

Publications

DOL Finalizes PTE 84-24 Amendments

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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 make 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 final amendments to PTE 84-24. Summaries of other portions of the package are available on Groom’s [investment advice resource hub](#) and are linked here: [DOL Amends Fiduciary Advice Definition Regulation](#); [DOL Finalizes PTE 2020-02 Amendments](#); [DOL Finalizes Changes to Other Exemptions Through Mass Amendment](#)

Under the 2024 Final Rule, insurance producers and other persons who recommend annuity and insurance products in transactions involving ERISA plans and IRAs are generally categorized as advice fiduciaries. These investment advice fiduciaries require relief from the prohibited transaction restrictions of ERISA and/or the Code to cover their receipt of commissions and other third-party paid compensation. Relief under PTE 84-24 is available to “Independent Producers” with respect to fiduciary recommendations of annuities and other insurance products that are not “securities” under Federal securities laws.

I. PTE 84-24 History and Background

Originally granted as PTE 77-9 and subsequently re-numbered by amendment, PTE 84-24 has historically provided broad-based exemptive relief for transactions involving the sale of insurance and annuities to ERISA plans and IRAs. The scope of the exemption includes section 406(a) relief for various party-in-interest transactions, including (i) the “effecting” of a plan’s purchase of an annuity by an party in interest insurance agent, broker, or pension consultant; (ii) the plan’s purchase of an annuity from a party in interest insurance company; and (iii) the purchase of an annuity contract from an insurance company that sponsors a master or prototype plan. Prior to the 2024 final amendments, the exemption was also available to cover the receipt of compensation by an insurance agent, broker, or pension consultant, including an insurance company employee, in connection with sales of all annuity products from the restrictions under section 406(b) prohibiting fiduciary self-dealing and the receipt of third-party compensation. PTE 84-24 included parallel relief for certain transactions involving recommendations of proprietary mutual funds.

Under the DOL’s 1975 “five part test” for determining fiduciary investment advice (which is replaced by the 2024 Final Rule), many insurance producers and companies opted to rely on PTE 84-24 under a “belt and suspenders” approach to prohibited transaction compliance. Without acknowledging that the five part test for fiduciary status had necessarily been met, insurance companies and producers that chose to comply with the pre-2024 amendment version of the exemption’s relatively straightforward compensation disclosure conditions, could claim relief under the exemption if they were ultimately determined to have functioned as fiduciary investment advisers when recommending annuities to plans.

II. Key Changes

DOL’s final PTE 84-24 amendment leaves the section 406(a) relief provisions in place and largely unchanged with respect to any transactions that do not involve provision of fiduciary investment advice. With respect to those transactions where fiduciary advice is involved, the final amendments transform the existing relief framework in the following ways –

- Relief for the receipt of compensation in connection with proprietary mutual fund recommendations is no longer available (with the result that PTE 2020-02 must generally be relied upon for such transactions);
- Similarly, relief is no longer available for fiduciary recommendations of annuity or insurance products by insurance companies or their employees (including “career agent” statutory employees of the recommended insurance company);
- Nor is any relief available for recommendations of variable annuities and other insurance products that are securities; and
- Relief for fiduciary recommendations of non-securities annuity and insurance products (generally, fixed and fixed index products) by Independent Producers (defined as persons or entities licensed to sell, solicit, or negotiate insurance contracts of multiple unaffiliated insurance companies and who are not insurance company employees, including Code section 3121 statutory employees) is available under the PTE 84-24 final amendments subject to compliance by Independent Producers and insurance companies with separate sets of conditions.

Importantly, the PTE 84-24 final amendments broadly cover all compensation types and sources, consistent with the approach taken under PTE 2020-02. The final amendments completely abandon the restrictive approach taken under DOL’s amendment proposal that would have limited covered compensation to “Insurance Sales Commissions” (defined as commissions paid by an insurance company or an affiliate for recommending and effecting the sale of a product, including renewal and trailing fees, but excluding “revenue sharing payments, administrative fees or marketing payments and payments from any party other than the insurance company or its affiliate”). Similarly, DOL’s preamble commentary indicates that it has retreated from statements made in the proposal and in connection with its 2016 rulemaking effort that compensation covered by PTE 84-24 is limited to so-called “simple commissions.”

Unlike PTE 2020-02, which requires that a Financial Institution acknowledge its fiduciary status with respect to each covered recommendation made by an Investment Professional, the final PTE 84-24 amendment does *not* require a fiduciary acknowledgment on the part of the insurance company product “manufacturer” with respect to an Independent Producer’s recommendations of its products. As discussed below, the final amendments include separate sets of relief conditions applicable to Independent Producers and

Insurers, respectively. Those conditions, along with the final amendments' disqualifying provisions which may result in the loss of the exemption for a period of ten years, are summarized below.

III. Relief Conditions Applicable to Independent Producers

The new conditions applicable to fiduciary recommendations by Independent Producers are listed in Sections VII(a) and (b) of PTE 84-24 as amended, which are summarized below.

A. Impartial Conduct Standards

Care and Loyalty Obligations. Independent Producers are required to adhere to Impartial Conduct Standards that generally parallel those of PTE 2020-02 when recommending annuities. These include (i) a Care Obligation (*i.e.*, advice that reflects 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 a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor); and (ii) a Loyalty Obligation (*i.e.*, the advice must not place the financial or other interests of the Independent Producer, Insurer, Affiliate, Related Entity or other party ahead of or otherwise subordinate the Retirement Investor's interests). When choosing among different products that he or she is authorized to sell, an Independent Producer may not recommend a product that is worse for the Retirement Investor, but better or more profitable for the Independent Producer or the Insurer.

Reasonable Compensation. The Independent Producer may not receive compensation, directly or indirectly, in connection with a recommended transaction that exceeds "reasonable compensation" within the meaning of ERISA section 408(b)(2).

No Materially Misleading Statements. The Independent Producer's statements to the Retirement Investor (whether written or oral) concerning the recommendation and other relevant matters must not be materially misleading at the time they are made.

B. Disclosures

For each recommended transaction, the Independent Producer must satisfy a pre-transaction disclosure condition by furnishing the following five items to the Retirement Investor by the later of the date the recommendation is made or the date that compensation is payable –

1. *Fiduciary Acknowledgment* — a written acknowledgment that the Independent Producer is providing fiduciary investment advice to the Retirement Investor under ERISA and the Code or both with respect to the recommendation;
2. *Written Statement of the Care and Loyalty Obligations* — the preamble to the proposed exemption contains a sample statement that may be used for this purpose;
3. *Statement of Material Facts, Including Cash Compensation (if Requested) and Product Shelf Available for Recommendation* — a statement of the material facts concerning the scope and terms of the Independent Producer's relationship with the Retirement Investor, including (i) the material fees and costs applicable to the investor's transactions, holdings and accounts; (ii) a notice of the investor's right to request additional information concerning cash compensation (if requested by the Retirement Investor, a reasonable estimate of the Independent Producer's cash compensation which may be stated as a range of amounts or percentages, and a statement describing whether the compensation will be provided as a one time payment or multiple payments, and their amounts and frequency, must be provided); and (iii) a description of the type and scope of services the Independent Producer will provide, including any material limitations on the recommendations that may be made, the products that the Independent Producer is licensed and authorized to sell, any limits on the range of recommended insurance products, and identifying the specific insurers and insurance products available for recommendation to the Retirement Investor;
4. *Conflicts of Interest* — a statement of all material conflicts associated with the recommendation (defined as an interest that might incline an Independent Producer – consciously or unconsciously – to make a recommendation that is not disinterested);
5. *Basis for Recommendation* — prior to the sale the Independent Producer must document the basis for the recommendation and provide copies of that documentation to both the Retirement Investor and the Insurer. If the recommended transaction involves a rollover from an ERISA plan or the investment of assets following their distribution from an ERISA plan, relevant factors include (i) alternatives to a rollover, including leaving assets in the plan; (ii) fees and expenses associated with the

plan versus those of the recommended investment; (iii) whether an employer or other party is bearing some or all of the plan's administrative expenses; and (iv) differing levels of fiduciary protection, services and available investments.

Disclosure errors or omissions made by an Independent Producer acting in good faith and with reasonable diligence do not result in a failure to satisfy the disclosure condition where the correct information is disclosed as soon as practicable and not later than thirty days from the date of discovery or that it reasonably should have been discovered.

IV. Conditions Applicable to Insurers

The new conditions applicable to insurance companies with respect to recommendations of their products by Independent Producers are set forth in Sections VII (c) through (e) of PTE 84-24 as amended, which are summarized below.

A. Policies and Procedures

The Insurer must establish, maintain, and enforce written policies and procedures for the review of each recommended annuity prior to issuance. These procedures must be prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate Conflicts of Interest, including by avoiding the use of quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other similar actions or incentives intended, or that a reasonable person would conclude are likely, to result in recommendations that do not satisfy the Care Obligation or the Loyalty Obligation. The Insurance Company's review of annuity recommendations must be made without regard to the Insurer's own interests. In addition, the Insurer's policies and procedures must include a prudent process for determining whether to authorize an Independent Producer to sell the company's products, to take action to protect Retirement Investors from Independent Producers who fail to adhere to the Impartial Conduct Standards or who are inadequately trained. The process must include reviews of consumer complaints and disciplinary history, and the Insurer must document its process for determining that an Insurance Producer may be relied upon to adhere to the Impartial Conduct Standards. These determinations must be reviewed at least annually as part of the retrospective review process described below. All Insurers must provide their complete policies and procedures to DOL within thirty days of request.

B. Retrospective Review

At least annually, the Insurer is required to conduct a retrospective review of *each Independent Producer* designed to detect and prevent violations of, and achieve compliance with, the conditions of exemption. The review must include a prudent determination as to whether to continue to permit Individual Producers to sell the Insurer's products. Sampling is permissible so long as the sampling methodology is designed to identify potential problems, deficiencies and violations. The results of the review must be provided to each Independent Producer. If any non-exempt prohibited transactions on the part of an Independent Producer have been detected, they are to be identified and the Independent Producer is to be instructed to (i) correct the prohibited transaction; (ii) report the transaction to the IRS on Form 5330; (iii) pay the applicable Code section 4975 excise taxes; and (iv) provide the Insurer with a copy of the filed Form 5330 within 30 days of the date that it is due (taking into account any extensions). The Insurer must produce a report of the retrospective review that is certified by a Senior Executive Officer within six months of the end of the period subject to review.

V. Self-Correction Process

A non-exempt prohibited transaction will not occur due to a violation of an exemption condition if correction is made during the 90 day window following the date that the Insurance Producer learns or reasonably should have learned of the violation. The process requires that either the Independent Producer refund the Retirement Investor's charges or that the Insurance Company rescind the mis-sold annuity. The Independent Producer is required to notify the Insurer of the correction and Insurer receiving notification is under an obligation to identify the violation and correction in its retrospective annual report.

VI. Ineligibility Provisions

Consistent with DOL's amendments to PTE 2020-02, under certain circumstances, an Independent Producer or Insurer may be rendered ineligible for relief for a period of ten years. These circumstances include a series of listed criminal convictions on the part of the Independent Producer, the Insurer (or an entity that is part of the Insurer's Controlled Group). Ineligibility also results where the Independent Producer, Insurer (or Controlled Group member) is determined in a final judgment or court-approved settlement in a case

brought by the DOL, various other federal agencies, or a State insurance regulator or attorney general to have participated in one or more of the following categories of conduct –

- Engaging in a systematic practice of conduct that violates the exemption conditions;
- Intentionally violating the exemption conditions;
- Engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS and pay prohibited transaction taxes (this category is applicable only to Independent Producers); or
- Provided materially misleading information to the relevant agencies in connection with the exemption conditions.

A one year “transition period” is available, at the election of an ineligible Independent Producer or Insurer, upon notice to the DOL. During the transition period, the Independent Producer or Insurer may continue to rely on the exemption.

VII. Effective Date

The final amendments to PTE 84-24 become effective on September 23, 2024. However, the amended provisions do not become fully applicable until one-year later, on September 23, 2025. During the interim “Phase-In Period” Independent Producers may receive compensation in connection with the recommendation of covered annuity and insurance products subject to compliance with a streamlined set of applicable conditions consisting of: (i) adherence to Impartial Conduct Standards; and (ii) providing a written acknowledgement of fiduciary status under ERISA and/or the Code. Both sets of Phase-In-Period conditions attach solely to Independent Producers, with the result that Insurers are not directly subject to any exemption conditions during that one year period. Insurance companies that manufacture fixed annuity and other non-securities products for distribution through the Independent Producer channel may nonetheless wish to re-examine and potentially begin redesigning existing compensation structures to support Independent Producer compliance efforts during the Phase-In Period.