

2016 AMENDMENTS TO EXISTING PROHIBITED TRANSACTION EXEMPTIONS

CURRENT PROHIBITED TRANSACTION EXEMPTION	AMENDMENTS TO CURRENT EXEMPTION (APPLICABLE AS OF APRIL 10, 2017)	COMMENTS
<p>PTE 77-4: §406(a) and (b) relief for the purchase or sale of mutual fund shares where the mutual fund advisor (or an affiliate) is a fiduciary.</p> <p>(Plans and IRAs)</p>	<p><u>New “Impartial Conduct Standards” Condition</u></p> <ul style="list-style-type: none"> • If the fiduciary is an advice or discretionary fiduciary with respect to the assets involved in the transaction, it must satisfy the following “Impartial Conduct Standards”: <ul style="list-style-type: none"> ○ The fiduciary acts in the “Best Interest” of the Plan or IRA at the time of the transaction. (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 acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, 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.”) ○ Compensation received by the fiduciary in connection with the transaction does not exceed “reasonable compensation” within the meaning of ERISA §408(b)(2) and IRC §4975(d)(2). ○ The fiduciary’s statements about recommended investments, fees and compensation, material conflicts of interest, and any other matters relevant to the plan’s or IRA owner’s investment decisions, are not materially misleading at the time they are made. A “material conflict 	<p><u>Amended: 81 FR 21208 (April 8, 2016)</u></p> <p><u>“Best Interest” Standard</u></p> <ul style="list-style-type: none"> • The “Best Interest” standard is based on longstanding concepts derived from ERISA and the law of trusts. • It effectively and intentionally imposes ERISA-like prudence and loyalty standards on IRA fiduciaries as a condition of relief. Heretofore, IRA fiduciaries have not been subject to such standard, which makes this part of the amendment very significant. • DOL clarified in the final amendment that the “Best Interest” standard applies “at the time of the transaction.” In the preamble to the final exemption, DOL confirmed that “the Best Interest standard is not a hindsight standard, but rather is based on the facts as they existed at the time of the transaction,” and that the standard “does not measure compliance by reference to how investments subsequently performed or turn fiduciaries into guarantors of investment performance...” • In the final amendment, DOL revised the definition of

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	<p>of interest” exists when a fiduciary has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to the plan or IRA owner.</p> <ul style="list-style-type: none"> • For purposes of the Impartial Conduct Standards, “IRA” includes any account or annuity described in IRC §4975(e)(1)(B)-(F), including a health savings account, Archer MSA or Coverdell savings account. 	<p>“Best Interest” to more closely track the duty of prudence provision in ERISA §404. However, DOL retained the controversial “without regard to” language and rejected requests to incorporate FINRA’s “suitability” standard into the definition of “Best Interest.” DOL <u>did</u> confirm in the preamble to the final exemption that it intends that “without regard to” be given the same meaning as the language in ERISA §404 that requires a fiduciary to act “solely in the interest of” participants and beneficiaries.</p> <p><u>“Reasonable Compensation”</u></p> <ul style="list-style-type: none"> • DOL clarified in the final amendment that the “reasonable compensation” standard is the same as the standard set forth in ERISA §408(b)(2) and IRC §4975(d)(2) and the regulations thereunder. In so doing, DOL omitted language from the proposed amendment stating that such compensation must be reasonable “in relation to the total services the fiduciary provides to the plan or IRA.” <p><u>“Misleading Statements”</u></p> <ul style="list-style-type: none"> • In response to comments, DOL included in the final amendment language which clarified that: <ul style="list-style-type: none"> ○ Only a “materially” misleading statement violated the Impartial Conduct Standards. ○ Whether a statement is materially misleading is to be determined as of the time the statement is made.
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		<ul style="list-style-type: none"> ○ A conflict of interest would be considered “material” only if a “reasonable person” would conclude that the conflict could affect the exercise of a fiduciary’s best judgment. ● DOL also deleted language included in the proposed amendment that stated that a “failure to disclose a material conflict of interest...is deemed to be a misleading statement.”
<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>	<p>Revokes Part II(2).</p> <p>Revises the recordkeeping provisions of Part II to shift the responsibility for maintaining records of covered transactions from the Plan or IRA to the broker-dealer, reporting dealer, or bank engaging in the transactions. The amendments also explain the consequences of failure to maintain or provide such records for examination, identify individuals who have a right to examine such records, and impose conditions on such examinations.</p>	<p><u>Amended: 81 FR 21181 (April 8, 2016)</u></p> <p>§406(b) relief for the receipt of commissions in connection with the purchase of mutual fund shares is now provided in section I(b) of PTE 86-128. That provision, however, does not apply to transactions involving IRA assets.</p> <p>For IRA transactions, §406(b) relief is provided under the BIC Exemption, but such relief is available only for advice fiduciaries.</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 to itself or an 	<p><u>Securities Transactions Exemption (section I(a))</u></p> <ul style="list-style-type: none"> ● Specific changes applicable to IRAs: <ul style="list-style-type: none"> ○ Revokes relief for transactions involving an IRA where the 	<p><u>Amended: 81 FR 21181 (April 8, 2016)</u></p> <p><u>Securities Transactions Exemption</u></p>

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<p>affiliated broker-dealer for effecting or executing securities transactions; and</p> <ul style="list-style-type: none"> • 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>fiduciary engaging in the transaction is an advice fiduciary, thereby limiting relief to IRA fiduciaries who have discretionary authority.</p> <ul style="list-style-type: none"> ○ Extends conditions currently applicable only to transactions involving Plans (e.g., written authorization, disclosure and reporting) to transactions involving IRAs. Written authorization requirement may be satisfied with respect to an existing IRA customer through a “negative consent” process. ○ “IRA” defined as any account or annuity described in IRC §4975(e)(1)(B)-(F), including a health savings account, Archer MSA or Coverdell savings account. <ul style="list-style-type: none"> • Adds new condition – if the fiduciary is an advice or discretionary fiduciary with respect to the assets involved in the transaction, it must satisfy the Impartial Conduct Standards. • Adds a new definition – “Commission” – that limits the types of fees that may be received under the PTE to brokerage commissions and sales loads. All other payments, including 12b-1 fees, revenue sharing, administrative and marketing fees, are excluded from the definition. • Expands relief for transactions in which Commissions are paid to “Related 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. • 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. The amendments also explain the consequences of failure to maintain or provide such records for examination, identify individuals who have a right to examine such records, and impose conditions on such examinations. 	<ul style="list-style-type: none"> • The IRA-related changes are significant in that (1) IRA advice fiduciaries must now rely on the BIC Exemption 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 challenging in the case of Plans and may find them even more so in the IRA market. • In the preamble to the final amendment, the DOL noted that although advice fiduciaries to Plans may continue to rely on the exemption, PTE 86-128 “will not provide relief for a recommended rollover from an ERISA plan to an IRA, where the resulting compensation is a Commission on the IRA investments.” The BIC Exemption should be available for these recommendations. • The new and more narrow definition of “Commission” means that this exemption is clearly no longer available for the receipt of revenue sharing in connection with mutual fund recommendations or purchases by Plans or IRAs. <p><u>Mutual Fund Transactions Exemption</u></p> <ul style="list-style-type: none"> • The new exemption includes most of the conditions from the now-revoked PTE 75-1, Part II(2) as well as most of the conditions imposed on transactions covered by section 1(a) of PTE 86-
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	<p><u>New Mutual Fund Transactions Exemption (section I(b))</u></p> <ul style="list-style-type: none"> • Provides §406(a)(1)(A), 406(a)(1)(D) and 406(b) relief for a fiduciary using its authority to cause a Plan to purchase of mutual fund shares from the fiduciary, and for the receipt of a Commission by the fiduciary, acting in its capacity as a broker-dealer, if - <ul style="list-style-type: none"> ○ The shares are purchased at NAV plus a commission, in accordance with applicable securities laws and regulations. ○ The fiduciary satisfies the Impartial Conduct Standards. • In addition, the following conditions must be satisfied: <ul style="list-style-type: none"> ○ The fiduciary is a registered broker-dealer that customarily purchases and sells securities for its own account in the ordinary course of its business. ○ The fiduciary is not a principal underwriter for, or affiliated with, the mutual fund. ○ The fiduciary is not affiliated with the sponsor, plan administration or (unless other exceptions are met) discretionary trustee ○ The transactions are not excessive (in amount or frequency) and are entered into on arm’s-length terms. ○ Advance authorization, disclosure, reporting and recordkeeping requirements are met. Written authorization requirement may be satisfied with respect to an existing non-ERISA Plan customer (<i>e.g.</i>, a Keogh plan) through a “negative consent” process. • The exemption is not available for transactions involving IRAs. 	<p>128.</p> <ul style="list-style-type: none"> • PTE 75-1, Part II(2) was widely understood by some as allowing a fiduciary to receive indirect compensation (12b-1 fees, revenue sharing, shareholder servicing fees, etc.) in connection with unaffiliated mutual fund transactions. The narrow definition of “Commission” under the new exemption will have a major impact, as it will effectively prevent fiduciaries relying on the new exemption from receiving any compensation with respect to such transactions other than brokerage commissions and sales loads. • In the final amendment, DOL included language limiting the mutual fund exemption to transactions involving Plans. • Although the BIC Exemption permits IRA advice fiduciaries to receive commissions and other compensation from third parties in connection with investments in shares of unaffiliated mutual funds, no comparable relief is available for discretionary fiduciaries. • The final amendment eliminated a reference in the proposed amendment to the fiduciary acting as “principal” but retained the requirement that the mutual fund shares be purchased from the fiduciary. DOL noted that this change was made in response to comments that “riskless principal”
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		<p>transactions may be documented as agency trades. Although agency trades would be covered by section I(a) of PTE 86-128, DOL noted that Section I(b) provided broader relief in that it covered the receipt of commissions from both the Plan and the mutual fund.</p>
<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 mutual fund shares; and • The purchase of an insurance or annuity contract. 	<p><u>Covered Transactions</u></p> <ul style="list-style-type: none"> • DOL <i>revoked</i> the relief previously provided for - <ul style="list-style-type: none"> ○ The receipt of commissions in connection the purchase of annuities other than “Fixed Rate Annuity Contracts” (<i>i.e.</i>, variable annuities and indexed annuities) with assets of both Plans and IRAs. (See DOL’s Appendix describing these annuities.) ○ The purchase of mutual fund shares with assets of an IRA, including the receipt of related commissions. • Therefore, the PTE as amended now covers, including in the context of a rollover or distribution, only - <ul style="list-style-type: none"> ○ The receipt of “Insurance Commissions” in connection with the purchase of a Fixed Rate Annuity Contract with assets of an Plan or IRA. ○ The receipt of “Mutual Fund Commissions” in connection with the purchase of mutual fund shares with assets of a Plan. ○ The effecting of a transaction for the purchase of Fixed Rate Annuity Contracts or other insurance contracts with assets of a Plan or IRA, or of mutual fund shares with assets of a Plan. ○ The purchase of Fixed Rate Annuity Contracts and other insurance contracts with assets of a Plan or IRA. • “Fixed Rate Annuity Contracts” generally include immediate annuity 	<p><u>Amended: 81 FR 21147 (April 8, 2016)</u></p> <p>As amended, PTE 84-24 is intended to provide “a more streamlined exemption for less complex annuity products that provide guaranteed lifetime income.” According to DOL, the BIC Exemption is better suited for more complex and less predictable variable annuities (and for sales of mutual fund shares to IRAs).</p> <p><u>Major Changes Between the Proposed and Final Amendment</u></p> <ul style="list-style-type: none"> • Revoked exemption for variable annuity sales to Plans and IRAs • Extended relief to rollover context • Simplified “reasonable compensation” condition • Added relief for insurer’s receipt of consideration • Permits fiduciary adviser to be related to IRA owner • Requires that the disclosure describe commissions in dollars, if feasible • Requires that insurance disclosures be repeated every year (rather than every 3 years)

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<p>(Plans and IRAs)</p>	<p>contracts and deferred annuity contracts issued by an insurance company the benefits of which do not vary, in whole or in part, based on the investment experience of a separate account or accounts maintained by the insurance company or the investment experience of an index or investment model.</p> <ul style="list-style-type: none"> • “IRA” includes any account or annuity described in IRC §4975(e)(1)(B)-(F), including a health savings account, Archer MSA or Coverdell savings account. <p><u>Exempt Payments</u></p> <ul style="list-style-type: none"> • DOL added new definitions -- “Insurance Commission” and “Mutual Fund Commission” – that limit the types of payments agents, brokers, pension consultants and principal underwriters can receive under the PTE. • These terms are defined narrowly and do not include revenue sharing, administrative or marketing fees (even, apparently, those received by insurers rather than advisers). <ul style="list-style-type: none"> ○ “Insurance Commission” does include “related employee benefits” (but not salaries, bonuses of employees) and “gross dealer concessions” and “overrides.” • Commissions may be paid indirectly by insurers, e.g., through third party marketing organizations. • Relief has been explicitly provided for an insurer’s receipt of consideration/compensation in connection with the sale of a Fixed Rate Annuity Contract or other insurance contract. <p><u>New “Impartial Conduct Standards” Condition</u></p> <ul style="list-style-type: none"> • Recommendations by agents, brokers, pension consultants, insurers and principal underwriters that are advice fiduciaries must satisfy the 	<ul style="list-style-type: none"> • Permits covered “Insurance Commission” to include payments from parties other than insurer <p><u>Additional Comments</u></p> <ul style="list-style-type: none"> • <u>Relief for “effecting” purchases</u>: DOL appears to narrowly interpret the existing (and retained) exemption for “effecting” purchases of insurance contracts and mutual fund shares to cover only the related provision of services by a party in interest. • <u>Proprietary products</u>: In the preamble, DOL confirmed that, notwithstanding the Impartial Conduct Standards, this PTE is available for the sale of proprietary products and the receipt of related commissions. • <u>Reasonable compensation</u>: In the preamble, DOL provides some guidance for applying this condition to Fixed Rate Annuity Contracts or to products that blend services and an annuity guarantee. Notably, spread is not considered compensation for this purpose.
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	<p>Impartial Conduct Standards.</p> <ul style="list-style-type: none"> • While not required as a condition for relief, BIC-like “policies and procedures” provide “useful guidance” for recommendations under PTE 84-24. <p><u>Disclosure to and Consent of Plan Fiduciary or IRA Owner</u></p> <ul style="list-style-type: none"> • Insurance disclosures must be repeated every year and still require affirmative (not negative) consent of the Plan fiduciary or IRA owner. • Disclosed commissions should be expressed as a dollar figure, if feasible, and must include gross dealer concessions and overrides. • “Description” of fees becomes a more specific “statement.” • IRA owner providing consent need not be independent of the fiduciary adviser (e.g., agents may recommend Fixed Rate Annuity Contracts to family members.) <p><u>Recordkeeping Requirements:</u> These are streamlined to simply require that the agent, broker, pension consultant, insurer or principal underwriter engaging in the covered transaction maintain records demonstrating compliance with the PTE’s conditions.</p>	
<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>Revokes Part I(b) - See ERISA §408(b)(2), IRC §4975(d)(2), and regulations thereunder for these services.</p> <p>Revokes Part I(c) - See §408(b)(2), IRC §4975(d)(2), and regulations thereunder for these services.</p>	<p><u>Amended: 81 FR 21181 (April 8, 2016)</u></p> <p>DOL noted that the relief provided in Parts I(b) and I(c) of PTE 75-1 is duplicative of the relief available under these statutory provisions and their corresponding regulations. Although brokers-dealers generally have not relied exclusively on the relief provided under PTE 75-1 Part I for the furnishing of services, the revocation of this relief does eliminate a potentially useful safeguard in the event of a technical violation of the fee disclosure requirements</p>

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<p>(Plans and IRAs)</p>		<p>set forth in regulations issued under ERISA §408(b)(2),</p>
<p>PTE 75-1 Part III: §406 relief for the purchase of securities in an underwriting from a person other than a fiduciary where the fiduciary is a member of the underwriting syndicate.</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 the Impartial Conduct Standards.</p> <p>For further details, see above discussion regarding PTE 77-4.</p>	<p><u>Amended:</u> 81 FR 21208 (April 8, 2016)</p> <p>See above discussion regarding PTE 77-4.</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 the Impartial Conduct Standards.</p> <p>For further details, see above discussion regarding PTE 77-4.</p>	<p><u>Amended:</u> 81 FR 21208 (April 8, 2016)</p> <p>See above discussion regarding PTE 77-4.</p>
<p>PTE 75-1 Part V: §406 relief for the extension of credit by a party in interest provided it is not an advice or discretionary fiduciary (unless no compensation or interest is received).</p> <p>(Plans and IRAs)</p>	<p>Expands relief to permit an advice fiduciary to receive reasonable compensation for extending credit to a Plan or IRA to avoid a failed purchase or sale of securities if:</p> <ul style="list-style-type: none"> • The fiduciary (or an affiliate) didn't cause the potential failure; • The terms of the extension of credit are at least as favorable to the Plan or IRA as the terms available in an arm's length transaction between unaffiliated parties; 	<p><u>Amended:</u> 81 FR 21139 (April 8, 2016)</p> <p>DOL rejected requests from commenters that the amendment be broadened to cover <u>all</u> transactions that are included in other sections of PTE 75-1, Part V (such as short sales, options trading and margin transactions), finding that such relief is not critical to all such other transactions.</p>

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	<ul style="list-style-type: none"> • The Plan or IRA receives written disclosure, <u>prior</u> to the extension of credit, regarding (i) the rate of interest or other fees that will apply and (ii) the method of determining the balance upon which interest will be charged, and receives prior written disclosure of any changes to these terms; and • The fiduciary maintains, for six years from the date of the transaction and in a manner that is reasonably accessible for examination, records necessary to enable certain persons (including DOL and IRS representatives and plan fiduciaries) to determine whether the conditions of this exemption have been met. The amendment shifts the burden of complying with the recordkeeping requirements <u>from</u> the Plan or IRA <u>to</u> the broker-dealer engaging in the transaction. It also clarifies which parties may view the records that are maintained by the broker-dealer and places certain conditions on the examination of such records. 	<p>DOL acknowledged concerns from commenters that language in the proposed amendment requiring that failed purchases or sales of securities not be “the result of action or inaction by such fiduciary or affiliate” was too vague, possibly overbroad and might involve fact-intensive inquiries regarding such failures, and replaced such language with the simpler “is not caused by” condition.</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 	<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 the Impartial Conduct Standards.</p> <p>For further details, see above discussion regarding PTE 77-4.</p>	<p><u>Amended:</u> 81 FR 21208 (April 8, 2016)</p> <p>See above discussion regarding PTE 77-4.</p>

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<p>when the proceeds may be used by the issuer to retire or reduce indebtedness to the bank fiduciary or an affiliate.</p> <p>(Plans and IRAs)</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 certificates). • §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 is a fiduciary. <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 mortgage pool certificate transaction, it must satisfy the Impartial Conduct Standards.</p> <p>For further details, see above discussion regarding PTE 77-4.</p>	<p><u>Amended:</u> 81 FR 21208 (April 8, 2016)</p> <p>See above discussion regarding PTE 77-4.</p>