it opens the door for the continuation of value-added support arrangements to the Independent Producer channel.

PTE 84-24 as amended, is significantly altered from its pre-amendment form. But the removal of the Proposal’s limitations on covered compensation would appear, at least initially, to make the final version far more viable than had been proposed.

## Other Exemptions:

The 2024 Package modified PTEs 75-1, 77-4, 77-4, 80-83, and 86-128 so that each no longer provides relief for investment advice arrangements. DOL did not include some of the additional recordkeeping changes that it had included in the Proposal.

## Reaction:

Providers who offer fiduciary advice are now constrained to the use of PTE 2020-02 for any recommendations that would require exemptive relief.