

Publications

DOL Finalizes Changes to Other Exemptions Through Mass Amendment

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On April 25, 2024, the U.S. Department of Labor (“DOL”) published its much-anticipated final regulation on the definition of “fiduciary” under section 3(21)(a)(ii) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). This marks the latest chapter of the DOL’s long-running effort to expand the circumstances under which a person is considered an investment advice fiduciary for purposes of ERISA and the parallel provisions of the Internal Revenue Code of 1986, as amended (the “Code”), and to change the landscape of prohibited transaction exemptions available to those fiduciaries.

The package of materials published by DOL includes:

- A final regulation re-defining who is a “fiduciary” by reason of providing investment advice to a plan or an IRA (the “2024 Final Rule”);
- Final amendments to Prohibited Transaction Exemption 2020-02 (“PTE 2020-02”), which DOL intends to be the primary source of exemptive relief for eligible investment advice fiduciaries going forward;
- Final amendments to PTE 84-24, providing a narrow alternative to PTE 2020-02 for recommendations of non-securities annuity and insurance products by Independent Producers; and
- Final amendments to PTEs 77-4, 75-1, 80-83, 83-1, and 86-128 (the “Mass Amendment”) that eliminate the availability of the exemption for investment advice fiduciaries and makes other changes to PTEs 75-1 and 86-128.

Groom Law Group prepared summaries of each of these proposals, including our initial observations on their impact and scope. We have created similar materials for the final package.

This client alert provides an overview of the amendments to PTEs 77-4, 75-1, 80-83, and 86-128. Those currently relying on these exemptions when providing investment advice will require significant changes to compliance structures. All of the summaries are available on Groom’s [investment advice resource hub](#) and are linked here: [DOL](#)

I. Consolidation of Exemptions for Investment Advice

The package consolidates the exemptions available for investment advice to just PTE 2020-02 and PTE 84-24. DOL explains that the consolidation is necessary because “[R]etirement investors will be best served by a uniform protective standard focused on the Impartial Conduct Standards, and associated policies and procedures.” Moreover, DOL explained that in its judgment, “there is no reason in law or policy to deprive Retirement Investors who receive advice that was formerly covered by the exemptions affected by these Mass Amendment of the protections now afforded to all Retirement Investors under PTE 84-24 and PTE 2020-02.”

To effectuate this consolidation, DOL amended PTEs 77-4, 75-1, Parts III and IV, 80-83, 83-1, and 86-128 to specifically state that they are not available for “the receipt of compensation as a result of the provision of investment advice.” Thus, those relying on these exemptions to provide advice and receive a fee will require a different compliance apparatus. This approach is different from what DOL took in 2016, where DOL attached the impartial conduct standards to PTEs 75-1, Parts III and IV, 77-4, 80-83, 83-1, and 86-128. It is also a different approach from the Proposal where DOL categorically disallowed investment advice fiduciaries from relying on these exemptions. Nevertheless, the import of the changes remains the same and requires that fiduciaries rely on a separate exemption to receive compensation for their advice under PTE 2020-02 or PTE 84-24.

These changes will change how certain programs currently relying on these exemptions comply with the law going forward. For instance, programs that rely on PTE 77-4 when providing advice would be required to consider a different compliance framework. Options might include eliminating the fee conflict through an offsetting approach or relying on PTE 2020-02. Moreover, those relying on PTE 77-4 within discretionary management structure may be forced to rely on PTE 2020-02 when recommending that retirement investors participate in the program and then rely on PTE 77-4 when managing the assets.

II. Additional Changes to Exemptions

The Mass Amendment made some additional changes to PTE 75-1 and PTE 86-128, although those changes were not as wide ranging as the changes that DOL included within the Proposal. These changes are described below.

A. PTE 75-1

PTE 75-1 provides relief for various transactions between plans and IRAs and broker-dealers, reporting dealers, and banks (e.g., agency transactions and services, purchases/sales of securities, and certain mutual fund purchases and extensions of credit).

DOL notes that it intends to amend PTE 75-1 to “provide certainty to the securities industry over the nature and extent to which ordinary and customary transactions between broker-dealers and plans or IRAs would be subject to ERISA’s prohibited transaction rules.” Unlike the Proposal, DOL did not eliminate PTE 75-1 Part I(b),(c) and Part II(2) which have been relied upon by broker dealers for years.

However, the Mass Amendment amends Part V of the exemption and now permits fiduciaries to receive compensation when they extend credit to plans and IRAs to avoid a failed securities transaction. The Mass Amendment removed the requirement from the Proposal that the fiduciary did not cause the failed security transaction.

The Mass Amendment also incorporates the 2016 rulemaking’s definition of “IRA” as “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.”

B. PTE 86-128

PTE 86-128 generally provides relief for certain fiduciaries to receive compensation for conducting securities transactions in an agency capacity on behalf of a plan or IRA, and also provides relief for certain agency cross transactions.

The Mass Amendment makes certain changes not related to the provision of investment advice. In this regard, the Mass Amendment makes certain changes that would provide that persons do not have to comply with certain conditions of the exemption where they return or credit profits earned in connection with a covered transaction. Thus, DOL amends Section IV(b) of the exemption to clarify that Sections III(a), III(h) and III(i) of the exemption “do not apply in any case where the person engaging in the covered transaction

returns or credits to the plan or IRA all profits earned by that person in connection with the securities transaction associated with the covered transaction.”

Moreover, DOL amended Section III(a) of the exemption to clarify that discretionary trustees could utilize the recapture of profits exemption under Section IV(d) of PTE 86-128. DOL described that these changes were made because prior amendments may have inadvertently caused confusion on “whether discretionary trustees were permitted to rely on the ‘recapture of profits’ provision.”

Unlike the Proposal, the Mass Amendment does not carry through changes that would have eliminated the exclusion from certain provisions for transactions engaged on behalf of IRAs. However, DOL did say that it may revisit the scope of PTE 86-128 relief at a later time.