

2015 PROPOSED REVISIONS TO EXISTING PROHIBITED TRANSACTION EXEMPTIONS

CURRENT PROHIBITED TRANSACTION EXEMPTION	PROPOSED REVISION TO CURRENT EXEMPTION	COMMENTS
<p>PTE 77-4: §406(a) and (b) relief for the purchase of mutual fund shares where the fiduciary is affiliated with the fund adviser.</p> <p>(Plans and IRAs)</p>	<p>Adds new condition – if the fiduciary is an advice or discretionary fiduciary with respect to the assets involved in the transaction, it must satisfy “Impartial Conduct Standards.” These standards are:</p> <ol style="list-style-type: none"> (1) The fiduciary acts in the Best Interest of the plan or IRA. (A fiduciary acts in the Best Interest when it “acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary or any other party.”) (2) The fiduciary’s compensation in connection with the transaction must be reasonable in relation to the total services the fiduciary provides to the plan or IRA. (3) The fiduciary’s statements about recommended investments, fees, “material conflicts of interest,” and any other matters relevant to a plan’s or IRA owner’s investment decisions, may not be misleading. <p>For purpose of the Impartial Conduct Standards, “IRA” means “any trust, 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.”</p>	<p>Unlike the new proposed PTEs, the Impartial Conduct Standards do not require that the fiduciary warrant its compliance with applicable law.</p> <p>Under the “Best Interest” standard, “the fiduciary must put the interests of the plan or IRA ahead of its own financial interests or those of any affiliate or other party.”</p> <ul style="list-style-type: none"> • It effectively and intentionally imposes ERISA-like prudence and loyalty standards on IRA fiduciaries as condition of relief. • Failure to disclose a material conflict may be misleading. <p>DOL has failed to address one of the key drawbacks to this exemption – the need for “affirmative” consent to mutual fund fee changes, which is difficult to obtain in the IRA market in particular.</p> <p>Non-discretionary advisers to Retirement Investors as defined in the Best Interest Contract PTE are not precluded from using PTE 77-4 instead, e.g., if fund platform consists of proprietary mutual funds.</p>

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<p>PTE 75-1 Part II</p> <ul style="list-style-type: none"> • <u>Part II(1)</u>: §406(a) relief for principal transactions with broker-dealers or banks. • <u>Part II(2)</u>: §406(b) relief for the purchase of mutual fund shares if the fiduciary is not affiliated with the mutual fund or its underwriter. <p>(Plans and IRAs)</p>	<ul style="list-style-type: none"> • No change to Part II(1) re principal transactions. • Revokes Part II(2) – relief for mutual fund purchases. 	<p>Relief for the purchase of mutual fund shares in a principal transaction (and the receipt of related commissions) is now provided in section I(b) of PTE 86-128.</p>
<p>PTE 86-128: §406(b) relief for a -</p> <ul style="list-style-type: none"> • A fiduciary using its authority to cause a plan to pay a fee for effecting or executing securities transactions to itself or an affiliated broker-dealer; and • A fiduciary acting as an agent in an agency cross transaction and receiving a commission from one or more of the parties. <p>(Plans and IRAs, but IRA conditions are limited)</p>	<p><u>Executing Securities Transactions</u></p> <ul style="list-style-type: none"> • Specific changes applicable to IRAs: <ul style="list-style-type: none"> ○ Revokes relief for IRA fiduciaries providing advice, limiting relief to IRA fiduciaries who have discretionary authority; ○ Applies conditions now applicable to plans to discretionary IRA fiduciaries (e.g., disclosures, authorization and reporting); and ○ Changes the definition of “IRA.” • Adds new condition – if the fiduciary is an advice or discretionary fiduciary with respect to the assets involved in the transaction, it must satisfy “Impartial Conduct Standards.” • Narrows the definition of “commission” - does not include revenue sharing, administrative or marketing fees. • Expands relief for transactions in which fees are paid to “related 	<p>The IRA-related changes are significant in that (1) IRA advice fiduciaries (but not plan fiduciaries) must now rely on the Best Interest Contract PTE for the receipt of commissions for executing securities transactions and (2) the full range of conditions will be imposed on discretionary fiduciaries of IRAs. Many financial institutions find the conditions of the PTE to be onerous in the case of plans and may find them completely unworkable in the IRA market.</p>

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	<p>entities” as well as the fiduciary or its affiliate. A “related entity” is defined as a person in whom the fiduciary may have an interest that could affect its best judgment.</p> <ul style="list-style-type: none"> • Permits discretionary trustees to use the “recapture of profits” provision as an alternative to the section III(h) and (i) conditions. • Adds new recordkeeping requirements for the fiduciary. <p><u>New Mutual Fund Exemption (section I(b))</u></p> <p>Provides §406(a)(1)(D) and 406(b) relief for a plan’s purchase of mutual fund shares from the fiduciary, acting as principal, and for the receipt of a commission by the fiduciary if -</p> <ul style="list-style-type: none"> • The shares are purchased or sold at NAV plus a commission, in accordance with applicable securities laws and regulations, and • Impartial Conduct Standards met. <p>In addition, the following conditions must be satisfied:</p> <ul style="list-style-type: none"> • Fiduciary is a registered broker-dealer; • Is not a principal underwriter for, or affiliated with, such Mutual Fund • Terms are arms’ length; • The fiduciary customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer; • The transactions are not excessive (in amount or frequency), • The fiduciary may not be affiliated with the employer, plan administrator, discretionary trustee (unless other exceptions met) • There is disclosure to and advance authorization by an independent fiduciary; and • The fiduciary provides individual trade confirmations or quarterly reports, and annual reports with turnover ratios. 	<p><u>Mutual Fund PTE:</u> The new mutual fund exemption includes most of the conditions from PTE 75-1, Part II(2) as well as most of the conditions of current 86-128.</p> <p>The current exemption (PTE 75-1) is widely understood in the marketplace as allowing the receipt of indirect compensation (12b-1 fees, shareholder services, revenue share, etc.). The modifications will have a major impact, as they will effectively prevent anyone other than a dealer from receiving any compensation with respect to discretionary sales of third-party mutual funds. In the case of a dealer, the only compensation permitted appears to be old-style sales loads.</p> <p>Accordingly, this change means that – unlike non-discretionary advisers – discretionary managers may not be permitted to be compensated for selling non-proprietary mutual funds.</p>
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<p>PTE 84-24: §406(a)(1)(A)-(D) and 406(b) relief for –</p> <ul style="list-style-type: none"> • The receipt of commissions by an agent, broker or pension consultant in connection with the purchase of an insurance or annuity contract; • The receipt of commissions by a principal underwriter in connection with the purchase of mutual fund shares; • The effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company; and • The purchase of an insurance or annuity contract. <p>(Plans and IRAs)</p>	<ul style="list-style-type: none"> • Revokes relief for advice to IRAs regarding mutual funds and variable annuities (and other annuities that are “securities”). • Adds a new condition – if the agent, broker, pension consultant, insurer or principal underwriter is an advice fiduciary, with respect to the assets involved in the transaction, it must satisfy “Impartial Conduct Standards.” • Narrows the definition of “Insurance Commission” and “Mutual Fund Commission” (does not include revenue sharing, administrative or marketing fees). • Updates the Recordkeeping Requirements. • Revises the definition of “IRA” to include vehicles described in Code section 4975(e)(1)(B)-(F), e.g., a health savings account. 	<p>See Best Interest Contract PTE for:</p> <ul style="list-style-type: none"> • Advice to IRAs re mutual funds and variable annuities (DOL believes that this PTE best protects interests of IRAs re securities products); and • The receipt of non-Commission in connection with advice to participants, to “under 100 participant” plans and to IRAs <p>DOL believes that the Best Interest Contract PTE better addresses the interests of IRAs receiving fiduciary advice because, for example, there is no separate plan fiduciary in the IRA market to review and authorize the transaction.</p> <p>DOL noted that investment advice transactions involving annuity contracts that are treated as securities and transactions involving the purchase of mutual fund shares are best handled under the Best Interest Contract Exemption due to the similarity of these investments, including their distribution channels and disclosure obligations, to other investments covered in the Best Interest Contract Exemption.</p>
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<p>PTE 75-1 Part I:</p> <ul style="list-style-type: none"> • <u>Part I(a)</u>: expired. • <u>Part I(b)</u>: §406 relief for effecting securities transactions by a non-fiduciary party in interest acting as agent. • <u>Part I(c)</u>: §406 relief for the furnishing of non-fiduciary advice re the value of securities or the advisability of investing. <p>(Plans and IRAs)</p>	<p>Revokes Part I(b) - See section 408(b)(2) for these services.</p> <p>Revokes Part I(c) - See section 408(b)(2) for these services.</p>	<p>DOL noted that the conditions of section 408(b)(2) are more appropriate for the provision of non-fiduciary services described in Part I.</p>
<p>PTE 75-1 Part III: §406 relief for the purchase of securities in an underwriting.</p> <p>(Plans and IRAs)</p>	<p>Adds new condition – if the fiduciary is an advice or discretionary fiduciary with respect to the IRA or Plan assets involved in the transaction, it must satisfy “Impartial Conduct Standards.”</p>	<p>The new Impartial Conduct Standards effectively and intentionally imposes ERISA-like prudence and loyalty standards on IRA fiduciaries as condition of relief.</p>
<p>PTE 75-1 Part IV: §406 relief for the purchase of security from a fiduciary market maker.</p> <p>(Plans and IRAs)</p>	<p>Adds new condition – if the fiduciary is an advice or discretionary fiduciary with respect to the assets involved in the transaction, it must satisfy “Impartial Conduct Standards.”</p>	<p>The new Impartial Conduct Standards effectively and intentionally imposes ERISA-like prudence and loyalty standards on IRA fiduciaries as condition of relief.</p>
<p>PTE 75-1 Part V: §406 relief for the extension of credit by a party in</p>	<p>Expands relief to permit a fiduciary to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of</p>	<p>DOL found it unnecessary to add the Impartial Conduct Standards as a condition to the new failed trade exemption</p>

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<p>interest provided it is not an advice or discretionary fiduciary (unless no compensation or interest is received).</p> <p>(Plans and IRAs)</p>	<p>securities if:</p> <ul style="list-style-type: none"> • The fiduciary (or an affiliate) didn't cause the potential failure; • The terms are arms' length; • The plan/IRA receives written disclosure; and • The fiduciary maintains records. 	<p>because the new exemption is already conditioned on the fiduciary's not causing the potential trade failure.</p>
<p>PTE 80-83:</p> <ul style="list-style-type: none"> • §406(a)(1)(A)-(D) relief for the purchase of a security in a public offering when the proceeds may be used by the issuer to retire indebtedness to a party in interest. • §406(a)(1)(A)-(D) and 406(b)(1), (2) relief for the purchase of a security in a public offering when the proceeds may be used by the issuer to retire or reduce indebtedness to the bank fiduciary or an affiliate. <p>(Plans and IRAs)</p>	<p>Adds new condition – if the fiduciary is an advice or discretionary fiduciary with respect to the assets involved in the transaction, it must satisfy “Impartial Conduct Standards.”</p>	<p>The new Impartial Conduct Standards effectively and intentionally imposes ERISA-like prudence and loyalty standards on IRA fiduciaries as condition of relief.</p>
<p>PTE 83-1:</p> <ul style="list-style-type: none"> • §406(a) and 407 relief for the sale of mortgage pool certificates (in the initial issuance of 	<p>Adds new condition – if the fiduciary is an advice or discretionary fiduciary with respect to the assets involved in the mortgage pool certificate transaction, it must satisfy “Impartial Conduct Standards.”</p>	<p>The new Impartial Conduct Standards effectively and intentionally imposes ERISA-like prudence and loyalty standards on IRA fiduciaries as condition of relief.</p>

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<p>certificates).</p> <ul style="list-style-type: none">• §406(a), 406(b) relief for the sale of mortgage pool certificates (in the initial issuance of certificates) by the pool sponsor to the plan where the sponsor, trustee or insurer a fiduciary. <p>(Plans and IRAs)</p>		
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