EVERSHEDS SUTHERLAND

A long and winding road

Department of Labor’s Final Rule 4.0

Fiduciary definition
Exemptions for investment advice

May 2024

Introduction

On April 23, 2024, the US Department of Labor (DOL or Department) released its Final Rule 4.0 regarding ERISA fiduciary investment advice, including amended exemptions for conflicted investment advice. The Final Rule substantially resuscitates the concepts of Rule 2.0 adopted by DOL in 2016, which the Fifth Circuit Court of Appeals vacated in 2018.

The package consists of a new regulation defining fiduciary investment advice; amendments to PTE 2020-02, PTE 84-24, and several other exemptions; a fact sheet from DOL; and a DOL press release.

Key elements of Proposal 4.0

As expected the Final Rule largely follows the proposal, with some revisions. The final regulation broadly treats financial services professionals as ERISA fiduciaries when engaging in individualized investment interactions with retirement investors.

- Rollover advice is explicitly included in the regulation as a form of fiduciary advice.
- Disclaimers of fiduciary status are generally ineffective if the professional is positioned in the market as trustworthy.
- As in Rule 2.0, one exemption – PTE 2020-02, adopted in Rule 3.0 – would be the flagship DOL exemption providing relief for conflicted investment advice, but with significant revisions.
- Compliance with other "best interest" and conflict mitigation regulations do not suffice under PTE 2020-02. As in Rule 2.0, the complex of other DOL exemptions for conflicted advice are amended.
- Relief would continue to be available for certain insurance transactions under PTE 84-24, but the application of the Final Rule to insurance distribution remains complex.
- Otherwise, providers relying on other DOL exemptions for conflicted advice would generally be remitted to PTE 2020-02.
- Statutory exemptions would remain in effect.
- As in Rule 2.0, elements of the Final Rule create the predicate for a potential private right of action by IRA owners.
- The initial effective date is September 23, 2024, with full compliance required on September 23, 2025.

Did you know?

36

Business days from the publication of Proposal 4.0, a major regulation, to the close of the public comment period

79

Business days from the close of the comment period to the publication of Final Rule 4.0

103

Business days from the publication of Final Rule 4.0 to the initial effective date

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For more information

For resources and commentary regarding this regulatory process, visit Eversheds Sutherland’s dolfiduciaryrule.com.
- Text of and supporting materials for Proposal 1.0, Rule 2.0, Rule 3.0 and Proposal 4.0
- Pleadings and decisions in the litigations challenging Rules 2.0 and 3.0
- Articles, news mentions and client alerts

Commentary: Considerations for plan sponsors

The effects of the Final Rule for plan sponsors will primarily be indirect effects, reflected in the availability and delivery of plan- and participant-level services from third party financial services providers. In the near term, however, the initial effective date is September 23, 2024, and existing agreements were not grandfathered, which may lead to substantial renegotiation or replacement activity over the balance of the year.

- The preamble to the Final Rule confirms that normal plan interactions between participants and HR employees of the sponsor do not constitute fiduciary investment advice.
- The preamble also confirms DOL's current support of the existing guidance on the distinction between investment education and investment advice (Interpretive Bulletin 96-1), but clouds that confirmation with a caveat that the communication not include an individualized recommendation.
- DOL also did not provide requested comfort with respect to internal call centers or financial well-being programs.
- There still is a concern that the Final Rule could distort the RFP process, in a manner unhelpful to plans. As discussed below, we believe sponsors should be able proactively to manage that concern in their RFPs so as to avoid that distortion.
- Depending on relationships with financial services providers, both sponsors and participants may see either an increase in PTE 2020-02 or other disclosures provided in respect of a broader range of investment interactions, or new constraints on such interactions available from providers.
  - A range of services and opportunities extended by financial services companies to institutional retirement investors, including defined benefit plans, potentially are in play.
  - Resort to PTE 2020-02 for participant-level interactions will expand beyond rollovers.
  - Sponsors may experience an influx of conflict disclosures that will need to be integrated into and evaluated under the plan's processes and procedures.
  - Expect even sharper attention to the limits of non-fiduciary investment "education," where that is intended.

Arrangements in scope of the Final Rule

The new definition of investment advice fiduciary applies not only to ERISA plans (including welfare plans and those §403(b) programs and employer-sponsored IRAs subject to ERISA), but also, by reason of Internal Revenue Code (IRC) §4975(e)(1), to the following non-ERISA arrangements:

- Traditional IRA accounts and annuities
- Roth IRAs
- Archer medical savings accounts
- Health savings accounts
- Coverdell education savings accounts

Section 403(b) and 457(b) plans generally are outside the legal scope of the proposal.

- Private sector 403(b) arrangements are in scope if they are subject to ERISA.
- As always, there is the probability of a "knock on" effect for arrangements outside the formal scope of the proposal.

Commentary: Considerations for financial services providers

DOL effectively rechristened itself as the Department of Labor and Financial Services, claiming authority to act as the most universal "standard of conduct" regulator with the broadest (but least informed) jurisdiction of any financial services regulator in the country. Final Rule 4.0 is potentially as disruptive for financial services providers as was vacated Rule 2.0 in 2016-2018, notwithstanding the other "best interest" regulatory regimes providers are already observing.

- **For the institutional market:**
  - The Final Rule treats investment or insurance recommendations from investment professionals to institutional investors that may bear on the management of ERISA plan/IRA assets as fiduciary investment advice, including in the context of "gating" or "hire me" interactions.
  - If conflicted, that advice requires an ERISA exemption, and the Final Rule revokes a number of longstanding exemptions for conflicted advice in favor of a more generic and onerous exemption, which has the potential to disrupt established business models and practices.

- **For the retail market:**
  - Rule 4.0 applies to IRA's as well as ERISA plans. In implementing Rule 2.0 in 2016-2018, many financial product and service providers found that IRA's constituted 40% to 60% of their overall business.
  - Its impact on investment interactions with individual investors goes well beyond rollover advice, and even reaches services with respect to the "outside" investment of distributions from retirement arrangements.

- **Compliance with other best interest regulations will not suffice.**
  - Rule 4.0 requires more than new disclosures, additional training, and an incremental focus for compliance supervision.
  - In its conflict mitigation requirements, it may have consequential effects for significant business matters like compensation structures, distribution and sales practices, product shelf and pricing, and HR systems.

- **Evaluating the ramifications of Rule 4.0 across a provider's business operations will be a substantial undertaking by itself**, even before the strategic and tactical decisions it necessitates, or the business and compliance restructuring it demands.

- **Rule 4.0 is effective on September 23, 2024, with full compliance required on September 23, 2025.** This is an unreasonably if not impossibly short transition period for a rule of this magnitude.

History: A long and winding timeline

Proposal 1.0

2010
Q4 DOL releases proposal

2011
Q1 DOL holds hearing
Q4 DOL withdraws proposal

Rule 2.0

2015
Q2 President Obama announces and DOL releases Proposal 2.0
Q3 DOL holds hearing

2016
Q2 DOL releases Final Rule 2.0 including BICE
Q3 DOL issues FAQs

2017
Q1 DOL issues FAQs
DOL proposes insurance intermediary exemption
White House directs DOL to restudy Rule 2.0
Q2 DOL delays compliance date for 60 days
June 6 initial compliance date
DOL issues RFI for additional public comments
Q3 DOL issues FAQs
Q4 DOL extends BICE transition period to July 2019

2018
Q1 Fifth Circuit vacates Rule 2.0
Q2 DOL announces temporary enforcement policy

Rule 3.0

2020
Q2 Reg BI compliance date on June 30
DOL releases Proposal 3.0
Q3 DOL holds hearing
Q4 DOL releases Final Rule 3.0

2021
Q1 DOL confirms Rule 3.0 will take effect on February 16 effective date
Q2 DOL issues FAQs explicating Rule 3.0 and announcing future Proposal 4.0
Q3 DOL delays transition dates

2022
Q3 PTE 2020-02 rollover requirements fully enforceable on July 1
NY district court declines to apply DOL rollover position retroactively and says one-time advice cannot be fiduciary advice

2023
Q2 Florida district court invalidates Rule 3.0 "regular basis" FAQ

Rule 4.0

2023
Q4 President Biden announces and DOL releases Proposal 4.0
DOL holds hearing

2024
Q2 DOL releases Final Rule 4.0

DOL's original regulation, defining investment advice fiduciary status through a 5-part test, was published fourteen months after enactment of the statute and had been standing (other than the period Rule 2.0 was in effect) since 1975. As the Fifth Circuit saw it in *Chamber of Commerce v. DOL* (2018), vacating Rule 2.0 (below):

> The 1975 regulation captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client.... The regulation also echoed the then thirty-five-year old distinction drawn between an "investment adviser," who is a fiduciary regulated under the Investment Advisers Act, and a "broker or dealer" whose advice is "solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor."

Proposal 1.0, released in October 2010 and limited to an expansion of fiduciary status beyond that specified in the 1975 regulation, was substantially informed by inward-looking considerations. DOL's experience was that the 5-part test unduly impeded its ability to prosecute ERISA enforcement matters in a manner it deemed appropriate. (In the most aggravating example, DOL and the US Securities and Exchange Commission (SEC) had a joint enforcement matter that the SEC resolved in months but that took DOL years to conclude because of issues around fiduciary status.) DOL also argued that the shift in the private retirement system from predominantly defined benefit to predominantly defined contribution plans justified an expansion of that definition. Proposal 1.0 was criticized from bipartisan perspectives, and DOL abandoned it in September 2011.

Proposal 2.0, introduced in April 2015, was far more ambitious. Defended essentially as broad consumer protections against conflicted interests on the part of investment intermediaries, it constituted no less than an undertaking by DOL to restructure the banking, insurance and securities industries at least as they did business with retirement plans and investors, without reference to the heavy pattern of regulation established by statute for and to the rules adopted by the primary regulators of those industries. It extended fiduciary status in unprecedented ways including to rollover advice, announced "best interest" standards with which fiduciaries were generally obliged to comply as a practical matter, and created private rights of action for individual retirement account (IRA) investors that did not exist under ERISA. Final Rule 2.0 implemented the proposal and was adopted in April 2016 with an initial compliance date of June 2017.

The financial services industries spent billions of dollars restructuring their business models and compliance processes before Rule 2.0 was vacated by the US Fifth Circuit Court of Appeals in March 2018 as regulatory overreach.

Proposal 3.0, offered in June 2020, formally reinstated the 5-part test, but accompanied by new and aggressive interpretive positions that extended the reach of that test particularly for rollover advice (akin to vacated Rule 2.0). DOL also proposed and adopted in December 2020 a new class PTE 2020-02 that allows investment advice fiduciaries to receive compensation when providing conflicted advice and to engage in certain principal transactions with a compensatory element, subject to impartial conduct standards intended to align with other bodies of regulation, advance disclosure requirements, conflict mitigation policies, retrospective compliance reviews, and other conditions. DOL extended its interpretive views in FAQ's issued in April 2021.

In September 2022, a New York district court declined to apply DOL's rollover position retroactively in private litigation and said that one-time advice could not be fiduciary advice. In February 2023, a Florida district court invalidated DOL's interpretation in the FAQ's of the regular basis prong of the 5-part test, which DOL did not appeal. A case is pending in Texas district court more broadly seeking to set aside the DOL's guidance on the 5-part test set forth in the preamble to PTE 2020-02.

Proposal 4.0, released in 2023 on Halloween, continued the process DOL commenced in 2020 of resuscitating its Rule 2.0, masked in the fashion of Rule 3.0. That is, DOL resumed its mission to extend its jurisdiction and become the uber "standard of conduct" regulator for the financial services industries, restructuring their businesses as they operate at least in the retirement space including IRAs.

For a variety of historical and analytical resources following these developments, please visit

DOLFiduciaryRule.com

Commentary: Context and Next Steps

As expected, DOL proceeded to adopt its Final Rule 4.0 on a highly accelerated timetable, with only modest refinements from the proposal. In so doing, and as it did in 2016, the Labor Department proclaimed itself to be the ultimate and universal "standard of conduct" regulator for the banking, insurance, securities and other investment industries.

As in 2016, DOL proceeded notwithstanding compelling arguments that it lacks authority to expand its own jurisdiction in this manner, as explained in our summary of Proposal 4.0 and in numerous comment letters.

- It is one thing for, say, the SEC or an insurance regulator to strengthen the standard of conduct for persons clearly within that regulator's jurisdiction (e.g., broker-dealers are defined, registered and regulated under the Securities Exchange Act of 1934 and the SEC was formed, and specifically directed to regulate broker-dealers under that Act). It is quite another for DOL to expand its jurisdiction by extending the reach of the established ERISA fiduciary standard to categories of persons never conceived in the decades since the enactment of ERISA (at least prior to 2015) to be subject to that standard. To paraphrase the old saying, to a regulator with a hammer, everyone looks like a nail.
- It is one thing to observe "the pervasiveness of conflicts of interest in investment advice," essentially, the shocking revelation that financial services providers make money only when and as they actually provide products or services. It is quite another to say, in 2024, that Congress:
    - In the 1974 federal pension law, of all places, appointed the Labor Department, of all agencies, to be the uber "standard of conduct" regulator for the banking, insurance, securities and other financial service industries, however otherwise regulated;
    - Authorized DOL to restructure the way those industries do business to conform to a "trustee" regulatory model;
    - Made that momentous appointment so subtly that it went undiscovered for over 40 years;

  which is the very definition of an "unheralded power representing a transformatory expansion of [DOL's] regulatory authority," as the Supreme Court has put it in its "major cases" jurisprudence.

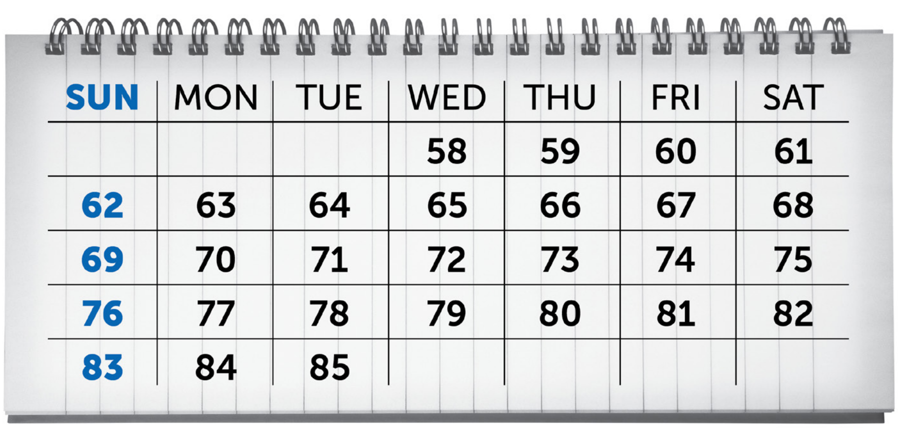
In some respects, Rule 4.0 parallels Rule 2.0.

- Both rules greatly expanded the long-understood scope of ERISA investment advice.
- Both rules ERISAfied IRA's, by extending ERISA fiduciary standards to them and (notwithstanding DOL's protestations) creating the predicate for a non-statutory private right of action for IRA owners.
- Both rules established a flagship exemption for conflicted investment advice and restructured the complex of existing exemptions, some of which have been extant since 1975, without any evidence that the existing exemptions were disserving retirement investors.
- Both rules established regulatory controls on financial services companies' distribution and sales practices, product shelf and pricing, compensation structures, and other significant business matters, although Rule 4.0 may be less prescriptive.
- Both rules failed to recognize and account for the insurance industry distribution model, and instead imposed a broker-dealer regulatory model on non-securities insurance product distribution.

Commentary: Context and Next Steps

From a rulemaking perspective, however, Rule 4.0 is even more audacious than Rule 2.0.

- The rulemaking hardly inspired confidence in the authenticity of the public comment process – a hearing in advance of the close of the comment period and held 24 business days after publication of a proposed major rule; comment letters due 36 business days after publication; and the final rule transmitted to OMB 47 business days after the end of the comment period, during which over 20,000 comment letters and petitions were submitted.
  - This was not a rulemaking designed to gain the consent of the governed. This was a rulemaking designed to let the Department dictate new law, without exposure to reversal under the Congressional Review Act in 2025.
- In a similar vein, Rule 4.0 in form gives service to, but in substance disrespects, the authority of the Fifth Circuit's *Chamber of Commerce* decision to say what the law is – the only substantive decision on Rule 2.0.
  - The Rule 2.0 cases in which DOL prevailed rested on overly simple *Chevron* deference to the agency.
  - Given the *Chevron* cases pending at the Supreme Court, it seems doubtful DOL will have the benefit of that level of mechanical deference in the litigations challenging Rule 4.0.
- In Rule 4.0, DOL essentially abandoned its longstanding position that ERISA fiduciary status is a functional determination and declared investment professionals to be fiduciaries by reason of their occupation, even where the primary regulator of that professional has determined fiduciary status to be unworkable or otherwise unwarranted.
- The only benefits of Rule 4.0 mustered in the regulatory impact statement are unquantified speculation and, as demonstrated in the comment letters on the proposal, the quantified costs are materially understated. The OMB requirements for the development of regulatory analysis were not remotely met.
  - As distinguished from the 2016 rulemaking, this Final Rule proceeds without any evidence of the current incidence of unfavorable outcomes for retirement investors due to conflicts on the part of investment intermediaries, or of the inadequacy of other bodies of law (as significantly enhanced since 2016 under state insurance laws and federal securities laws) to remedy those outcomes. That is, there is no proof of the need for this regulation..
  - In 2016, vacated Rule 2.0 was in the vanguard of "best interest" regulation. In 2024, Rule 4.0 layers duplicative "best interest" regulation on top of other "best interest" regulation adopted since 2016, without any demonstration that those additional costs produce a commensurate benefit for retirement investors.
- Even more aggressively than Rule 2.0, Rule 4.0 slants the ERISA enforcement scheme to favor DOL and plaintiffs. It very much harkens back to DOL's argument in Proposal 1.0 that the 5-part test (i.e., the law) impeded DOL's ability to make cases it wanted to make. In important ways, Rule 2.0 was more policy driven, and Rule 4.0 is more enforcement driven.



The next steps for Rule 4.0 are entirely and drearily predictable.

1. Representatives of one or more of the affected industries will file litigation, including in a Fifth Circuit jurisdiction, challenging Rule 4.0 as regulatory overreach. In our judgment, DOL will have more exposure in that litigation than it did in the Rule 2.0 litigations.
2. If the courts do not grant a preliminary injunction, financial services providers will face very difficult choices about costly and disruptive compliance efforts before and after the effective date, while the litigation is pending. Compliance entails billions of dollars of expense, disruption of existing relationships and expectations, dislocation of business methods and practices, and loss of service for smaller accounts, none of which will be required if Rule 4.0 is retroactively vacated.
3. As the Final Rule is digested, DOL will be asked for further clarification and guidance in the form of FAQ's, and DOL's timely response will be impeded by litigation considerations, further complicating the compliance efforts of affected persons.
4. As the 2024 effective date or 2025 full compliance date approaches, DOL will be pressed to extend the transition period, because compliance during the allowed time proved impossible and/or of the uncertainties created by the pending litigation, and the litigation will again factor into DOL's response. For example, if compliance is as reasonable and relatively inexpensive as DOL claims, how will a court react to any extension of either date on the basis of impossibility?

It would be admirable if DOL, of its own motion, took action to mitigate these complications by staying the compliance period once the litigation is docketed, out of respect for the judicial process and the constitutional separation of powers – which would certainly enhance DOL's standing and stature with the regulated community as a fair-minded regulator – but that is likely too much to ask.

We continue to find it unfortunate that public and private resources are still being expended on this regulatory initiative. In support of Rule 4.0, DOL did not offer an estimate of the adverse dollar effect on retirement savings caused by conflicted investment advice, but its (overstated) guess for Rule 2.0 amounted to no more than a quarter of a basis point annually (0.0025%) of the assets in the private retirement system, and that cost has undoubtedly declined since 2016. The costs to and disruption of the retirement system resulting from this undertaking, from Proposal 1.0 through the next steps for Rule 4.0, is entirely disproportionate to any benefit to retirement investors. To the extent DOL's policy concerns have merit, it is past time for those concerns to be addressed to Congress and sorted out through the bipartisan legislative process. Notwithstanding the challenges of bicameralism and presentment, Secure Act 1.0 and 2.0 prove that it remains possible to move sensible retirement legislation to enactment, which at this point has become the only way forward to a meaningful resolution of this issue with the consent of the governed. Otherwise, the retirement system will continue to suffer the adverse effects of ping pong regulation following any turnover of the White House, to the detriment of Americans' retirement savings.

Effective date and transition

Starting almost 50 years ago, the retirement community has organized itself around the 5-part fiduciary definition and the existing complex of exemptions. DOL believes it reasonable and feasible to demand that the community reorganize itself in 21 weeks.

- The new fiduciary definition is effective on September 23, 2024.
- The amendments to the complex of prohibited transaction exemptions are effective on September 23, 2024, but affected parties may continue to rely indefinitely on existing exemptions for transactions on or before September 22, including ongoing compensation for recommendations made before the effective date, e.g., through a systematic purchase payment or trail commissions.
- Providers relying on PTE 2020-02 or PTE 84-24 must comply with the impartial conduct standards and the fiduciary acknowledgement (but not the recitation of fiduciary duties and conflicts) required by those exemptions for transactions on or after September 23, 2024. Full technical compliance with the conditions of the exemptions is not required until September 23, 2025.
- For an unspecified period of time, DOL will "primarily" proceed in a compliance assistance mode, rather than in enforcement mode.

DOL declined requests from plan sponsors to grandfather all existing agreements. To the extent the Final Rule either transforms existing non-fiduciary services into fiduciary services, or materially modifies the terms of exemptions pursuant to which an existing fiduciary provides services, a variety of disruptive consequences may ensue, including mid-term renegotiation or premature termination of the arrangement, which may be costly; lack of bandwidth on the part of either the plan sponsor or the provider to handle those modifications or otherwise to cover in the market, within the allotted time; and other economic dislocations. Completing this process by the initial effective date, or even the full compliance date, will put enormous logistical and economic pressure on plan sponsors and providers.

Severability

The preamble to the fiduciary investment advice regulation expressly contends that the regulation should survive any vacatur of the amendments to the exemptions, and the preambles to the exemption amendments argue the inverse position. DOL's views on severability do not bind a court. Our view is that, like Rule 2.0, this is an integrated regulatory initiative that stands or falls as a whole.

History: The many faces of DOL's "investment advice" definition

ERISA §3(21)(A)(ii): "[A] person is a fiduciary with respect to a plan to the extent… he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan…."

<table>
<tr><td>Original regulation (1975)</td><td>For a direct or indirect fee, a person:</td><td colspan="2">1. Renders advice as to the value of securities or property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property
2. On a regular basis
3. Pursuant to a mutual agreement arrangement or understanding with a plan fiduciary, that
4. Advice will serve as a primary basis for investment of plan assets, and
5. Advice will be individualized to particular needs of the plan</td></tr>
<tr><td rowspan="2">Proposal 1.0
(2010;
withdrawn 2011)

"3x4" definition</td><td rowspan="2">Person meets at least one in each row, for a direct or indirect fee</td><td>Service</td><td>1. Provides valuation advice or opinion
2. Makes recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property
3. Provides advice or makes recommendations as to the management of securities or other property</td></tr>
<tr><td>Status</td><td>1. Admitted fiduciary
2. Otherwise an ERISA plan administration or discretionary asset management fiduciary
3. Registered investment adviser
4. Provides service pursuant to an agreement, arrangement or understanding with a plan fiduciary that such advice may be considered
5. in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan or participant</td></tr>
<tr><td rowspan="2">Proposal 2.0
(2015)

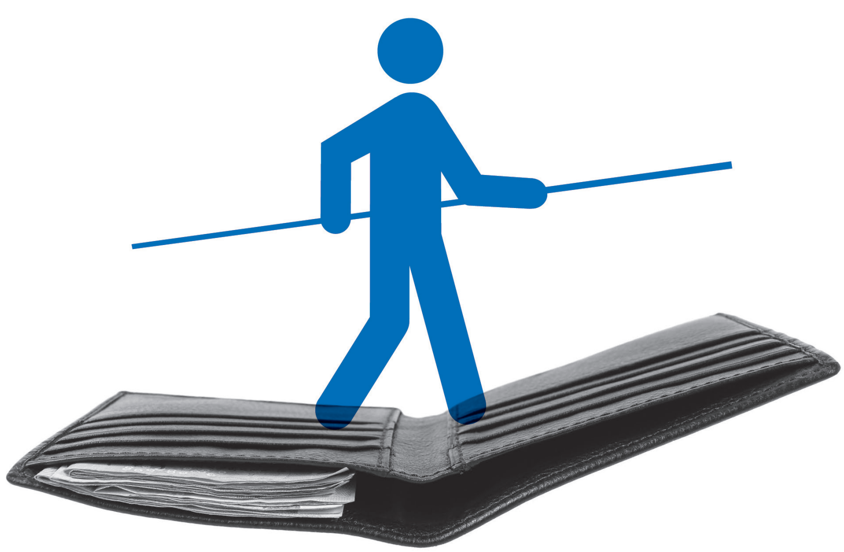
"4x2" definition</td><td rowspan="2">Person meets at least one in each row, for a direct or indirect fee (including to an affiliate)</td><td>Service</td><td>1. Investment recommendation, including to take
2. a distribution, or as to the investment of a rollover or distribution
3. Asset or investment property management or recommendation, including any recommendations regarding rollovers, transfers or distributions
4. Valuation of an asset in a specific transaction
5. Paid adviser recommendation</td></tr>
<tr><td>Status</td><td>Makes a recommendation regarding:
1. Acquiring, holding, disposing of or exchanging an investment in a plan/IRA
2. How an investment should be invested after rollover, transfer or distribution from a plan/IRA
3. Management of an investment in a plan/IRA</td></tr>
<tr><td rowspan="2">Rule 2.0
(2016;
vacated 2018)

"3x3" definition</td><td rowspan="2">Person meets at least one in each row, for a direct or indirect fee (including to an affiliate)</td><td>Service</td><td>1. Investment recommendation, including to take a distribution, or as to the investment of a rollover or distribution
2. Asset or investment property management or recommendation, including any recommendations regarding rollovers, transfers or distributions
3. Valuation of an asset in a specific transaction
4. Paid adviser recommendation</td></tr>
<tr><td>Status</td><td>1. Admitted fiduciary
2. Provides advice pursuant to written or verbal agreement, arrangement or understanding that the advice is based on the needs of the recipient
3. Directs advice to a recipient regarding a particular management or investment decision</td></tr>
</table>

History: The many faces of DOL's "investment advice" definition

Rule 3.0 **2020**	5-Part test is reinstated, with new interpretations relevant to rollover advice and other matters:		
Proposal 4.0 **(2023)** **"1x2x3" definition**	Person meets at least one in each row, for a direct or indirect fee	Service	Makes a recommendation to a retirement investor of: 1. Any securities or investment transaction 2. Any investment strategy involving securities or other property
		Context	**1.** Discretion over the investment of any assets of the retirement investor 2. Makes investment recommendations to investors on a regular basis as part of their business, and the recommendation is provided under circumstances indicating that the recommendation is individualized to the retirement investor and may be relied on by the retirement investor as a basis for "best interest" investment decisions 3. Admitted fiduciary under any body of law
Final Rule 4.0 **(2024)** **"1x2x2" definition**	Person meets at least one in each row, for a direct or indirect fee	Service	Makes a recommendation to a retirement investor of: 1. Any securities or investment transaction 2. Any investment strategy involving securities or other property
		Context	1. Makes professional investment recommendations to investors on a regular basis as part of their business, and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on a review of the investor's particular needs or circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or circumstances, and may be relied on by the retirement investor as intended to advance the retirement investor's best interest 2. Represents or acknowledges fiduciary status under ERISA or the IRC with respect to the recommendation

Lest there be any doubt that DOL is making up the rules as it goes in this regulatory initiative, Final Rule 4.0 reflects the sixth different iteration of the definition of fiduciary investment advice offered by the Department since 2010.



Rule 4.0: the scope of "investment advice" fiduciary status

The final definition largely follows the proposal with limited refinements, including the following.

A PERSON IS AN "INVESTMENT ADVICE" FIDUCIARY IF:

For a **fee**, including to an affiliate,

THE PERSON

SERVICE

Makes a **recommendation** (either directly, or indirectly through formal delivery by an affiliate) to a **retirement investor** of:

The preamble clarified the import of the reference to an affiliate.

1. any securities transaction or other investment transaction, or

2. any investment strategy involving securities or other **investment property**,

including as to:

- acquiring, holding, disposing of or exchanging securities or other investment property, including providing a "select list" of investments;
- investment management, such as investment policies or strategies (including bond ladders, day trading and margin strategies), portfolio composition, selection of account arrangements (e.g., brokerage vs. advisory), selection of other managers or advisers, and proxy voting;

The preamble makes the point that the reference to "other" managers or advisers does not capture promotion of a person's own services, which have to implicate another component of this list to become an investment recommendation.

- rolling over, transferring or distributing assets from a plan or IRA, including whether to engage in the transaction and the amount, form and destination of the rollover/transfer/ distribution; and
- investment after a roll over, transfer or distribution from a plan or IRA;

but NOT including advice to take a required minimum distribution (RMD) or investment valuation services.

The preamble confirms that informing a retirement investor of the need to take an RMD is not a recommendation, nor is discussing the merits of a plan loan or hardship withdrawal, at least absent other facts.

AND THE PERSON:

The Final Rule dropped the proposed context of discretionary authority over any of the investor's assets.

CONTEXT

1. Either directly or indirectly (e.g., through or with an affiliate), makes professional investment recommendations to investors on a regular basis as part of their business, and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on a review of the investor's particular needs or circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or circumstances, and may be relied on by the retirement investor as intended to advance the retirement investor's best interest; or

The formulation of the investment professional context was refined in several respects from the proposal.

2. Represents or acknowledges that they are acting as a fiduciary under ERISA or the IRC when making the investment recommendations.

Under Proposal 4.0, admission of fiduciary status under *any* body of law would have been a basis for ERISA fiduciary status.

DISCLAIMERS	
Written statements by a person disclaiming fiduciary status or any of the above conditions will not control to the extent inconsistent with the person's oral or other written communications, marketing materials, applicable state or federal law, or other interactions with the retirement investor.	The limitations on disclaimers were elaborated in the Final Rule.
"EXCEPTIONS" REFLECTED IN THE REGULATION	
Securities Execution. The final definition retains the traditional exception for the execution of transactions, as instructed by a plan fiduciary, by a securities firm.	
Sales Activity. Sales activity, e.g., to purchase a specific investment or pursue a specific investment strategy, is not investment advice, *so long as neither of the contexts is implicated*.	The Final Rule provides less comfort than requested on the "hire me" and investment education concerns.
Investment Education. The provision of investment education or education is not fiduciary advice, *so long as it does not include an investment recommendation*.	
DEFINITIONS	
Retirement investor is a plan, plan participant or beneficiary, IRA owner or beneficiary, or plan/IRA fiduciary other than another investment advice fiduciary	The Final Rule includes a refinement in the retirement investor definition that has the effect of excluding many (but not all) "investment professional to professional" interactions such as wholesaling.
Plan is any ERISA §3(3) or IRC §4975(e)(1)(A) plan, including IRA's	
Recommendation means the facts and circumstances "call to action" determination used by the SEC.	
Investment property does not include health, disability or term life insurance policies, or other property to the extent it does not contain an investment component.	The preamble lists annuities (including group annuities), banking products and digital assets as examples of "investment property" within the scope of the definition that may not be securities.
Fee, consistent with DOL's longstanding position, essentially means economic compensation of any kind and from any source, if received in connection with, and would not have been received "but for," the recommended transaction or provision of the investment advice.	

ESsentials

The Final Rule retained the core of the proposal – its broad application to investment professionals – with refinements to primarily peripheral issues. We suspect the refinements reflect both policy considerations and DOL's institutional interest in defending the Final Rule in court. For example:

- DOL abandoned the proposed discretionary manager context, which presented a number of conceptual and operational problems and, in intended effect, likely added little to the investment professional context.
- The Final Rule narrowed the admitted fiduciary context from acknowledged fiduciary status under any law – which was difficult to justify – to acknowledged ERISA or IRC fiduciary status with respect to the specific recommendation.
  - It is of course much easier to defend the position that persons who admit to ERISA fiduciary status for a particular transaction should be held to ERISA fiduciary standards. (DOL's conceptualization of fiduciary status on a transaction-by-transaction basis, as distinguished from the SEC's attention to a firm's relationship with the investor, factors into the PTE 2020-02 and 84-24 conditions in various ways, as discussed below.)
  - Because of this refinement, for example, a non-fiduciary plan platform provider that issues a global communication to all participants about the utility of its target date funds should not be an investment advice fiduciary under this context unless it admits ERISA fiduciary status with respect to that particular communication, even if it otherwise acknowledged fiduciary status to participants who happened to using the provider's robo-adviser for discretionary management or who are invested in a CIT managed by the provider. (Because of lack of consideration of any participant's individual circumstances, this communication also should not be fiduciary advice under the investment professional context.)

ESsentials

- It was important to DOL to retain the admitted fiduciary context as refined, however, in part to capture Financial Institutions forced to acknowledge fiduciary status under PTE 2020-02 but that are not involved in the formulation or delivery of the investment recommendation.
- The preamble asserts that this context will be evaluated on the basis of the substance of the acknowledgement, which need not be in writing (which of course creates the possibility of swearing contests) and need not follow the precise operative text of the regulation.

– Exceptions to fiduciary status continue to be framed more narrowly than under vacated Rule 2.0.

- Because the Fifth Circuit cited the various exceptions from the Rule 2.0 definition as evidence of its over breadth, DOL was disinclined to provide exceptions in the Rule 4.0 definition. That approach seems unnecessarily defensive to us – plaintiffs in the coming cases will hardly need exceptions to prove the over breadth of the Rule 4.0 definition – and may be a particular instance where sensible policy was subordinated to DOL's institutional interests, but we commend DOL for its candor.
- Accordingly, there is no exception for institutional or sophisticated investors, for example, although the preamble does say that, at least to some extent, parties are free to structure their arrangements to provide a mutually intended fiduciary outcome.
- DOL again declined suggestions to exclude welfare plans generally, and health savings accounts (HSA) specifically, from the scope of the rulemaking, with the technical but paradoxical result that welfare plan participants are "retirement investors" under the Final Rule. The investment property definition broadly excludes insurance products offered in welfare plans, however, and (as discussed below) DOL made PTE 2020-02 available to IRS-approved non-bank trustees for HSA's (who service a large portion of that market).
- Because of the change in the "retirement investor" definition noted above, communications between investment intermediaries, none of whom have investment discretion, is not fiduciary advice, even if the intermediaries are themselves "investment advice" fiduciaries. For example, a discussion between a wholesaler and an investor-facing financial professional about an investment product or service that might be appropriate for a particular retirement investor should not be fiduciary advice, unless the professional has discretion to invest the retirement account (including selecting investment options for a participant-directed plan).

– The Final Rule takes essentially the same position as Proposal 4.0 on "hire me" and similar activity.

- DOL continues to claim that the Final Rule is not intended to confer fiduciary status merely as the result of normal marketing … except when it does.
- In a departure from conventional fiduciary concepts, the Final Rule, like vacated Rule 2.0, takes the position that "hire me" sales pitches become fiduciary investment advice at the point they entail a specific investment "recommendation." That is, a sales pitch for a person's own investment services is not an investment recommendation, until it includes an individualized recommendation for an investment transaction or investment strategy as broadly conceived in the definition.
  - If it is possible for an investment professional to secure an engagement on the basis of, e.g., its credentials, quality of services, industry trends and performance history, without responding to the retirement investor's question of "what do you think I should be doing," DOL is content not to treat that interaction as fiduciary advice.
  - The preamble also offers a second example, drawn from the *Chamber of Commerce* decision: "You'll love the return on this stock in your retirement plan, let me tell you about it" is not itself fiduciary advice, without more, even if the retirement investor buys the stock solely on the basis of this interaction. Boiler room operators will take comfort.
  - Otherwise, we suspect the logic of DOL's rollover position compels it to also contend that "hire me" interactions are investment advice, and standard marketing practices in the financial services industries will quite often be regarded as fiduciary activity under the Final Rule.
  - Operationally, this position leads to substantial changes to existing industry practice, and invents a new "conflict" for providers that have already solved for any conflicts present in the delivery of their actual services.

ESsentials

- The treatment of investment education in the Final Rule is particularly disappointing.
  - No one doubts that plan participants and IRA owners would benefit from more investment education and financial literacy, not less.
  - DOL did ratify its existing guidance on investment education (IB 96-1), reserving the right to reconsider that guidance in the future.
  - DOL undercut that ratification, however, with the caveat that the investment "education" does not include an investment recommendation. DOL's expressed concern is that the Final Rule might be gamed by disguising recommendations as education. In our view, an individualized recommendation would fall outside the scope of IB 96-1 as it stands, but DOL plainly felt the need to issue itself more ammunition on this point.
  - The problem with the caveat is that sponsors and providers now will have to worry whether current practices or tools, none of which are of course designed to game new rules that had not been announced, might in the future be deemed a "recommendation" by DOL.
    - For example, under IB 96-1, a properly positioned and described asset allocation model is investment "education," even if it identifies specific investment options available under the plan or the plan has only one option available in a particular investment category.
    - IB 96-1 also approves interactive investment tools, which may steer a participant towards particular outcomes.
    - Under the rubric of IB 96-1, sponsors and providers have made effective use of proactive "prompts" or "nudges" directed to, e.g., participants wholly invested in the company stock alternative under the plan, on the potential benefits of diversification, or to participants requesting a hardship withdrawal or terminating employment, on the avoidance of "leakage" by taking a plan loan instead of a hardship withdrawal or leaving assets in the plan or a rollover IRA instead of cashing out.

    The Final Rule will cause, needlessly in our view, conscientious sponsors and providers to expend resources on a review of those issues, which may result in a reduction in the education offered to retirement investors.
  - On this point, DOL has done a specific disservice to the cause of retirement security, and we look forward to future clarification from the Department on any intersection – and, in principle, there should be none – between IB 96-1 and the Final Rule.
  - DOL did definitively approve the IRC section §402(f) safe harbor notice for eligible rollover distributions, developed by the IRS, as investment education.

- The treatment of disclaimers is essentially circular – if the recommendation provider satisfies the conditions of the definition to be a fiduciary, then those conditions nullify any disclaimer.
  - We take DOL's point that the use of disclaimers to protect against "inadvertent" fiduciary status has become largely academic. The point of Rule 4.0 is to convert investment professionals generally into fiduciaries, leaving little or no room for "inadvertent" fiduciary concerns.
  - We do think it will be fair and prudent to provide that any admission of fiduciary status based on the Final Rule, for purposes of PTE 2020-02 or otherwise, by its terms will be null and void if the Final Rule is vacated in a judicial proceeding or otherwise retroactively reversed – which, in our view, does not constitute a disclaimer.
  - The preamble notes, however, that the parties are otherwise permitted to define their relationship. The preamble confirms, for example, that an agreement for brokerage execution services could properly provide that the firm is acting only as an order-taker and that the agreement governs to avoid fiduciary status, although DOL adds that the agreement must be consistent with the overall interactions and communications between the parties.

Plan Sponsors

In general, the Final Rule directly affects financial services providers to retirement investors, and only indirectly affects plan sponsors.

- **Normal HR interactions.** The employer's HR personnel are neither in the business of nor paid for providing professional investment recommendations. DOL offered no guidance on leased employees or contractors engaged to assist with HR activities, and did not provide specific comfort on internal call centers.

- **Finance function.** The elimination of the discretionary manager context should alleviate concerns that officers and employees in the sponsor's finance function might be inadvertent fiduciaries, for reasons other than, e.g., service on the plan investment committee.

- **Enrollment, education and prompts.** Enrollment for retirement plans and for core or supplemental welfare benefits, whether conducted online or through individual interactions with HR personnel or professional enrollers, conventionally has been structured to provide no more than plan information and other investment "education". Digital engagement tools and financial educational materials and websites have been similarly structured, as have automated "prompts" or "nudges." It may be prudent to review the guardrails in those arrangements that prevent the inadvertent furnishing of individualized "recommendations."

- **Financial well-being programs.** DOL did not address financial well-being programs, beyond its general discussion of investment education.

- **Requests for Proposal.** As under Rule 2.0, financial services providers are concerned that the breadth of the fiduciary definition means they cannot take their own business considerations into account when providing a fee proposal and otherwise responding to an RFP. It may be possible to get comfortable that, in this setting, the parties are dealing at arm's length, with no objective expectation that the plan sponsor is relying on the bidders in the manner described in the investment professional context.

  In any event, as we see it, there is nothing in the Final Rule that prohibits a plan sponsor from proactively managing this issue so as not to disrupt its RFP process, by providing in its RFP that:

  - The sponsor is requesting a business proposal for investment recommendations or services to be provided in the future;
  - RFP responses, provided in the present, will be neither considered fiduciary advice nor compensated; and
  - Compliance with fiduciary responsibilities, as applicable, will be expected only in the delivery of substantive investment recommendations or services by the successful provider upon its paid engagement.

  To the extent such RFP parameters might be deemed a "disclaimer" for purposes of the regulation – and at least arguably they should not – the sponsor would be framing the overall RFP process from the outset objectively not to give rise to the "trusted advice provider" elements of the fiduciary definition. The preamble approves disclaimers in RFP's that are consistent with the overall interactions and communications between the parties. To reinforce the proper understanding of the relationships, it may also be useful to provide the RFP responses to the plan's consultant or adviser, for its consideration, rather than directly to the plan sponsor.

  For providers, such an approach should mean that the proposed business terms of their responses are not subject to ERISA fiduciary standards, but their substantive investment proposals should anticipate ERISA fiduciary compliance, as applicable, if the provider is selected – just as RFP's have operated prior to the Final Rule.

  DOL also added a new provision to PTE 2020-02 dealing with RFP's for a specific set of services, which we discuss below.

- **Pension Risk Transfers.** These transactions are mentioned in the preamble, without specific elaboration. Analytically, they seem properly to be a subset of the RFP case, but with the risk analysis colored by the recently filed ERISA private litigations contesting PRT transactions.

- **Mergers and acquisitions.** The final preamble did not respond to requests for confirmation that discussions and negotiations with respect to the handling and disposition of employee benefit plans in mergers and acquisitions will not be treated as fiduciary advice, but this also seems a point that the pre-negotiation agreement between the parties as to confidentiality and similar matters might properly set expectations from the outset. The preamble did state that discussions in the context of a merger or acquisition with plan participants, by HR and other employees of the plan sponsor who are not investment professionals, is not fiduciary advice.
  - More generally, DOL appeared to reserve judgment on employees of the plan sponsor who are themselves investment professionals.
  - At least where the plan sponsor itself is not a financial services company, it is unclear to us how any employee of the plan sponsor can be a fiduciary under the terms of the new definition, unless fiduciary status is admitted.
- **Welfare plans.** As noted above, the "plan" definition includes ERISA welfare plans, so the preamble confirms that welfare plan participants can be "retirement investors," but the "investment property" definition generally excludes core or supplemental insurance products typically offered through welfare plans.

Financial Services Providers

For financial services companies benchmarking Rule 4.0 against their implementation of Rule 2.0, the scope of fiduciary status under Final Rule 4.0 is marginally broader than it was under the vacated Rule 2.0 definition.

- Constituent terms under the fiduciary definition are comparably broad.
  - "Fee" retains DOL's traditional concept of any economic consideration, and "investment property" is defined in the same manner as under Rule 2.0. DOL was unwilling to concede that set salaries or other fixed compensation arrangements do not constitute a "fee" for these purposes.
  - In perhaps the only true point of alignment, the Final Rule does definitively adopt the SEC approach to "recommendation" – i.e., the objective "call to action" facts-and-circumstances determination – and abandons DOL's habitual effort to leave itself a back door for undetermined facts and circumstances as they arise. The final preamble argues, however, that communications to a group of investors or about a select list of investments can constitute such a "recommendation," and retains the completely unadministrable position that a series of interactions that are not individually recommendations may in the aggregate constitute a recommendation.
  - The "retirement investor" concept has been broadened, at least in form, with the important exception of the exclusion of other investment advice fiduciaries.
  - The statement of services that constitute ERISA fiduciary advice is more comprehensive, at least in form, than it was in Rule 2.0.
- The "investment professional" context is intended to include any person who is in the business of providing investment recommendations, by reason of occupation.
  - Investment professional status is framed as an objective analysis.
  - With respect to the elements of the context:
    - The "makes professional investment recommendations to investors on a regular basis as part of their business" element will be applied on the basis of the activities of the firm and its employees, agents and representatives, and, confusingly, "on the role of the individual investment professional providing the recommendation in relation to the retirement investor." By way of example, the preamble states that this element "likely" would be met by broker-dealers, registered investment advisers, banks and insurance companies.
    - The balance of the context is intended to identify, objectively, when the recommendation provider is a "trusted advice provider." The preamble states that the provider need not expressly represent each of the three component parts of this element. For example, the preamble argues that individualization of the recommendation can be objectively inferred from the collection of information on the retirement investor's personal financial needs or circumstances – often required by "know your customer" and similar requirements for investment professionals under other bodies of law. Similarly, other regulators' "best interest" standards may make it "more or less likely" that the other two components are met, although the preamble claims that, in the end, the relationship between the recommendation provider and the retirement investor is determinative.

      The preamble conclusively states that, if the investment professional has investment discretion with respect to the assets that are the subject of the recommendation (and it is not clear to us why the professional would be providing a recommendation to the retirement investor if she has discretion over the assets), all three components will be objectively satisfied, absent unusual facts.

Financial Services Providers

- Interestingly, the preamble also asserts that this element of the rule will apply "in circumstances in which each party would reasonably understand that the retirement investor may rely on the recommendation as intended to advance their best interest" (emphasis added).
- According to the preamble, the use of titles such as "financial consultant," "financial planner" and "wealth manager," as well as credentials and marketing slogans, will be relevant but not determinative for purposes of this context.

Based on the operative text, the preambles to the proposed and final rule, various statements from DOL and the White House, and comment letters submitted to DOL – and notwithstanding the distinctions made in the Fifth Circuit's *Chamber of Commerce* decision – the categories of "investment professionals" within the intended reach of the Final Rule, when they provide paid recommendations to retirement investors, may well include at least:

- Alternative asset sponsors
- Bank/trust officers, and potentially tellers (depending on the scope of their authority to interact with customers on bank products and services)
- Broker-dealer representatives
- Certified financial planners
- CPAs providing financial planning
- Commodities brokers
- Insurance agents and brokers
- Investment advisory representatives
- Real estate investment professionals
- Swaps dealers

DOL did not respond to requests to address the status of registered futures commission agents.

– In its final form, the investment professional context therefore reads as an outline of the fairly simple evidentiary points DOL intends to suffice for making a typical enforcement case: (i) Was the recommendation provider an investment professional associated with an "investment" firm? (ii) Did the recommendation provider collect personal information about the investor? (iii) Was the recommendation provider subject to a "best interest" obligation promulgated by the SEC or state securities or insurance regulator, or a banking regulator, or an SRO or industry organization, or otherwise?

– In actual practice, DOL's enforcement case will be even easier to make. The Final Rule effectively boxes financial services providers into conceding fiduciary status.

  - The investment professional context creates, purposefully, a risk that financial services providers generally will be deemed ERISA fiduciaries.
  - Providers generally have three options to manage that risk: (1) Leave the retirement market, which constitutes more or less half the demand for financial services in the US and would functionally be a decision to go out of business; (2) Take the risk, which exposes the provider to excise taxes, civil penalties, reputational damage, and corrective action including the guarantee of any investment losses incurred by the retirement investor; or (3) Comply with PTE 2020-02 (or other applicable exemption).
  - Compliance with PTE 2020-02 of course requires the provider to deliver a written fiduciary acknowledgement with respect to the recommendations it provides. DOL argues that a retirement investor is entitled to know the interactions for which the provider is accepting fiduciary responsibility, but:
    - In reality, retirement investors hardly care; and
    - Every day, providers currently can and do function as proper ERISA fiduciaries without admitting that status in writing, which the statute requires only of ERISA §3(38) investment managers.
  - Rather, the practical function of the fiduciary acknowledgement is to serve as Plaintiff's Exhibit A in the DOL enforcement case – i.e., as an admission that that the provider was acting as an ERISA/IRC fiduciary in respect of its recommendations, which conclusively establishes the admitted fiduciary context under the new fiduciary definition and concedes that a recommendation has been delivered to a retirement investor.

Financial Services Providers

- By functionally extorting providers into giving up that one piece of paper, DOL finally solves a principal driver of this regulatory initiative since 2010: that in its enforcement practice, DOL has found it burdensome to prove fiduciary status under the statute as elucidated in the contemporaneous 1975 regulation.

In sum, through an overbroad fiduciary definition and PTE 2020-02, DOL is compelling the provider to make the enforcement case against itself for DOL, materially slanting the ERISA remedial scheme.

Again, it is one thing for the SEC to establish a heightened standard of care, at the specific behest of Congress, for persons inarguably within its regulatory jurisdiction (broker-dealers), or for an insurance regulator to do the same for insurance agents. It is quite another for DOL to extend ERISA fiduciary responsibility broadly to persons not subject to those rules under any prior reading of the statute, and to do so on terms that effectively require those persons either to concede DOL's turf grab for enforcement and litigation purposes or to leave the retirement market.

– Finally, as noted above, exceptions to fiduciary status are framed more narrowly than under vacated Rule 2.0.

- While there is no "seller's exception," wholesaling and similar interactions between investment professionals generally will not be fiduciary advice, with the possible exception of cases where the investor-facing professional has investment discretion or the wholesaler directly interacts with the retirement investor.
- The preamble suggests that insurance marketing organizations (IMO), field marketing organizations (FMO) and similar insurance intermediaries who do not deal directly with retirement investors may take comfort from this analysis.

Specific Circumstances

– **Persons other than investment/financial professionals.** The preamble to Proposal 4.0 made a particular point of saying that car salespeople will not be treated as fiduciaries if they suggest paying for a car with a distribution from the purchaser's retirement savings. In response to comment letters, DOL added that it also will not treat real estate agents (acting for personal residential purchases), life coaches, probation officers and divorce counselors as fiduciaries.

- That such questions reasonably could be asked, and answered, evidences the over breadth of the definition.

– **Plan platform providers.** The final preamble provided less help with respect to the essential activities of plan platform providers than it should have.

- The logic of the Final Rule is that neither the marketing nor making available of a platform of available investments to plans, without regard to individualized plan/participant needs, nor responding to an RFP with respect to the investments available on the platform, should be fiduciary advice, which the preamble substantially acknowledges. At least until the communication specifically endorses a specific investment choice for a specific plan or retirement investor, this should be the case even if the platform provider offers only a fixed set of predetermined investment menus.
- The preamble also addresses a narrower set of circumstances, i.e., that screening and monitoring available investments options against a plan's specifications for its menu is not fiduciary advice, but responding to a request for a selective list of possible investment options would be if "individually tailored" to the plan. DOL also argued that website disclosure that the platform provider is not undertaking to provide impartial fiduciary advice is ineffective.
- That leaves open the important, everyday question of whether a proposal from a platform provider or intermediary to a plan sponsor that it select an integrated platform of (1) plan recordkeeping services, (2) an investment platform, and (3) ancillary services including the option of an expert adviser to recommend an investment menu or to suggest or manage participant account allocations, can be fiduciary advice. In principle, it should not be – such a proposal reflects at most a judgment that the investment elements of the integrated platform are sufficient for the plan's purposes, and does not recommend a specific investment or investment strategy or investment menu or that any available investment service be implemented for the plan – but the concern is that DOL might take a contrary position.

Specific Circumstances

- **Pooled Employer Plans (PEP).** PEPs were created in SECURE 1.0 to expand retirement plan coverage in the small plan market. They are structured to designate a single named fiduciary with broad discretion over plan operations and often offer a single investment line-up or a limited range of alternatives. Simply marketing a PEP is not fiduciary activity, according to the preamble, unless and until the investment options are presented as selected for and appropriate for the plan. DOL declined to characterize the employer's decision to join a PEP as settlor activity, or to provide a special provision for PEPs.

- **Call centers.** With respect to the highly useful call centers maintained by plan platform providers to assist with a range of customer-service matters, DOL opined that its investment education analysis would be equally applicable in this circumstance, and that call center personnel can provide investment-related information without fiduciary status attaching, so long as it is not based on the caller's particular needs or individual circumstances.

- **General investment communications.** Broad, generalized investment guidance does not constitute fiduciary advice.

- **Proxy communications.** In a tightened discussion from the proposal, the Final Rule preamble states that a proxy guideline provided on a non-individualized basis to a broad class of investors *and that is not directed or presented as a recommended policy for the plan or IRA to adopt,* or a voting recommendation addressed to all shareholders, is not fiduciary advice.

- **Institutional investors.** By way of illustration, banks, securities firms and other financial market participants often discuss investment services and opportunities with institutional investors that manage, on a commingled or non-comingled basis, substantial investment pools that include ERISA assets and/or non-plan assets. The import of the Final Rule arguably is that, if the institutional investor has discretion to manage the investment of $1 of plan/IRA "plan assets," the entirety of any such interaction could be ERISA fiduciary "investment advice" for which exemptive relief is required – which would make DOL, rather than the SEC or bank regulators, the effective regulator of the financial market and market participants. The only solution offered in the preamble is not to base these discussions on the individual needs or particular circumstances of any plan or IRA. It may also be that a "reasonable investor in like circumstances" of an institutional investor objectively would have different expectations about the trusted advice provider components of the fiduciary definition, than would a less sophisticated retirement investor.

- **Foreign Exchange.** Banks routinely engage in FX transactions for ERISA customers in reliance on one of several exemptions, including §§408(b)(17) and (18) and PTE's 84-14 and 91-28. These exemptions generally require that the bank and its affiliates not provide fiduciary investment advice with respect to the FX transaction. The preamble to the Final Rule offered no help on this issue.

- **Securities Lending Services.** Similarly, the preamble provided no guidance whether the marketing of securities lending services - typically, a securities lending agent describes the operation of its service and the expected incremental income, without a "recommendation" as to the investment of assets – will constitute fiduciary advice.

- **Listed Options.** Brokers routinely screen retirement investors and follow FINRA and options exchange rules before allowing a given customer to trade listed options. While the final preamble did not address this matter, engaging in that process without solicitation efforts does not seem to rise to the level of a "recommendation."

- **Swap transactions.** DOL reconfirmed its guidance issued after the Dodd-Frank Act that disclosures required of swap counterparties would not be fiduciary recommendations, but cautioned that a swaps dealer could become a fiduciary by making specific investment recommendations to plan clients. The preamble also states that clearing firms will not become fiduciaries merely by reason of providing valuation, pricing and liquidity information.

Specific Circumstances

- **Third Party Models.** Asset allocation strategies developed by third party strategists/model makers are widely available to retirement investors. In these arrangements, an investor-facing intermediary recommends an asset allocation model developed by a third party financial expert, who often (but not always) has no affiliations that create conflicts. The third party expert designs each model for a specified investor profile and/or investment strategy; that expert may or may not populate the model with specific assets, but it never makes the trades for the model. These arrangements have proven useful and cost-effective for retirement investors in part because they are operated and priced on the basis that the third party expert is not an ERISA fiduciary, because it is not in privity with the retirement investor and the model is not individualized. While the Final Rule apparently treats the investor-facing intermediary's recommendation to use a third party model as fiduciary advice, in our view the third party expert still should not be a fiduciary.
  - Fiduciary status necessarily implies a relationship, and the third party expert has no relationship with the retirement investor. Generally, the third party expert does not even know the identity of the investors making use of its models.
  - More technically, the third party expert develops generic models that, objectively, are not "based on review of the retirement investor's particular needs or circumstances" and do not reflect "the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances," even on a group basis.
- **Digital tools for financial intermediaries.** Similarly, product manufacturers and asset managers offer digital investing tools to financial intermediaries, to assist in evaluating and, if appropriate, selecting the tool provider's products or models. The intermediary can typically use the tool to compare the tool provider's offering, including specific investments, to a retirement investor's current holdings, and may choose to show that output to the investor. For the same reasons as third party models, and because the tool provider is not communicating directly with the retirement investor, the intermediary, not the tool provider, generally should be treated as providing any fiduciary investment advice.
- **Solicitation/referrals.** The compensated referral of a retirement investor to an unrelated adviser or manager is treated as an investment recommendation under the Rule.
- **"Implicit" rollover recommendations.** The Final Rule preamble, as did the Proposal 4.0 preamble, signals DOL's intent to argue that rollover advice in any form includes "in many or most cases," or at least "often," an implicit recommendation to take the rollover, even if the provider's mandate is limited to advising on how the rollout should be invested.
  - In the usual manner, DOL offers no empirical support for this hypothesis.
  - In perhaps the clearest counter-example, suppose a participant has terminated employment and independently elected to cash out of an ERISA plan (she has come to think poorly of the plan sponsor and has resolved to sever all ties), received a distribution in the amount of her total plan balance, and is in the 60-day period when she can choose to roll those funds into an IRA. The logic of the preamble suggests that an investment professional, first consulted by the participant during the 60-day period as to the choice of IRA, has a fiduciary obligation also to consider whether the participant would be better served to roll those funds back into the plan, even if the participant has not asked for that advice and has no interest in hearing from the investment professional on that topic.
  - Further suppose that the participant has her banker, her financial adviser, and her insurance agent all competing for her IRA business. DOL apparently expects each of them to say, "Wait a minute, DOL imagines I'd be giving you an implicit recommendation on your cash-out from the plan, so first I have to collect information and make a professional judgment whether you should have taken those funds out of the plan in the first place." And the banker, financial adviser and insurance agent may well have licensing limitations with respect to the types of investments available and held under the ERISA plan, which the preamble acknowledges in some places but not in others.

In general, we find this position to be a dubious proposition, for a variety of reasons.

Scope of Investment Advice Fiduciary Status

In the Final Rule, DOL reiterated its traditional positions that:

- An investment advice fiduciary has fiduciary responsibility only with respect to assets for which they provide advice, although they may have co-fiduciary responsibilities (discussed below) and will be treated as parties in interest under the prohibited transaction rules in respect of other assets; and
- An investment advice fiduciary does not have an automatic fiduciary duty to monitor investments, which instead depends on the "reasonable expectations, understandings, arrangements, or agreements of the parties."

Enforcement jurisdiction

It appears from the preamble that DOL will take the litigation position – which is certainly debatable – that it has enforcement jurisdiction over any recommendation implicating assets currently held in an ERISA plan, even if the recommendation is limited to the investment of monies after rollout from the plan to an IRA or after distribution from the plan. It seems that only IRA-to-IRA rollovers, or the reallocation of IRA assets remote from a rollover, are clearly outside this claim of enforcement authority.

It is important not to confuse the substantive scope of the rule with the scope of DOL's enforcement jurisdiction. For example, under the Final Rule, recommendations for IRA-to-IRA rollovers are fiduciary advice, but only the IRS would have enforcement jurisdiction.

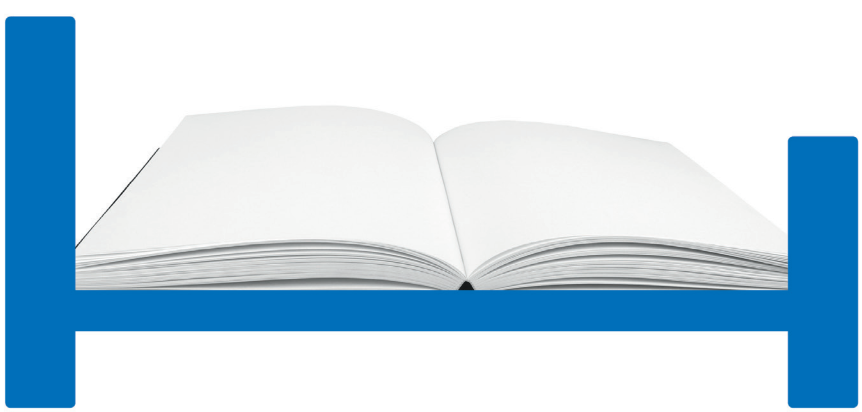
Ramifications of Fiduciary Status

While the purpose and the focus of the Final Rule is to create investment advice fiduciary status so as to invoke the ERISA §406(b) conflict of interest prohibitions and then to construct an extra-statutory "best interest" regulatory system, in the guise of a prohibited transaction exemption, for mitigating or eliminating those conflicts, the ERISA consequences of fiduciary status do not end there. Newly minted fiduciaries should take account of the other ramifications of that status in the process of operationalizing the Final Rule.

APPLICABLE TO ERISA PLANS AND (THROUGH THE IRC) IRA'S		
§406(a) "Per se" prohibited transaction rules (with IRC counterparts)	Absent an exemption, a fiduciary shall not cause a plan to engage in: • Sale or exchange or leasing of property between a plan and a party in interest • Lending of money or other extension of credit between a plan and a party in interest • Furnishing of goods, services or facilities between a plan and a party in interest • Transfer to or use by or for the benefit of a party in interest, of any plan assets • Acquisition on behalf of the plan of any employer security or employer real property in violation of ERISA §407	Because a fiduciary is also by definition a party in interest, the §406(a) prohibitions also are applicable.
APPLICABLE ONLY TO ERISA PLANS (EXCEPT WHERE THE NEW PTE'S EXTEND THE DUTIES TO IRAS)		
§404(a) general fiduciary standards - A fiduciary shall discharge his duties in respect of the plan:		
Duty of loyalty	Solely in the interest of plan participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.	In practice, compliance with applicable §406(b) relief is generally thought to satisfy this standard.
Duty of prudence	With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man 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.	A conscientious investment professional should by definition satisfy this "prudent expert" standard, which focuses on the "procedural prudence" of the investment process. See ERISA Reg. §2550.404a-1.
Duty to diversify	By diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.	The duty to diversify is limited by the scope of the fiduciary's investment mandate.
Duty to follow the governing documents	In accordance with the documents and instruments governing the plan to the extent they are consistent with ERISA.	Unless it is otherwise clear from the circumstances – e.g., the investment intermediary is responsible for the governing documents or is engaged to advise on allocation among 401(k) investment options or on whether to rollover – normal practice is to inquire about any applicable guidelines or limitations stated in the plan documents or investment policy statement.

Ramifications of Fiduciary Status

APPLICABLE ONLY TO ERISA PLANS (EXCEPT WHERE THE NEW PTE'S EXTEND THE DUTIES TO IRAS)		
§405 co-fiduciary liability	An "innocent" fiduciary is liable for the fiduciary breach of another fiduciary if the "innocent" fiduciary: • Participates knowingly in the breach, or knowingly acts to conceal it; or • Enables the breach by its own failure to comply with the §404(a) general fiduciary standards; or • Has knowledge of the breach and does not take reasonable action to remedy it.	The first two categories of co-fiduciary liability are based on affirmative acts of the "innocent" fiduciary. The third basis is passive, and somewhat counter-intuitive.
§409 liability for breach of fiduciary duty	A breaching fiduciary is personally liable to make good losses to the plan, to restore any profits to the plan made through the use of plan assets, and for other appropriate equitable or remedial relief.	Other ERISA provisions elaborate the details of claims against fiduciaries, which are subject to a three year/six year limitations period.
§410 exculpatory provisions	Exculpatory agreements relieving a fiduciary of ERISA liability are void as against public policy.	Fiduciaries may obtain fiduciary insurance, at their own expense or at the expense of the plan sponsor. Business E&O policies typically exclude coverage for ERISA liabilities.
§412 bonding	A fidelity bond in a specified amount is required of every fiduciary and every person who handles plan funds, with exceptions for broker-dealers covered by SIPC bonds, and for trust companies and insurance companies that meet minimum capital plus surplus and other requirements.	Guidance issued in 1975 states that nondiscretionary investment advice fiduciaries are not required to be bonded. Normal financial institution bonds typically do not include ERISA bonding.



Relief for conflicted fiduciary investment advice: Introductory observations

The discussion that follows considers in detail the various alternatives providing exemptive relief for conflicted fiduciary investment advice after the Final Rule. ERISA prohibits a fiduciary from engaging in self-dealing, acting with a conflicted interest, or receiving third party compensation, absent an exemption, Since conflicted investment advice can implicate all three prohibitions, a compliance solution is required.

In a variety of ways, the Final Rule is intended to, and does, narrow the alternatives available for conflicted investment advice fiduciaries to manage those conflicts.

- Traditionally, ERISA permits three methods for managing fiduciary conflicts:
  - Avoid fiduciary responsibility;
  - Negate the conflict; or
  - Make use of an available exemption.
- The Final Rule does not foreclose all opportunities to structure a relationship with a retirement investor so as not to invoke ERISA fiduciary responsibility. For example:
  - The Final Rule makes no change in the ERISA "plan asset" regulation. To the extent, e.g., an asset manager is relying on a position that it is not an ERISA fiduciary because is not managing "plan assets" under that regulation, the Final Rule should not alter that position, although the manager may still become a fiduciary with respect to "gating" interactions regarding the plan's investment in the manager's fund. If so, PTE 2020-02 (discussed below) will be the likely compliance solution.
  - In appropriate circumstances, an investment intermediary could limit its services to non-fiduciary "investment education," which the Final Rule expressly approves.
  - A conflicted intermediary could outsource the recommendation to an unconflicted, independent financial expert, and pass through that recommendation without modification. DOL has opined that, in appropriately structured circumstances, the conflicted fiduciary would not be deemed responsible for such a recommendation. See Advisory Opinion 2001-09A (the SunAmerica letter).
  - While the preamble reflects DOL's intention that its definition comprehensively captures investment intermediaries, there may be facts where all the elements of the definition are not present.
- Negating the conflict also remains conceptually available as an ERISA compliance alternative. In general, this alternative requires structuring the relationship so the revenue to the investment intermediary's enterprise does not vary with the investment decisions made by the retirement investor. There are of course many circumstances where this alternative is functionally unavailable, e.g., for gating interactions.
- Finally, while PTE 2020-02 is intended as the flagship exemption for conflicted advice and PTE 84-24 the alternative in limited circumstances, it is not the only extant exemption. Notably, the statutory exemptions for conflicted advice were not susceptible to modification by DOL in the Final Rule, and include §406(b) relief covering, for example:
  - Investment in interest-bearing bank deposits (ERISA §408(b)(4));
  - Solicitation of ancillary bank services (§408(b)(6));
  - Purchase or sale of an interest in a bank collective investment fund or insurance company separate account (§408(b)(8)); and
  - Participant investment advice through an eligible level fee or computer model arrangement (§408(b)(14)).

With respect to more specific matters:

Conflict mitigation. The preambles to both amended PTE 2020-02 and amended PTE 84-24 have extended discussions of conflict mitigation. Because both exemptions adopt the same standards, we read those discussions as equally applicable to both PTEs.

Post-initial sale transactions. Even under suitability standards of conduct, post-initial sale transactions – e.g., additional deposits, re-allocations and withdrawals – have been persistently problematic, in that the financial services company has no reliable way to independently validate whether the transaction was self-directed or was the result of a recommendation from its investment professional, and has no way to determine if and when "hold" recommendations are being provided. The Final Rule doubles down on that problem, generally making it an issue under PTE's both at the time of the transaction and during any retroactive compliance audit or review, as applicable, without offering any guidance for how a company should handle the problem. In our experience, the only viable approach entails training then relying on the investment professional to identify when a recommendation was provided.

Recordkeeping. The exemptions discussed below generally include a recordkeeping requirement, which usually incorporates specific instructions for access to those records. DOL has from time to time, starting with its first class exemption (PTE 75-1, discussed below), required as a condition for relief that the exempted party makes its records available for inspection during normal business hours, without notice, to a range of specified persons including but not limited to the DOL or IRS, such as plan sponsors and participants. In Proposal 4.0, there was some variation on this point among the class exemptions affected by the rulemaking, including in some cases even allowing access by authorized representatives of the listed persons (i.e., plaintiff's attorneys) during regular business hours.

In any event, ERISA by statute (§504(a),(b)) limits (i) the authority to investigate ERISA compliance only to the Department, which then may provide information it discovers to actually affected persons and other agencies, and (ii) books and records requests from DOL to once annually, absent a reasonable belief that that an ERISA violation may exist.

In the Final Rule, DOL receded on its more aggressive recordkeeping proposals and reverted to a standard 6-year recordkeeping requirement with access only by DOL and IRS, and without a demand for access without notice during business hours. It did not modify the extra-statutory recordkeeping requirements extant in existing exemptions, e.g., PTE 75-1.

DOL did suggest in the preambles that it will be actively requesting copies of disclosures, policies and procedures and other similar documents from exempted persons, which presumably will be subject to the statutory limitation of only one "books and records" request annually.

Admonitions. At different points, sometimes in connection with the same PTE, DOL variously admonishes the financial services provider to proceed "reasonably," or "carefully," or "prudently." The choice among those terms, which are not defined, presumably is purposeful, but in legal usage, they all conventionally denote a negligence standard.

Relief for conflicted fiduciary investment advice: Revisions to PTE 2020-02

As in Rule 2.0, DOL has restructured the complex of prohibited transaction relief for conflicted investment advice so that one exemption – under the new Final Rule, PTE 2020-02 – is the flagship exemption and, in many cases, the only available exemption. As compared to the revisions to the proposed fiduciary definition, the revisions in the Final Rule to the proposed PTE 2020-02 amendments are somewhat more consequential.

PTE 2020-02: Scope of relief

The Final Rule broadened the relief available for principal transactions.

Conditional exemptions are provided from the following ERISA prohibited transaction provisions and corresponding IRC provisions	§406(a)(1)(A): sale or exchange or leasing of property between a plan and a party in interest (including a fiduciary) §406(a)(1)(D): transfer to or use by or for the benefit of a party in interest (including a fiduciary), of any plan assets §406(b)(1): fiduciary acting in its own interest (self dealing) §406(b)(2): fiduciary acting with a conflicted interest §406(b)(3): fiduciary receiving third-party compensation in connection with a plan asset transaction	Note that PTE 2020-02 includes partial §406(a) relief as well as complete §406(b) relief, but does not clearly obviate any need to make use of the §408(b)(2) service provider exemption.
For these covered transactions	As a result of §3(21)(A)(ii) investment advice: • Receipt of reasonable compensation • Purchase or sale of an investment product to or from a Retirement Investor, and receipt of a mark-up, mark-down or other payment	In the Final Rule, relief was broadened to the purchase or sale of any "investment product," and is no longer limited to certain principal transactions.
Subject to these exclusions	• The transaction involves an ERISA Title I plan, and the Investment Professional, Financial Institution or any Affiliate is the employer of covered employees or (unless selected by an independent fiduciary or a Pooled Plan Provider) the plan's named fiduciary or plan administrator • Investment Professional or Financial Institution is acting as a plan administration fiduciary or discretionary asset management fiduciary	As in the proposal, robo-advice is no longer excluded from PTE 2020-02 relief, but the exemption remains unavailable for, e.g., plans of the Financial Institution, Investment Professional or an Affiliate.

ESsentials

- Under the Final Rule, PTE 2020-02 remains unavailable when the Investment Professional or Financial Institution has investment discretion over the transaction in question, and is available only in cases where the fiduciary just provides investment advice.
- The extension of the relief provided by the exemption, to "investment product" transactions resulting from fiduciary investment advice, is a marked departure from more limited relief DOL has granted in the past.
  - "Investment product" is not a defined term, but the preamble specifically references closed-end funds traded on a principal basis at inception.
  - The preamble also warns of the perceived dangers of conflicts, complexity and/or risk posed by principal transactions. The Department admonished Financial Institutions to "carefully" address these transactions under both the Care Obligation and Loyalty Obligation of the exemption in its policies and procedures (discussed below).

ESsentials

- At least in some circumstances, Financial Institutions and Investment Professionals will need to also make use of a second exemption, in addition to PTE 2020-02. As was the case with original PTE 2020-02, the scope of relief provided does not include relief from ERISA §406(a)(1)(C), which prohibits the furnishing of services between a plan and a party in interest (including a fiduciary). At least in some circumstances, Financial Institutions and Investment Professionals may also need to satisfy the §408(b)(2) service provider exemption and its regulation, including the 408b-2 disclosure requirement as applicable.

Key Definitions

The Final Rule made changes to the Retirement Investor and Financial Institution definitions and omits the Riskless and Covered Principal Transaction definitions as unnecessary in light of the broadened scope of the exemption.

Retirement Investor	• Plan • Plan participant or beneficiary • IRA • IRA owner or beneficiary • Plan or IRA fiduciary other than an investment advice fiduciary
Financial Institution	A federal or state Registered Investment Advisor, an SEC registered broker dealer, a federal or state supervised bank or savings association, an insurance company meeting certain requirements or (with respect to HSA's only) an IRS-approved non-bank trustee or custodian that: • Is not suspended, barred or prohibited from making recommendations by any regulator/SRO or PTE 2020-02; and • Employs/retains the Investment Professional, including as an independent contractor, agent or registered representative
Investment Professional	An investment advice fiduciary with respect to the assets involved in the recommended transaction, who is an employee, independent contractor, agent or registered representative of a Financial Institution, satisfies applicable federal and state regulatory and licensing requirements with respect to the covered transaction, and is not disqualified or barred from making recommendations by any regulator/SRO including by DOL under this PTE

The Retirement Investor definition was conformed to the definition in the fiduciary regulation, and excludes other investment advice fiduciaries.

In a wholesaling or similar setting, another investment professional with fiduciary discretion would be a Retirement Investor.

The Financial Institution definition was extended to non-bank trustees or custodians, as to HSA's only, but not to any other type of organization.

As in the proposal, only insurance companies are subject to additional requirements beyond applicable status as a regulated financial services company.

ESsentials

- PEP pooled plan providers (PPP) can make use of PTE 2020-02 to the extent they are and on the same basis as other Financial Institutions. DOL reserved, for another guidance setting, questions raised by commentators about a PPP's decision to hire affiliates or employer decisions to join a PEP.
- There are, however, categories of investment professionals potentially covered by the expanded definition that cannot make use of PTE 2020-02 for lack of a Financial Institution as defined.

Conditions

All the relief provided by PTE 2020-02 is subject to three conditions:

- An "investment advice arrangement" condition, which itself includes five clusters of substantive, process and/or disclosure requirements, described separately below;
- A euphemistically named "eligibility" provision, which disqualifies a Financial Institution or Investment Professional from relying on the exemption in the event of certain criminal convictions; and
- A recordkeeping requirement.

The effect of the conditions is that only Financial Institutions and Investment Professionals, as defined, along with their Affiliates and Related Persons, can avail themselves of any of the relief provided.

The preambles claim that these compliance obligations are "generally consistent" with Regulation BI and the Advisers Act, but at no point does DOL definitively state that compliance with those rules constitutes compliance with PTE 2020-02. The exemption does impose compliance obligations that are incremental to any other body of "best interest" regulation.

Investment Advice Arrangement: Impartial Conduct Standards

The Financial Institution and Investment Professional must comply with the following standards.

Definitions	**Affiliate** • Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Investment Professional or Financial Institution • Any officer, director, partner, employee, or ERISA (3)(15) relative of the Investment Professional of Financial Institution • Any corporation or partnership of which the Investment Professional or Financial Institution is an officer, director, or partner **Related Entity**: Any party that is not an Affiliate and (i) has an interest in an Investment Professional or Financial Institution that may affect the exercise of the fiduciary's best judgment as a fiduciary, or (ii) in which the Investment Professional or Financial Institution has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary.

The Affiliate definition follows a long-established pattern in PTE's.

DOL has a penchant for writing rules with a facts and circumstances back door – the purpose of the Related Entity definition – which of course defeats the purpose of having a rule in the first place. This definition was refined in the Final Rule for clarity.

On a related point, see Advisory Opinion 2011-06A, in which DOL outlined a range of relationships that might cause a fiduciary to have an impermissible conflict of interest that "may affect the exercise of the fiduciary's best judgment."

Conditions

Impartial Conduct Standards: **Care Obligation and Loyalty Obligation**	At the time provided, the investment advice meets the Impartial Conduct Standards, i.e.: • Meets the ERISA "prudent expert" standard, based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor (Care Obligation); and • Does not place the financial interests of the Investment Professional, Financial Institution, Affiliate, Related Entity or other person ahead of the Retirement Investor's interest, or subordinate the Retirement Investor's interest to their own (Loyalty Obligation).	In the Final Rule, "best interest" terminology was dropped from the operative text, in favor of identifying the two obligations separately.
Reasonable Compensation	The compensation received, directly or indirectly, by the Financial Institution, Investment Professional and their Affiliates and Related Entities for their services does not exceed ERISA §408(b)(2) reasonable compensation.	Reasonable compensation is a conventional PTE condition and is judged against a market standard.
Best Execution	As required by the federal securities laws, the Financial Institution and Investment Professional seek to obtain the best execution of the investment transaction reasonably available under the circumstances.	
Anti-fraud Standard	Written and oral statements by the Financial Institution and Investment Professional to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time made, materially misleading, including by omission.	The anti-fraud condition was edited for clarity.
Special Exemption for §3(38) RFP	If a Financial Institution or Investment Professional provides fiduciary investment advice as part of an RFP response to provide ERISA §3(38) investment manager services and is hired, it may receive compensation under PTE 2020-02 if it complies with the Impartial Conduct Standards.	The Final Rule adds a new exemption for this specific transaction.

ESsentials

Fundamentally, broadly imposing these conditions is the principal point of this entire exercise. When DOL publicly defends Rule 4.0, the impartial conduct, reasonable compensation and anti-fraud standards are the conditions it most often references as "reasonable expectations" for any investment intermediary, and the expansion of the fiduciary definition functionally subjects more intermediaries to these standards.

More specifically:

– The policies and procedures requirement, discussed below, builds out the Care and Loyalty Obligations.

– The Care Obligation is the condition that that extends the ERISA "prudent expert" standard of "procedural prudence" to non-ERISA IRA's.

ESsentials

- The operative text of the Final Rule adds two new examples of the application of the Loyalty Obligation, for a total of three.
  - As between two commission-based products available on the Financial Institution's platform, the Investment Professional may not recommend an investment that is worse for the Retirement Investor but better or more profitable for the Investment Professional or the Financial Institution.
  - As between a brokerage account and an advisory account, the Investment Professional must base their recommendation on the Retirement Investor's financial interest, not on any competing interest of the Investment Professional.
  - An Investment Professional "generally" may not recommend an advisory account if the Retirement Investor's interests are better served by paying a one-time commission for a long-term buy-and-hold investment, taking into account total costs to the Retirement Investor over time.
- The preamble takes care to reiterate that the Impartial Conduct Standards do not foreclose transactional or ongoing compensation, or proprietary products or products that generate third party compensation, or a limited investment platform, but states that those circumstances have consequences for the Financial Institution's policies and procedures.
- The preamble also confirmed that FAQ 18 from the 2021 FAQs on PTE 2020-02 remains valid. That FAQ provides that an insurance company distributing products through independent distribution channels are responsible under PTE 2020-02 to supervise only recommendations and sales of its own products, not sales of other companies' products, and described how the conditions of PTE 2020-02 could be satisfied in those circumstances, which is reiterated in the preamble.
- DOL has a longstanding position that best execution is a component of prudent fiduciary practice under ERISA, We read this condition to incorporate the federal securities best execution obligation but not to extend its scope.

Investment Advice Arrangement: Disclosure

The Final Rule meaningfully restructured the pre-transaction and rollover disclosures, dropped the additional fee disclosure on request, and did not add a public website.

Definitions	Conflict of Interest: An interest that might incline a Financial Institution or Investment Professional – consciously or unconsciously – to make a recommendation that is not disinterested.
At or before the time a covered transaction occurs, the Financial Institution must provide to the Retirement Investor:	Written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice and are fiduciaries under ERISA and the IRC or both, with respect to the recommendation
	Written statement of the Impartial Conduct standard of care owed by the Investment Professional and Financial Institution to the Retirement Investor
	Written disclosure of all material facts relating to the scope and terms of the relationship with the Retirement Investor, including: • Material fees and costs that apply to the Retirement Investor's transactions, holdings and accounts; and • The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be provided to them.
	Written disclosure of all material facts relating to Conflict of Interests that are associated with the recommendation.
Prior to engaging in or recommending a rollover from an ERISA plan to an IRA, or making a recommendation of a post-rollover investment currently held in an ERISA plan, the Financial Institution and Investment Professional must provide to the Retirement Investor:	Documentation of the bases for their recommendation to engage in the rollover, which must consider but is not limited to (as applicable): • The alternatives to the rollover, including leaving the money in the current Plan • The fees and expenses associated with the Plan and the recommended investment or account • Whether an employer or other party pays for some or all of the current Plan's administrative expenses • The different levels of services and investments available under the current Plan and the recommended investment or account
Good faith errors	Disclosure errors or omissions, made in good faith and with reasonable diligence, may be corrected as soon as practicable and no later than 30 days after the Financial Institution discovers or reasonably should have discovered the error, without loss of exemptive relief for the affected covered transactions.
Reasonable reliance	The disclosures may be prepared with good faith reliance on information and assurances provided by other parties (other than Affiliates) that the Financial Institution and Investment Professional do not know or have reason to know are incomplete or inaccurate.
Prohibited disclosures	A Financial Institution is not required to disclose information where otherwise prohibited by law.

The Conflict definition was modified in the Final Rule to disconnect it from the Impartial Conduct Standards, and is otherwise problematic.

The preamble provides greater clarity on DOL's expectations for the fiduciary acknowledgement.

DOL provides a model form for the first two disclosures, and only those disclosures.

This disclosure essentially is a mini 408b-2 disclosure.

The redrafting of the conflicts disclosure in the Final Rule was infelicitous, as discussed below.

Reasonable assumptions of plan expense data, based on publicly available information, may be substituted if the actual Plan information is not reasonably obtainable, but then must be explained in the document.

Similarly, the last two categories of Plan information may not be readily and reliably obtainable, but it is unclear from the preamble how the Financial Institution and Investment Professional are to proceed on these disclosure points.

ESsentials

- As always, a requirement to provide pre-transaction disclosure, in the context of a typically fluid discussion of investment possibilities and changing investor inclinations, and in an environment where investment choices often can be entered and transmitted in real time, will have its practical challenges.
  - On this point, the Final Rule includes a timing rule to the effect that the pre-transaction disclosure must be provided at the **later** of the time the recommendation is made or the time the Financial Institution or Investment Professional becomes entitled to current or future compensation by reason of the recommendation.
  - For gating interactions or transaction-specific compensation, delivery will be most commonly required at or about the time of execution on the recommendation.
  - For conflicts arising under a fee for service arrangement, e.g., recommendation of a proprietary product by an investment advisory representative of an RIA, the same would be seem generally to be the case.
- The rollover disclosure, however, must be provided "[b]efore engaging in or recommending" a rollover and, at least on the face of the operative language, it is questionable whether the timing rule applies to that disclosure. The Final Rule does narrow the circumstances in which this disclosure must be provided, to:
  - A rollover from an ERISA Title I plan, or
  - The post-rollover investment of assets currently held in an ERISA Title I plan.

  The disclosure is not required for IRA-to-IRA rollover recommendations, or for the post-rollover investment of assets currently held in an IRA, although the preamble reiterates that the other conditions of the exemption apply and the analysis memorialized in the rollover disclosure would still be applicable even if it need not be documented and disclosed in the same manner.

  With respect to the substance of the rollover disclosure, the preamble notes that DOL did not add consideration of the Retirement Investor's Social Security benefits to the operative text, but observed that may be an "important component" of the overall rollover analysis.

  The preamble recognizes that the Investment Professional may not have the regulatory license or professional expertise to advise with respect to the investments under the incumbent plan or IRA, and at no point suggests the Investment Professional therefore is barred from providing the rollover recommendation, but provides no satisfactory explanation of how the Investment Professional should proceed in those circumstances, a point we discuss in additional detail under PTE 84-24. This leaves stakeholders in a very difficult position, caught between DOL on the one hand, and the primary investment regulators on the other. It would appear that there are at least three options available to address this risk, all of which will likely be viewed as sub-optimal:
  - Require an Investment Professional to become licensed in a manner that allows them to discuss securities under the incumbent plan (or to align with an investment adviser or broker-dealer or other licensed professional to provide that aspect of the rollover recommendation);
  - Build a comprehensive set of guardrails about the manner in which the Investment Professional assesses and describes their role in assessing the incumbent plan and the limited nature of such assessment related to the securities offered or held in such plan as a means of taking a position that no recommendation was provided about the specific securities in the incumbent plan. While this helps with the issue of whether the Financial Professional is properly registered or licensed to discuss the securities, it may put pressure on the determination of whether or not the Impartial Conduct Standards have been met; or
  - Avoid business where the incumbent plan includes assets for which the Investment Professional is not licensed.

ESsentials

- It is unclear what DOL intends for transfers among 403(b) vehicles, which often do not take the form of "rollovers." At a minimum, the incumbent vehicle must be part of an ERISA Title I plan for the rollover disclosure requirement to have any potential for applying.
- With respect to the fiduciary acknowledgement, the development and operationalization of that disclosure will require careful consideration.
  - In the Final Rule, DOL was adamant that the fiduciary acknowledgement include an affirmative admission of fiduciary status. It criticized the now impermissible "conditional" acknowledgement referenced in the preamble – "we are an ERISA/IRC fiduciary to the extent we provide a recommendation that ERISA treats as investment advice" – for not definitively committing to fiduciary status.
  - The model acknowledgement offered by DOL – "we are making investment recommendations to you as ERISA/IRC fiduciaries" – is said to "broadly apply to all the advice provider's recommendations," and therefore seems to be an omnibus acknowledgement that could be provided once. The preamble also permits the model acknowledgement to be limited to "specific recommendations or classes of recommendations," which could necessitate delivery more than once.
  - Financial Institutions may be well-served to evaluate, for risk management reasons, the degree of specificity to include in a fiduciary acknowledgement. In some cases, the specificity may be inherently provided by the circumstances, e.g., if the fiduciary acknowledgment is included in a package of account-opening documentation or with an annuity application. In other cases, e.g., a recommendation regarding a mutual fund trade on a digital platform to which the retirement investor already has access, the Financial Institution may be inclined to reflect such specificity through a transaction-specific acknowledgement, but that would also introduce operational complications and increase the risk of a non-exempt prohibited transactions through disclosure failure.
- The mini 408b-2 disclosure and the conflicts disclosure together are said to be modeled on Regulation BI disclosures. There is no definitive statement that the Regulation BI disclosures suffice as PTE 2020-02 compliance for broker-dealers.
- With respect to the mini 408b-2 disclosure, the requirement was redrafted in meaningful ways, including to delete (i) the specific reference to third party compensation and (ii) the competing mandates that the disclosure be in plain English, taking into account the Retirement Investor's level of financial experience, but also be accurate and not misleading in any respect.
  - Notwithstanding the reformulation of this disclosure requirement, DOL may expect disclosure of indirect compensation received from third parties, at least in some circumstances.
  - For participant-level recommendations, this will be a challenging disclosure to prepare in a form that will be accessible to participants with a range of financial sophistication. The deletion of the competing mandates was warranted, as they created a liability trap, but the preamble still encourages a plain English approach and the general anti-fraud standard of the exemption is applicable.
  - For plan-level recommendations where a plan fiduciary is receiving a 408b-2 disclosure, the mini 408b-2 disclosure required by PTE 2020-02 will be duplicative, and the Financial Institution will have to spend resources managing the risk of discontinuity between documents created by that unnecessary duplication. In these circumstances, delivery of the full 408b-2 disclosure should also satisfy the PTE 2020-02 condition, and DOL should so state.
- With respect to conflicts, the proposal would have required disclosure of "the Financial Institution's and Investment Professional's material Conflicts of Interest." The Final Rule instead requires disclosure of "all material facts relating to Conflict of Interests that are associated with the recommendation."

ESsentials

- Read literally, the Final Rule requires disclosure about **all** Conflicts, not just material Conflicts. By contrast, the formulation under Regulation BI relating to conflict disclosure is that all "material facts" related to "conflicts of interest" must be disclosed.
- Given the squishy language used to define a Conflict, which is not tied to the Impartial Conduct Standards – viz., an interest that might incline a Financial Institution or Investment Professional, consciously or unconsciously, to make a recommendation that is not disinterested – the reformulated requirement on its face creates a new liability trap.

DOL should clarify that it intends disclosure only with respect to material Conflicts – which would better serve Retirement Investors and provides the appropriate basis for fiduciary responsibility and liability.

– Finally, it is essential to understand that the fiduciary acknowledgement requirement has far-reaching substantive import, beyond its disclosure function.

- As discussed above, the fiduciary acknowledgement condition effectively broadens the scope of the fiduciary definition. In certain insurance and securities distribution models, the Financial Institution is not party to the recommendation provided to the Retirement Investor, other than in an oversight or supervisory capacity. That is, the Financial Institution itself is not providing investment advice on the facts, and would not be a fiduciary under even the new, expansive definition. Nonetheless, in these circumstances the fiduciary acknowledgement condition still requires the Financial Institution to admit fiduciary status, which it does not otherwise have, as a condition for fiduciary relief for its Investment Professional, which has the circular consequence of creating a need on the part of the Financial Institution for its own fiduciary relief.
- In addition, the first two pre-transaction disclosures risk converting an IRC excise tax obligation to the IRS into an affirmative and legally enforceable obligation owed an IRA owner that is not provided by statute. DOL may continue to insist that the required fiduciary acknowledgement and recitation of the Impartial Conduct Standards does not create the basis for a legal claim by the IRA owner not provided in the statute – which figured prominently in the Fifth Circuit's decision to vacate Rule 2.0 – but federal judges are often very familiar with the dynamics of state-law civil litigation and will find to the contrary in the litigation challenging Rule 4.0. Even the preamble describes the disclosure as "necessary to provide Retirement Investors with a clear statement of *the duties Financial Institutions owe them*" (emphasis added), a characterization repeated in the operative text. A plaintiff's lawyer surely will not find it challenging to turn a statement to the effect that "I am a fiduciary providing a recommendation to you and MUST comply with the Care and Loyalty Obligations" into a complaint.

Investment Advice Arrangement: Policies and Procedures

Requirement	The Financial Institution must have and enforce written policies and procedures "prudently" designed to ensure the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions.	The policies and procedures requirement was redrafted to apply to all the conditions of the PTE, not just the Impartial Conduct Standards.
Conflict mitigation: in general	The policies and procedures must mitigate **Conflicts of Interest** to the extent a reasonable person reviewing the policies and procedures as a whole would conclude that they do not create an incentive for the Financial Institution or Investor Professional to place its own interest, or those of an **Affiliate** or **Related Entity**, ahead of the Retirement Investor.	Like the disclosure requirement, the Conflict mitigation requirement is not limited to **material** Conflicts of Interest.
Conflict mitigation: specific actions	Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude is likely, to result in recommendations that do not the Care Obligation and Loyalty Obligation.	The import of this critical requirement is not perfectly clear, as discussed below.
Production to DOL	A Financial Institution must provide its complete policies and procedures upon DOL request within 30 business days.	The delivery requirement was extended from 10 days to 30 days.

ESsentials

Perhaps the most consequential question left open under the Final Rule is how the policies and procedures condition will be administered over time.

- The Final Rule suggests that this condition will be administered in a reasonable and sensible manner.
  - The operative text expresses this requirement in terms of conflict "mitigation" rather than "elimination," and the preamble admits that no set of policies and procedures will perfectly police conflicts. A given violation of the Impartial Conduct Standards by an Investment Professional does not push the Financial Institution's overall PTE 2020-02 program out of compliance.
  - The preamble states more than once that the conflict mitigation requirement is an objective rather than subjective requirement, which is consistent with the general rule stated in the operative text.
  - The operative text tests the effect of the policies and procedures on an aggregate basis, not on a line by line basis.
  - The preamble is also very clear that the Final Rule does not prescribe the use of any of the specific actions enumerated in the operative text, and contends that commentators who read Proposal 4.0 to the contrary misunderstood DOL's intentions.
  - In particular, the preamble specifically states that educational conferences are permitted with "reasonable guardrails," especially if they involve travel, and that it can be reasonable to tie conference attendance to sales thresholds "in certain circumstances." "Special care" is required, however, if the educational conference is held in a vacation destination or where training is merely incidental to the event.
  - Similarly, the preamble confirms that investments in Class A mutual fund shares are not precluded.

Investment Advice Arrangement: Policies and Procedures

  - The preamble suggests that policies and procedures developed and administered in reasonable good faith, and appropriately refined with experience, will satisfy this condition.
  - The preamble also suggests that Regulation BI conflict mitigation norms will also satisfy this policies and procedures requirement.
- It is perhaps inevitable with any new regulatory action, but the Final Rule is not as definitive on these points as it could be.
  - Institutional memories in the financial services industries are long enough to recall the conflict mitigation and elimination positions DOL took under Rule 2.0.
  - The preamble suggests that reasonable, good faith compliance and observance of Regulation BI norms will suffice, but does not conclusively commit to those points, leaving room for DOL retrospectively to second guess Financial Institutions.
  - The conflicts mitigation analysis is repeatedly said to be objective but, with respect to the list of specific actions, the operative text provides that those actions may not operate "in a manner that is *intended*, or that a reasonable person would conclude is likely, to result in recommendations that do not meet the Care Obligation or the Loyalty Obligation" (emphasis added). Accordingly, notwithstanding the preamble and the general rule, this operative text leaves open the possibility that a separate, subjective test is applicable to these specific actions.
  - Also with respect to the specific actions, the preamble says those actions are not "categorically" prohibited, but that Financial Institutions "are only required to eliminate such incentives" (emphasis added) if they do not meet the foregoing standard, and recalled the language from FAQ 16 that "[t]he Financial Institution should aim to eliminate such conflicts to the extent possible, not create them."
    - This is more prescriptive language than otherwise used in the preamble, where, for example, "the Department stresses that is not imposing an obligation on firms to eliminate all differential compensation, but rather to manage any conflicts of interest," including "supervisory oversight of recommendations, particularly in areas where differential compensation remains."
    - Similarly, in the PTE 84-24 preamble, DOL "recognizes that it is impossible to eliminate all conflicts of interest with respect to the commission-based sale of insurance products, and the Department is not demanding the impossible."

  It is not unfair to think that the preambles are providing mixed signals.
- In any event, it is also not unfair to have a concern that, if the Final Rule survives judicial review, the policies and procedures requirement will be administered more stringently over time. For example, in the five years since the adoption of Regulation BI, the SEC staff and FINRA (guided by the SEC staff's positions) have been taking more restrictive positions than the Commission suggested would be applicable when it adopted that regulation, and have been doing so through the publication of staff bulletins/FAQs as well as through examination and enforcement activities.
- Finally, DOL continues to face political pressure to eliminate trips and other awards.
- Characteristically, DOL will say these are all facts and circumstances determinations that it is not in a position to definitively prejudge. Characteristically, financial services providers will say it is asking too much to take a regulator on faith, when the provider is facing regulation by enforcement and bearing all the risk.
- To the extent DOL can provide more definitive clarity, e.g., on common fact patterns in the affected industries, it would advance the purposes of this undertaking.
- On a more specific point, the preamble observes, in connection with principal transactions but presumably intended more broadly, that that "the greater the dangers posed by conflicts of interest, complexity, or risk, the greater the care" that must be taken in the Financial Institution's policies and procedures.
- The preamble retains DOL's detailed discussion of the many steps it believes Financial Institutions should take to offer proprietary products (and by extension, products that provide third party compensation), notwithstanding reasonable arguments that this discussion goes well beyond the operative terms of the PTE. It is, however, the one case where DOL has provided detailed insight into how it is conceptualizing compliance with the policies and procedures requirement, and so may be instructive by analogy in other circumstances as well.

Investment Advice Arrangement: Retrospective Review

The retrospective review condition was adopted substantially as proposed

Definition	**Senior Executive Officer:** any of the CEO, president, CFO, CCO, or one of the three most senior officers of the Financial Institution
Review	At least annually, the Financial Institution must conduct a retrospective review "reasonably" designed to assist the Financial Institution in detecting and preventing violations of and achieving compliance with the conditions of the exemption.
Updates	The Financial Institution must update its policies and procedures as developments dictate and to ensure they remain "prudently" designed, effective, and compliant with the conditions of the exemption.
Report	The methodology and results of the retrospective review must be provided in a written report to a Senior Executive Officer.
Certification	The Senior Executive Officer must certify annually that: • The officer has reviewed the report; • The Financial Institution has or will timely file with the IRS Form 5330 reporting and paying any excise tax for non-exempt prohibited transactions discovered by the Financial Institution; and • The Financial Institution has written policies and procedures, and a prudent updating process, which meet the conditions of the exemption.
Timing	The review, report and certification must be completed within six months following the end of the period covered by the review.
Recordkeeping and production to DOL	The Financial Institution must retain the report, certification and supporting data for a six-year period and make them available, to the extent permitted by law, to DOL within 30 business days of the request to the extent permitted by law.

There is no requirement to engage an outside auditor.

There is, purposefully, no materiality standard for the excise tax requirement.

The delivery requirement was extended from 10 days to 30 days.

ESsentials

DOL persisted in adding of the Form 5330 filing to the Senior Executive Officer's certification, which was not required at the initial adoption of PTE 2020-02.

- Under the tax law, a taxpayer need not file Form 5330, like any other tax return, if it has a reasonable basis to believe no tax is due.
- In the preamble, DOL says that "it is merely requiring that transactions that are reportable to the IRS are in fact reported." The source for this authority remains unclear.
- It remains unclear, however, how a good faith determination not to file a Form 5330 should be handled under the certification, or whether this condition of the exemption would be failed if a Financial Institution in good faith did not file a Form 5330 but an excise tax subsequently was found to be due and owing, but DOL disavowed any intention of rewriting tax law or modifying any taxpayer obligations in the Final Rule.

Investment Advice Arrangement: Self-Correction

The self-correction provision, the final provision grouped under the investment advice arrangement condition, was adopted as proposed, except that the requirement to notify DOL of the self-correction was omitted. Self-corrections, which are not obligatory but will cure an otherwise non-exempt prohibited transaction, are to be memorialized in the report of the applicable retrospective review, which is available to DOL.

Correction	The Financial Institution corrects any violation of the conditions of PTE 2020-02 and the Retirement Investor is made whole for any investment loss.
Timing	Correction occurs no later than 90 days after the Financial Institution learned or reasonably should have learned of the violation.
Retrospective review	The Financial Institution notifies its PTE 2020-02 retrospective reviewer during the applicable review cycle, and the violation and correction must be specifically set forth in the applicable written report.

In-"Eligibility"

The second condition in PTE 2020-02 disqualifies otherwise eligible Financial Institutions and Investment Professionals from making use of the exemption in the event of certain criminal convictions or determinations by DOL.

Definition	Controlled Group has the IRC 414(b) and (c) definition and includes predecessor or successor entities.
Basis for ineligibility	The Financial Institution, an entity in its Controlled Group, or the Investment Professional is: • Convicted on or after September 23, 2024, by a US federal or state court of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or • Convicted on or after September 23, 2024, by a foreign court of competent jurisdiction of a substantially equivalent crime, excluding convictions that occur within a foreign country listed on the Commerce Department's "foreign adversaries" list; or • Found or determined on or after September 23, 2024, in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by DOL or certain other Federal or State agencies, to have participated in a systematic pattern or practice of violating or for intentional violation of the conditions of PTE 2020-02, or a systematic pattern or practice of failing to correct non-exempt prohibited transactions involving investment advice or report and pay resulting excise tax, or providing materially misleading information to DOL in connection with the conditions of PTE 2020-02. *Continued on next page...*

The Controlled Group concept was substituted for the broader Affiliate concept in the Proposal.

Income tax evasion both is different in kind from the other listed crimes (or ERISA §411) and receives unique treatment in this recitation. We read it to mean that IRC §7201 felony attempt to evade or defeat tax would be a disqualifying crime, but not §7202 felony willful failure to collect or pay over tax, or §7203 misdemeanor willful failure to file a return, supply information, or pay tax.

The foreign adversaries exclusion was added in the Final Rule.

A judicial determination was substituted for DOL's judgement as to these matters, which in DOL's view obviated the need for the elaborate "Opportunity to be Heard" procedures.

Continued from the previous page...

Timing and scope	Ineligibility to rely on PTE 2020-02 begins on: • The date of conviction in the trial court, regardless of whether an appeal is filed; or • The date of the final judgment (regardless of whether an appeal is filed) or court-approved settlement. Ineligibility ends: • 10 years after the ineligibility date or release from imprisonment, whichever is later; • On the date of a subsequent judgment reversing the applicable conviction or other court decision; or • On the date DOL grants an individual PTE permitting continued reliance on PTE 2020-02.
Transition period	The Financial Institution or Investment Professional may continue to rely on PTE 2020-02 for a one-year period after its ineligibility date, upon specified notice to DOL within 30 days of that date.
Alternative exemptions	The Investment Professional or Financial Professional may continue to rely on other alternative exemptions, if available, or to apply for a retroactive or prospective individual PTE.

The wind-down period was reframed as a transition period and reverted to one year.

ESsentials

One of the virtues of PTE 2020-02 as originally adopted was its reasonable and commensurate ineligibility provision. In contrast, the ineligibility provision of the qualified professional asset manager (QPAM) PTE has been an epic failure. To date, it has done nothing to advance the security of Americans' retirement savings. All it has accomplished is to compel 10 global financial institutions to become beggars at the feet of DOL, forced by reason of a foreign criminal conviction of a remote affiliate that had no connection to the institution's conduct of US business, to seek, in protracted and expensive administrative proceedings, the agency's grace to continue to act as a QPAM.

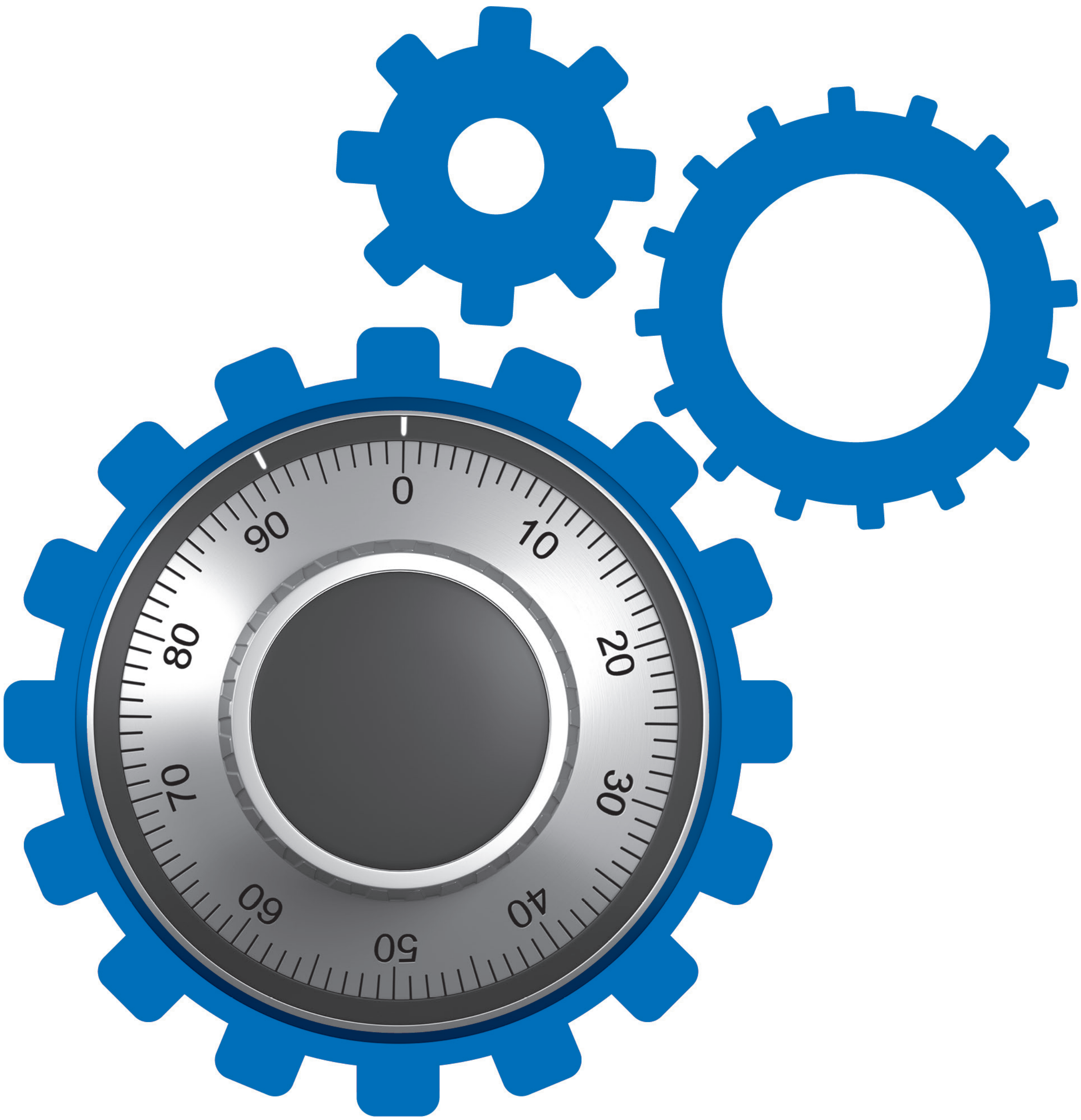
DOL recently adopted an amendment to the QPAM ineligibility provision and generally replicated that provision in PTE 2020-02. While it is an improvement over the provision offered in Proposal 4.0, particularly in respect of observance of due process norms, this provision is wrong in so many ways, particularly in an exemption that will have far broader application than the QPAM exemption and where there are few if any alternative paths to compliance.

- DOL is substituting its preferred approach over the statutory criminal disqualification provision (ERISA §411), which is far narrower and does not attribute a criminal conviction of an affiliate to the fiduciary.
- DOL is also substituting its own judgment, for the judgment of the primary regulator, as to the integrity of the Financial Institution or Investment Professional to do US retirement business. It is the most fundamental responsibility of the primary regulators to pass on the fitness of financial services providers to carry on that business in the US, which DOL is usurping.
- Without any specific authority from Congress, DOL arrogated for itself the power to impose a "death sentence" on a Financial Institution – disqualification from providing conflicted "recommendations," as broadly conceived in the new fiduciary definition, in the US retirement market would effectively force a US financial services provider out of business – in circumstances where the primary regulator might very well conclude that outcome is contrary to the greater public good.
- To the extent DOL's purpose is to encourage financial services enterprises to maintain a global compliance culture, the agency is presuming to act far outside its purview.

Recordkeeping

The final condition of PTE 2020-02 is that the Financial Institution must for six years maintain records demonstrating compliance with the exemption and must make those records available, to the extent permitted by law, to the DOL or IRS.

- On the one hand, this recordkeeping requirement is conventional in PTEs and tracks the ERISA limitations period for claims of fiduciary breach.
- On the other hand, given the content of the PTE 2020-02 conditions and the breadth of their application to daily investment interactions with Retirement Investors, the recordkeeping requirement in this particular PTE is no small undertaking and will require careful attention.



Limited alternative relief: Amended PTE 84-24

Prior to amendment, PTE 84-24 functionally provided two sets of helpful exemptions for certain insurance and mutual fund transactions. As of the effective date, amended PTE 84-24 narrows the two existing sets of exemptions in respect of advice provided by investment advice fiduciaries, and adds a new exemption for conflicted investment advice fiduciaries limited to the independent insurance distribution channel and that models PTE 2020-02 with refinements specific to that setting.

While this is not clear from the operative text, relief under PTE 84-24 is provided on different terms for transactions occurring in three different time periods:

- Transactions occurring on or before October 31, 1977, which were subject to limited conditions;
- Transactions occurring on or after November 1, 1977, and on or before September 22, 2024, which are subject to the contemporaneous terms of the exemption. The operative text as amended suggests that the new conditions of the exemption are retroactively applicable, but that amendment takes effect on September 23, so the existing conditions of the exemption continue to apply until the effective date of the amendment even though they will no longer appear on the face of the exemption; and
- Transactions occurring on or after September 23, 2024, to which the amended terms of the exemption apply.

The proper treatment of insurance and annuity transactions under the revised complex of exemptions for conflicted advice was never fully resolved under Rule 2.0 before it was vacated, and again proved problematic in Proposal 4.0. As we see it, both the BIC Exemption in Rule 2.0 and PTE 2020-02 were in the first instance structured around the premises of the broker-dealer regulatory model and, while SEC-registered insurance products are sold through that model, other insurance products are offered through multiple other insurance distribution channels regulated in other ways that do not mesh with the premises of the SEC-regulated model. DOL received significant comments addressing the inadequacies of Proposal 4.0 for insurance distribution, and undertook to be responsive in at least some respects in the Final Rule.

Amendments to Existing Exemptions

<table>
<tr><th colspan="2">Definitions</th></tr>
<tr><td colspan="2">Affiliate has the same meaning as under PTE 2020-02.</td></tr>
<tr><td>Relief provided in amended PTE 84-24</td><td>Relief available to:</td></tr>
<tr><td>§§406(a) and (b) relief for:
• Insurance agent/broker/pension consultant's (or an Affiliate's) receipt of a sales commission from an insurance company for plan purchase of an insurance/annuity contract, if the sales commission is not received as a result of fiduciary investment advice.
• Principal Underwriter's (or an Affiliate's) receipt of a sales commissions for plan purchase of mutual fund securities, if the sales commission is not received as a result of fiduciary investment advice.
• Effecting of the foregoing purchases by insurance agent/broker/pension consultant/Principal Underwriter (or an Affiliate), if the purchase is not the result of fiduciary investment advice.
• Plan purchase of an insurance/annuity contract from an insurance company, if the purchase is not the result of fiduciary investment advice.
[PTE 84-24 §§III(a)-(d)]</td><td>Specified persons who are:
• Non-fiduciary parties in interest
• Investment advice fiduciaries (at least in form)
The conditions have always excluded relief for the other two categories of ERISA fiduciaries: plan administrators and discretionary asset management fiduciaries.</td></tr>
</table>

Throughout the exemption, the limitation in respect of fiduciary investment advice is formulated differently than proposed, which may be consequential (discussed below).

DOL receded on its proposal to limit these exemptions to specified forms of sales commission.

Limited alternative relief: Amended PTE 84-24

§§406(a) and (b) relief for purchase of an insurance/annuity contract or mutual fund securities where the insurance company or mutual fund/Principal Underwriter (or an Affiliate)/fund investment adviser is a fiduciary/service provider solely by reason of sponsorship of an IRS-approved prototype plan, *if the purchase is not the result of fiduciary investment advice.* [PTE 84-24 §§III(e)-(f)]	• Non-fiduciary parties in interest • Plan administrators • Discretionary asset management fiduciaries • Investment advice fiduciaries (at least in form) The conditions excluding plan administrators and discretionary asset management fiduciaries are inapplicable to these exemptions.
Conditions	
For both sets of exemptions	• The transaction is effected in the ordinary course of business. • The transaction is on terms at least as favorable as an arm's length transaction. • The total consideration received in connection with the provision of services and the purchase transaction is not in excess of reasonable compensation. • The insurance agent/broker/company, pension consultant or Principal Underwriter must retain for six years records that these conditions have been met, and make them available to DOL or Treasury Department/IRS.
Only for the first set of exemptions	• Prior to the transaction, an independent plan fiduciary is provided specified written disclosures. • The independent fiduciary provides affirmative written consent for an insurance transaction, or affirmative or negative consent for a mutual fund transaction.

ESsentials

With respect to the amendments to these sets of exemptions:

- PTE 84-24 has always had a trick – variously helpful or unhelpful – that, as used in the PTE, the terms "insurance agent or broker," "pension consultant," "investment company" and "Principal Underwriter" (only "investment company" and "Principal Underwriter" are actually defined) include Affiliates. The amended Affiliate definition is the same as in PTE 2020-02, and at least in form has minor revisions from the prior PTE 84-24 definition. This trick was not extended to the new Independent Producer and Insurer definitions used in the new exemption discussed below.
- DOL not only abandoned its proposal to limit these exemptions to certain forms of sales commissions, but backed away from similarly limiting interpretations of the existing terms of PTE 84-24 asserted in the Rule 2.0 and Proposal 4.0 preambles.
- In the Final Rule, DOL framed its new limitation in respect of fiduciary investment advice not as applicable to investment advice fiduciaries only, but as applicable to the overall exemption. Thus, if the exempted transaction is the result of fiduciary investment advice – even unconflicted fiduciary investment advice – relief generally becomes unavailable.
    - Suppose, for example, that an unconflicted registered investment adviser recommends the purchase of non-proprietary mutual fund shares. To the extent the principal underwriter of the fund or an affiliate, or the fund itself if it provides a prototype plan, has been relying on PTE 84-24 for any needed, ordinary-course-of-business §406(a) or (b) relief with respect to routine share transactions, that relief apparently has been withdrawn as of September 23. There may be no practicable way to determine if the order for any given mutual fund transaction was the result of a third party fiduciary recommendation, assuming such a distinction could be operationalized at all. And PTE 2020-02 almost certainly would not be available for relief; absent a conflict, the registered investment adviser would have no need to comply with that exemption, and in any event the mutual entities would not be eligible for relief because they would not be Affiliates or Related Entities of the registered investment adviser acting as the Financial Institution.
    - To the extent a conflicted fiduciary is recommending the transaction, it is unclear to us why simply excluding that fiduciary's receipt of compensation from the scope of relief provided by PTE 84-24 – the approach ultimately adopted for the mass amendment of five other PTE's, discussed below – would not have sufficed to serve DOL's purposes. As it is, DOL has created an ambiguity whether, in this circumstance, the generic relief of PTE 2020-02 replicates all the specific relief provided by PTE 84-24.
- This may mean that DOL's expressed intent to preserve the second set of exemptions, particularly in the mutual fund setting, may have been less effective than intended.
- This point requires further study, but it may also be that the §406(b) relief provided by the first set of PTE 84-24 exemptions is effectively a dead letter. The §406(b) relief provided by the second set of exemptions may still have practical application, for example, if the transaction results from action by a discretionary asset management fiduciary.

Relief for Conflicted Investment Advice: New Insurance Exemption

Rule 4.0 adds to PTE 84-24 a specialized exemption for certain insurance transactions, as an alternative to the generalized relief provided by PTE 2020-02. Because insurance companies and professionals will have a choice of exemption for some transactions, the following side-by-side summarizes their overlaps and differences.

	Amended PTE 2020-02	New PTE 84-24 §III(g)
Scope of relief		
Exemptions provided from:	§406(a)(1)(A): sale or exchange or leasing of property between a plan and a party in interest (including a fiduciary) §406(a)(1)(D): transfer to or use by or for the benefit of a party in interest (including a fiduciary), of any plan assets §406(b)(1): fiduciary acting in its own interest §406(b)(2): fiduciary acting with a conflicted interest §406(b)(3): fiduciary receiving third-party compensation in connection with a plan asset transaction	§406(a)(1)(A) §406(a)(1)(D) §406(b)
Available to/for:	Insurance companies and agents/ brokers that meet the Financial Institution and Investment Professional definitions, and their Affiliates and Related Persons	**Independent Producer** is a person or entity that is state licensed to sell, solicit or negotiate insurance contracts including annuities, that sells to Retirement Investors products of multiple, unaffiliated companies, and is a not a common-law employee of an insurance company, or a statutory employee of an insurance company that has a financial interest in the covered transaction.
Covered transactions	As a result of §3(21)(A)(ii) investment advice: • Receipt of reasonable compensation • Purchase or sale of an an investment product to or from a Retirement Investor, and receipt of a mark-up, mark-down or other payment	As a result of §3(21)(A)(ii) investment advice: • Direct or indirect receipt by an Independent Producer of reasonable compensation • Sale of a non-security annuity contract or other insurance product that does not meet the definition of "security" under the Federal securities laws
Exclusions	• The transaction involves an ERISA Title I plan, and the Investment Professional, Financial Institution or any Affiliate is the employer of covered employees or (unless selected by an independent fiduciary or a Pooled Plan Provider) the plan's named fiduciary or plan administrator • Investment Professional or Financial Institution is acting as a plan administration fiduciary or discretionary asset management fiduciary	• The transaction involves an ERISA Title I plan, and the Independent Producer, Insurer or any Affiliate is the employer of covered employees or (unless selected by an independent fiduciary) the plan's named fiduciary or plan administrator • Independent Producer is acting in any ERISA fiduciary capacity other than as an investment advice fiduciary

Prior PTE 84-24 also included an exemption from §406(a)(1)(C), the prohibition on furnishing services. No explanation is provided for this change.

The Final Rule extended the exemption to statutory employees of an insurance company that does not have a financial interest in the transaction, e.g., a career agent of one company selling an annuity issued by a different company.

Under the Final Rule, PTE 84-24, like PTE 2020-02, does not limit the exemption to specific forms of compensation.

This important limitation in the new PTE 84-24 exemption, to insurance products that are not securities, was redrafted in the Final Rule.

To the extent the insurance producer or type of insurance product does not meet the limitations of amended PTE 84-24, compliance with PTE 2020-02 is the intended alternative.

PTE 84-24 omits the possibility of selection by a Pooled Plan Provider.

Relief for Conflicted Investment Advice: New Insurance Exemption

	Amended PTE 2020-02	New PTE 84-24 §III(g)
Conditions		
Impartial Conduct Standards		
Responsibility	The Financial Institution and Investment Professional must comply with the following standards.	The Independent Producer must comply with the following standards.
Impartial Conduct Standards	At the time provided, investment advice meets the Care Obligation and Loyalty Obligation, i.e.: • Meets the ERISA "prudent expert" standard, based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor (Care Obligation); and • Does not place the financial interests of the Investment Professional, Financial Institution, Affiliate, Related Entity or other person ahead of the Retirement Investor's interest, or subordinate the Retirement Investor's interest to their own (Loyalty Obligation). The Final Rule provides three examples.	At the time provided, the Independent Producer's investment advice meets the Care Obligation and the Loyalty Obligation, i.e.: • Meets the ERISA "prudent expert" standard, based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor; and • Does not place the financial interests of the Independent Producer, Insurer, Affiliate, Related Entity or other person ahead of the Retirement Investor's interest, or subordinate the Retirement Investor's interest to their own. The Final Rule retains the example that says the Independent Producer may not recommend, as between products offered by Insurers the Independent Producer is authorized to sell, the alternative that is worse for the Retirement Investor but better or more profitable for the Independent Producer or Insurer. The Final Rule provides one example.
Reasonable Compensation	The compensation received, directly or indirectly, by the Financial Institution, Investment Professional and their Affiliates and Related Entities for their services does not exceed ERISA §408(b)(2) reasonable compensation.	The compensation received, directly or indirectly, by the Independent Producer does not exceed ERISA §408(b)(2) reasonable compensation.
Best Execution	As required by the federal securities laws, the Financial Institution and Investment Professional seek to obtain the best execution of the investment transaction reasonably available under the circumstances.	No comparable requirement.

Assignment of the compliance responsibility for the Impartial Conduct Standards is a principal difference between the two exemptions.

Under PTE 84-24, the Care and Loyalty Obligations are obligations of the Independent Producer, in recognition of the Insurer's limited authority over the Independent Producer and lack of knowledge about the products of other companies the Independent Producer is authorized to sell.

Like PTE 2020-02, relief under PTE 84-24 is not limited to specified forms of compensation.

The best execution requirement was omitted in the new PTE 84-24 exemption, presumably because it does not cover SEC-regulated products.

Relief for Conflicted Investment Advice: New Insurance Exemption

Anti-Fraud Standard	Written and oral statements by the Financial Institution and Investment Professional to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time made, materially misleading, including by omission.	Written and oral statements by the Independent Producer to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time made, materially misleading, including by omission.
Disclosures		
Pre-Transaction Disclosure	At or before the time that a covered Transaction occurs, the Financial Institution and Investment Professional must provide to the Retirement Investor: • Written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice and are fiduciaries under ERISA and the IRC or both when making an investment recommendation • Written statement of the Care and Loyalty Obligations owed by the Investment Professional and Financial Institution to the Retirement Investor • Written disclosure of all material facts relating to the scope and terms of the relationship with the Retirement Investor, including: (i) material fees and costs that apply to the Retirement Investor's transactions, holdings and accounts; and (ii) the type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be provided to them.	At or before the time that a covered transaction occurs, the Independent Producer must provide to the Retirement Investor: • Written acknowledgment that the Independent Producer is providing fiduciary investment advice and is a fiduciary under ERISA and the IRC or both when making an investment recommendation • Written statement of the Care and Loyalty Obligations owed by the Independent Producer to the Retirement Investor • Written disclosure of all material facts relating to the scope and terms of the relationship with the Retirement Investor, including: (i) material fees and costs that apply to the Retirement Investor's transactions, holdings and accounts; (ii) notice of the Retirement Investor's right to request additional information regarding cash compensation; and (iii) the type and scope of services to be provided to the Retirement Investors, including any material limitations on the recommendations that may be made to the Retirement Investor. The description must include the products the Independent Producer is licensed and authorized to sell, inform the Retirement Investor of any limits on the range of insurance products recommended, and identify the specific Insurers and specific insurance products available for recommendation.

This condition in the new PTE 84-24 exemption is also limited to statements by the Independent Producer, but picks up materials prepared by the Insurer that the Independent Producer provides to the Retirement Investor, which according to the preamble may not be misleading to the Independent Producer's knowledge.

PTE 84-24 places these disclosure obligations on the Independent Producer but not the Insurer.

Similarly, the PTE 84-24 fiduciary acknowledgement is limited to the Independent Producer.

PTE 84-24 also limits the standard of care disclosure to the Independent Producer.

This disclosure in the new PTE 84-24 exemption differs materially from the PTE 2020-02 disclosure and is more comparable to an existing PTE 84-24 disclosure. The recitation of other available insurance products could be voluminous and is likely to be less helpful to the Retirement Investor, and more helpful to DOL or a plaintiff's attorney looking to second guess the Independent Producer.

Relief for Conflicted Investment Advice: New Insurance Exemption

	• All material facts relating to Conflict of Interests that are associated with the recommendation.	• All material facts relating to Conflict of Interests that are associated with the recommendation.
	No comparable disclosure.	• Written statement that, upon request of the Retirement Investor, the Independent Producer shall disclose (i) a reasonable estimate of the amount of cash compensation to be received by the Independent Producer, which may be stated as a range of amounts or percentages; and (ii) whether the cash compensation will be provided through a one-time payment or through multiple payments, the frequency and amount of the payments, which may also be state as a range of amounts or percentages.
	No comparable disclosure.	• Documentation of the Independent Producer's conclusions as to whether the recommended annuity is in the Best Interest of the Retirement Investor, which must be provided to the Insurer as well as the Retirement Investor
Pre-rollover disclosure	Prior to engaging in or recommending a rollover from an ERISA plan to an IRA, or making a recommendation of a post-rollover investment currently held in an ERISA plan, the Financial Institution and Investment Professional must provide to the Retirement Investor documentation of the bases for their recommendation to engage in the rollover, which must consider but is not limited to (as applicable): • The alternatives to the rollover, including leaving the money in the current Plan • The fees and expenses associated with the Plan and the recommended investment or account • Whether an employer or other party pays for some or all of the current Plan's administrative expenses • The different levels of services and investments available under the current Plan and the recommended investment or account	Prior to engaging in or recommending a rollover from an ERISA plan to an IRA, or making a recommendation of a post-rollover investment currently held in an ERISA plan, the Independent Producer must provide to the Retirement Investor and Insurer documentation of its conclusion that the rollover is in the Retirement Investor's Best Interest, which must consider to the extent applicable but is not limited to: • The alternatives to the rollover, including leaving the money in the current Plan or account type • The comparative fees and expenses • Whether an employer or other party pays for some or all of the current Plan's administrative expenses • The different levels of fiduciary protection, services and investments available.

This additional disclosure on request, which was not included in final PTE 2020-02, was carried over from existing PTE 84-24.

This unique disclosure in the new PTE 84-24 exemption, which we read to reach other insurance products as well as annuities, reflects strucural differences in the independent insurance distribution channel, and also perhaps a recurring skepticism about annuity purchases.

Curiously, the PTE 84-24 disclosure requirement makes no mention of any difference in the availability of lifetime income protection between the annuity product and other options, but does not exclude including that consideration if relevant.

DOL keeps trying to make the case that the loss of ERISA protection and DOL oversight for a rollover IRA is a material disadvantage, and apparently is uniquely concerned for rollover IRA annuities.

Relief for Conflicted Investment Advice: New Insurance Exemption

<table>
<tr><td>Good faith disclosure errors</td><td colspan="2">Disclosure errors or omissions, made in good faith and with reasonable diligence, may be corrected as soon as practicable and no later than 30 after the error was discovered or reasonably should have been discovered, without loss of exemptive relief for the affected covered transactions.</td></tr>
<tr><td>Reasonable reliance</td><td colspan="2">The disclosures may be prepared with good faith reliance on information and assurances provided by other parties (other than Affiliates) that the disclosing party does not know or have reason to know are incomplete or inaccurate.</td></tr>
<tr><td>Prohibited disclosures</td><td colspan="2">A Financial Institution or Independent Producer is not required to disclose information where otherwise prohibited by law.</td></tr>
<tr><td colspan="3">Policies and procedures</td></tr>
<tr><td>Requirement</td><td>The Financial Institution must have and enforce written policies and procedures "prudently" designed to ensure the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions.</td><td>The Insurer must have and enforce written policies and procedures for the review of each recommendation, before an annuity is issued to a Retirement Investor pursuant to an Independent Producers recommendation, that are "prudently" designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions.</td></tr>
<tr><td>Conflict Mitigation: In general</td><td>The policies and procedures must mitigate Conflicts of Interest to the extent a reasonable person reviewing the policies and procedures as a whole would conclude that they do not create an incentive for the Financial Institution or Investor Professional to place its own interest ahead of the Retirement Investor.</td><td>The policies and procedures must mitigate Conflicts of Interest to the extent a reasonable person reviewing the policies and procedures as a whole would conclude that they do not create an incentive for the Independent Producer to place its own interest, or those of the Insurer or any Affiliate or Related Entity, ahead of the Retirement Investor.</td></tr>
<tr><td>Conflict Mitigation: Specific actions</td><td>Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude is likely, to result in recommendations that do not the Care Obligation and Loyalty Obligation.</td><td>Insurers may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude is likely, to result in recommendations that do not the Care Obligation and Loyalty Obligation.</td></tr>
</table>

The differences in the formulations of the policies and procedures requirements reflect, at least in part, the assignment of Impartial Conduct Standards and disclosure responsibilities jointly to the Financial Institution and Investment Professional under PTE 2020-02, and solely to the Independent Producer under PTE 84-24.

The preamble describes an Insurer's adherence to the policies and procedures requirement as "critically important" to the granting of the exemption by DOL, even though the Insurer is neither a fiduciary nor an exempted party. DOL did not endorse the NAIC model best interest regulation, which it described as significantly less stringent, as a safe harbor.

With its reference to Affiliates and Related Entities, the PTE 84-24 mitigation requirement is formulated somewhat more broadly than the comparable PTE 2020-02 requirement.

Relief for Conflicted Investment Advice: New Insurance Exemption

Independent Producer Authorization	No comparable provision.	The Insurer's policies and procedures must include a "prudent" process for authorizing an Independent Producer to sell the Insurer's contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have failed to adhere to the Impartial Conduct Standards or who lack the necessary education, training or skill. • The process must include a "careful" review of customer complaints, disciplinary history and regulatory actions concerning the Independent Producer, and of its training, education and conduct with respect to the Insurer's products. • The Insurer must document the basis of its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards, and review that determination annually as part of the retrospective annual review.	**In the Final Rule, DOL deleted the requirement that that the Insurer's policies and procedures take action against Independent Producers "likely to fail" to comply, i.e., that an Insurer have the precognition to accurately assess whether there is a 51% chance that a previously compliant Independent Producer will become noncompliant.** **No specifications for the requisite education, training or skills are provided.** **These determinations will of course be second guessed on a 20-20 hindsight basis, and only in the event of unfortunate facts.**
DOL production	A Financial Institution or Insurer must provide its complete policies and procedures upon DOL request within 30 business days.		
Retrospective annual review			
Review	At least annually, the Financial Institution must conduct a retrospective review "reasonably" designed to assist the Financial Institution in detecting and preventing violations of and achieving compliance with the conditions of the exemption.	A t least annually, the Insurer must conduct a retrospective annual review of each Independent Producer "reasonably" designed to detect and prevent violations of and achieve compliance with the conditions of the exemption. The review must include: • Effectiveness of the supervision system • Exceptions found, and corrective actions taken or recommended • Review of Independent Producers' rollover recommendations and the required rollover disclosure • "Prudent" determination whether to continue to permit individual Independent Producers to sell contracts to Retirement Investors	**The PTE 84-24 retrospective review requirement is more granular in formulation and burdensome than its PTE 2020-02 counterpart.**

Relief for Conflicted Investment Advice: New Insurance Exemption

Updates	The Financial Institution or Insurer must update its policies and procedures as developments dictate and to ensure they remain "prudently" designed, effective, and compliant with the conditions of the exemption.	
Report to Senior Executive Officer	The methodology and results of the retrospective review must be provided in a written report to a Senior Executive Officer.	
Report to Independent Producer	No comparable provision	The Insurer provides to the Independent Producer the methodology and results of the retrospective review, including a description of any non-exempt prohibited transaction engaged in by the Independent Producer with respect to fiduciary investment advice, and instructs the Independent Producer to: • Correct those prohibited transactions; • Report the transactions to the IRS on Form 5330; • Pay the resulting IRC §4975 excise tax; and • Provide the Insurer a copy of the Form 5330 within 30 days after the due date (with extensions).
Certification	The Senior Executive Officer must certify annually that: • The officer has reviewed the report; • The Financial Institution has or will timely file with the IRS Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution, corrected those transactions, and paid any resulting excise tax; and • The Financial Institution has written policies and procedures, and a prudent updating process, which meet the conditions of the exemption.	The Senior Executive Officer must certify annually that: • The officer has reviewed the report; • The Insurer has provided its Independent Producers with the information required above and has received a certification that the Independent Producer has filed Form 5330 as instructed; and • The Insurer has written policies and procedures, and a prudent updating process, which meet the conditions of the exemption.
Timing	The review, report and certification must be completed within six months following the end of the period covered by the review.	
Recordkeeping and production to DOL	The Financial Institution or Insurer must retain the report, certification and supporting data for a six-year period and make them available, to the extent permitted by law, to DOL within 30 business days of the request.	

In the Final Rule, the PTE 84-24 obligation to file the Form 5330 and pay excise tax was switched from the Insurer (which actually cannot file the Form, because it is not the taxpayer) to the Independent Producer.

The Independent Producer is not obliged to accept the Insurer's judgement that a nonexempt prohibited transaction has occurred, which apparently is to be reflected in the Insurer's report to its Senior Executive Officer and in its evaluation of whether to continue the appointment of the Independent Producer.

The need for this certification, which perhaps should have been omitted when delivery of the Form 5330 was added above, should be reflected in the information above provided to the Independent Producers.

Relief for Conflicted Investment Advice: New Insurance Exemption

Self-Correction		
Correction	The Financial Institution corrects any violation of the conditions of PTE 2020-02 and the Retirement Investor is made whole for any investment loss.	Either the Independent Producer refunds any charge to the Retirement Investor or the Insurer rescinds a "mis-sold" annuity, canceling the contract and waiving the surrender charge.
Timing	Correction occurs no later than 90 days after the Financial Institution or Independent Producer learned or reasonably should have learned of the violation.	
Retrospective review	The Financial Institution notifies its PTE 2020-02 retrospective reviewer during the applicable review cycle, and the violation and correction, must be specifically set forth in the applicable written report.	The Independent Producer notifies the Insurer of the violation and the refund or recission, within 30 days of the correction.
In-"Eligibility"		
Scope of ineligibility	Ineligibility is determined separately for the Investment Professional/ Independent Producer, and for the Financial Institution/Insurer.	
Basis for ineligibility	The Financial Institution, an entity in its Controlled Group, or the Investment Professional is: • Convicted on or after September 23, 2024, by a US federal or state court of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or	The Insurer, an entity in its Controlled Group or the Independent Producer is: • Convicted on or after September 23, 2024, by a US federal or state court of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

The forms of self-correction permitted under PTE 84-24 are more limited than under PTE 2020-02, seem disproportionate to any violation other than an Impartial Conduct Standards violation, and may be contrary to insurance or contract law or to the Retirement Investor's wishes.

Relief for Conflicted Investment Advice: New Insurance Exemption

Basis for ineligibility	• Convicted on or after September 23, 2024, by a foreign court of competent jurisdiction of a substantially equivalent crime, excluding convictions that occur within a foreign country listed on the Commerce Department's "foreign adversaries" list; or • Found or determined on or after September 23, 2024, in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by DOL or certain other Federal or State agencies, to have participated in a systematic pattern or practice of violating or for intentional violation of the conditions of PTE 2020-02, or a systematic pattern or practice of failing to correct non-exempt prohibited transactions involving investment advice or report and pay resulting excise tax, or providing materially misleading information to DOL in connection with the conditions of PTE 2020-02.	• Convicted on or after September 23, 2024, by a foreign court of competent jurisdiction of a substantially equivalent crime, excluding convictions that occur within a foreign country listed on the Commerce Department's "foreign adversaries" list; or • Found or determined on or after September 23, 2024, in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by DOL or certain other Federal or State agencies, to have participated in a systematic pattern or practice of violating or for intentional violation of the conditions of PTE 84-24, or a systematic pattern or practice of failing to correct non-exempt prohibited transactions involving investment advice or report and pay resulting excise tax, or providing materially misleading information to DOL in connection with the conditions of PTE 84-24.
Timing and scope	Ineligibility to rely on the class exemption begins on: • The date of conviction in the trial court, regardless of whether an appeal is filed; or • The date of the final judgment (regardless of whether an appeal is filed) or court-approved settlement. Ineligibility ends: • 10 years after the ineligibility date or release from imprisonment, whichever is later; • On the date of a subsequent judgment reversing the applicable conviction or other court decision; or • On the date DOL grants an individual PTE permitting continued reliance on the class exemption.	
Transition period	The ineligible person may continue to rely on the class exemption for one year after its ineligibility date, if it provides specified notice to DOL within 30 days of that date.	
Alternative exemptions	The ineligible person may continue to rely on other alternative exemptions, if available, or to apply for a retroactive or prospective individual PTE.	
Recordkeeping		
Recordkeeping	Financial Institution must for six years maintain records demonstrating compliance with the exemption and must make those records available, to the extent permitted by law, to the DOL or US Treasury.	Independent Producer and Insurer must retain for six years records demonstrating compliance with the exemption and must make those records available, to the extent permitted by law, to the DOL or US Treasury.

Systematic excise tax failures are not applicable to Insurers.

ESsentials

Insurance companies and/or producers will make different choices whether to rely on PTE 2020-02 as a universal compliance solution or on different exemptions for different categories of agents or products, reflecting differences in their circumstances as well as different judgments about the relative compliance benefits and burdens presented by various solutions.

We note at the outset that neither PTE 2020-02 nor the Independent Producer exemption in PTE 84-24 provide §406(a)(1)(C) "service provider" relief, so resort to the §406(b)(2) "service provider" exemption, including the 408b-2 disclosure as applicable, arguably may be required in either case.

Leaving aside other alternatives (discussed elsewhere), and focusing on PTE 2020-02 as compared to PTE 84-24:

- There are several differences apparent in the express terms of the exemptions. For example:
  - The preamble takes care to note that the new exemption in PTE 84-24 provides no relief for the Insurer, which must look to PTE 2020-02 or elsewhere to the extent it requires an exemption.
  - Significantly, PTE 2020-02 requires the Financial Institution to acknowledge fiduciary status, while PTE 84-24 has a comparable requirement for the Independent Producer but not for the Insurer.
  - More generally, on its face, amended PTE 84-24 should not cause an Insurer to become an ERISA fiduciary or party in interest; as discussed below, issuance of an insurance contract does not of itself cause an Insurer to become a fiduciary or party in interest, and the compliance activities required of the Insurer under the PTE should not constitute the provision of services to the plan/IRA for purposes of the party in interest definition.
    - Consequently, a PTE 84-24 Insurer should not be exposed to any IRC §4975 excise tax for any non-exempt prohibited transaction committed by the Independent Producer, which is payable only by "a disqualified person [the IRC equivalent of a party in interest] who participated in the prohibited transaction (other than a fiduciary acting only as such)." In contrast, a PTE 2020-02 Financial Institution likely would be jointly liable for any excise tax payable.
    - Presumably for this reason, PTE 84-24 requires, through the retrospective review requirement, that the Insurer notify the Independent Producer of any non-exempt prohibited transaction, the Independent Fiduciary file a Form 5330 reporting the prohibited transaction violation and paying the excise tax, and the Independent Producer provide a copy of the Form 5330 to the Insurer.

> Beyond being unprecedented in a PTE, these excise tax provisions may not have the consequences DOL contemplates. Because the Financial Institution, Investment Professional or Independent Producer will always be a fiduciary, the §4975 exclusion from excise tax liability for a "fiduciary acting only as such" will be in play.

    - The Insurer may have exposure to ERISA Title I remedies, depending on the facts and the applicable authority explicating non-fiduciary liability for fiduciary violations after *Harris Trust and Savings Bank v. Salomon Brothers, Inc.*, 530 US 280 (2000). Various provisions of PTE 84-24 appear plainly designed to entangle the Insurer in any violation by the Independent Producer.
  - PTE 2020-02 requires the Financial Institution to contemporaneously review each recommendation of an Investment Professional to a Retirement Investor, while PTE 84-24 requires an Insurer to so review only the Independent Producer's recommendation with respect to initial issuance of its contract. The PTE 84-24 retrospective review covers all recommendations within the scope of the exemption, however.

ESsentials

- The PTE 84-24 disclosure requirement falls on the Independent Producer rather than the Insurer and is more burdensome than its analogue in PTE 2020-02. Nonetheless, insurance companies no doubt will consider whether it is more reliable (and more readily demonstrable in the retroactive review or an investigation) to provide the PTE 84-24 disclosures themselves, to the extent they have knowledge of the required content.
- The PTE 84-24 requirement that the Insurer initially determine and annually re-determine that it can rely on each of its Independent Producers to comply with the exemption is a major practical difference. DOL provided no direct guidance whether an Insurer must evaluate all its existing Independent Producers against that standard prior to the effective date or full compliance date of the Final Rule.
- The other differences in the retrospective review and self-correction requirements warrant careful attention.

– It is unclear to us whether there are practical differences in the scope of conflict mitigation and supervision required of an insurance company acting as a PTE 2020-02 Financial Institution or as an PTE 84-24 Insurer.

- The preambles are clear that an insurance company is required to supervise only sales of its own products.
- DOL also reaffirmed FAQ 18, which the industry generally has read to mean that an insurance company must take account of only its own product platform when evaluating a recommendation provided by its agent, even if the agent is also authorized to sell products of other insurers.
- Under PTE 84-24, however, the disclosure requirement obliges the Independent Producer to provide to the Insurer documentation of the Independent Producer's basis for determining to recommend the annuity to the Retirement Investor, which likely will take account of other companies' products the Independent Producer can offer.

– On a related point, there is a confusing discussion in the PTE 84-24 preamble about the obligations in the rollover setting of Independent Producers who are licensed only to sell insurance products and have not been appointed to represent every insurer in the industry (which presumably is pertinent also for Investment Professionals under PTE 2020-02 and comparable licensing and platform limitations they may have). The preamble states each of the following points:

- Nothing in the PTE requires Independent Producers to make recommendations about investment products they are not qualified or legally permitted to recommend, or prohibits recommendations by "insurance-only" agents, or requires insurance specialists to render advice with respect to investments outside their expertise.
- At the same time, a rollover recommendation may not be based solely on the Retirement Investor's existing investment allocation without consideration of other options on the plan's platform.
- In addition, "if an Independent Producer limits its recommendations to annuities or to a limited menu of annuities provided by specific insurers" – as must always be the case – "it could not justify a recommendation that was imprudent on the basis it was the most appropriate alternative from the Independent Producer's range of available investment alternatives."

This discussion may be intended to say no more than, if none of the alternatives any intermediary acting as a fiduciary is authorized to offer – and of course no intermediary has access to the complete universe of possible investments – is within the range of choices an investment expert would professionally and objectively recommend in the circumstances, the fiduciary should turn the Retirement Investor away. This is a familiar concept under existing standards of care.

There is, however, also a suggestion that the insurance agent is obligated to take account of the mutual fund or other investment options in which the Retirement Investor currently is or can be invested under the plan, in ways that may exceed the scope of the agent's licensed authority, to the point that the preamble suggests the insurance agent may be obliged to advise the Retirement Investor to also consult another investment professional. Both the import and the limits of this suggestion, and the pressures it puts on any investor-facing intermediary who is not licensed with respect to all the investment options available under the incumbent plan, are troubling.

– With respect to the role of IMO's and similar organizations in the insurance distribution system, the preamble confirms that compensation remitted by the IMO to the Independent Producer, either on behalf of the Insurer or as a split of commission paid to the IMO, is within the scope of PTE 84-24. The Final Rule also provides a path for IMO's not to be characterized as fiduciaries under the new definition. The preamble leaves hanging, however, the question of whether DOL would regard the services provided by an IMO in respect of an insurance sale as, indirectly, services provided to the retirement investor, but unhelpfully points to §408(b)(2) should that be the case – which is singularly unsuited for "indirect" service arrangements, particularly if running through an insurance product.

Getting technical:

In addition to the differences on the face of the exemptions, there may be another, more subtle difference between PTE 2020-02 and PTE 84-24.

Insurance companies traditionally have taken the correct and supportable position that they are not parties in interest solely by reason of issuing an insurance or annuity contract; absent plan recordkeeping or other services, they are acting as product manufacturers, not service providers.

The admission of fiduciary status in the PTE 2020-02 fiduciary acknowledgement would make the insurance company a party in interest, however. Alternatively, an affiliated broker-dealer or other appropriate affiliate of the insurance company might act as the PTE 2020-02 Financial Institution, which could cause the insurance company to become a party in interest under ERISA §3(14) depending on corporate relationships. If so, this change in status in turn may necessitate broad reconsideration by insurance companies of their overall ERISA prohibited transaction compliance programs, to the extent reliant on the company not being a party in interest. This newly invented problem is independent of the conflicted investment advice issue – an apparently unintended consequence of the Final Rule, and another difference between PTE 2020-02 and PTE 84-24.

For example, insurance companies generally have not provided 408b-2 disclosures by reason of issuance of their contracts, on the basis that they are not parties in interests, and that in any event their services run solely to the insurance contract and are excepted by the terms of the 408b-2 disclosure requirement on that basis as well.

- Fiduciaries generally are conceived for ERISA purposes as providing services to a plan or participant, which would violate the §406(a)(1)(C) prohibition on furnishing services by a party in interest (fiduciaries are by definition parties in interest) absent compliance with the §406(b)(2) service provider or other applicable exemption.
- In general, however, insurance companies will become parties in interest under the Final Rule not by reason of providing a fiduciary or other service to a plan or participant, but by reason of admitting fiduciary status in the PTE 2020-02 fiduciary acknowledgement or of a relationship to an acknowledged fiduciary.
- Accordingly, we are inclined to think that the Final Rule does not indirectly require insurance companies to provide 408-2 disclosures, or to otherwise require resort to the §408(b)(2) exemption (which could create other problems), solely by reason of issuing a contract, regardless of whether the company otherwise makes use of PTE 2020-02 or 84-24.

To the extent an insurance company determines that it is a party in interest, as a fiduciary or otherwise, and in need of relief from the §406(a)(1)(A) prohibition on the sale of any property between a plan and a party in interest (in addition to any necessary conflict of interest relief) for the issuance of its contract:

- The expanded investment product exemption of PTE 2020-02 provides that §406(a)(1)(A) relief, if the company is utilizing that exemption. In this rulemaking, annuity and other insurance products are conceptualized as investments; and
- If available, the existing PTE 84-24 exemptions also provide that relief, subject to incremental conditions.

Mass amendment and modification of other exemptions

In service of DOL's determination to impose a "one size fits all" compliance mandate for conflicted advice – justified in the preamble on grounds of uniformity, without any more nuanced discussion – the Final Rule revokes existing conflict of interest relief for investment advice fiduciaries in five other PTEs issued in 1975-1986. DOL also took the occasion to modify certain of the exemptions in other, limited respects.

These are all exemptions that have long been embedded in financial services provided to retirement plans, without any indication that the plans were being disserved. In response to a range of comments, the changes to these exemptions in the Final Rule are much narrower than proposed.

- In the Final Rule, none of the existing exemptions were revoked. Instead, certain exemptions were amended only to make them unavailable to investment advice fiduciaries for the receipt of compensation, in favor of PTE 2020-02 or PTE 84-24. To the extent the existing exemption provided prohibited transaction relief beyond the receipt of compensation, that relief remains available to investment advice fiduciaries.
- To the extent the existing exemption was also available to non-fiduciary parties in interest or to one or both of the other categories of ERISA fiduciaries – plan administrators and/or discretionary asset managers – that exemption remains in effect, including for the receipt of compensation.

As we read it, these amendments are applicable for transactions occurring on or after September 23, 2024.

PTE 75-1

PTE 75-1 was the first class exemption issued by DOL under ERISA, in order to preserve plans' access to seven customary securities transactions and services.

- In the ERISA legislative history, Congress expressed an expectation that administrative exemptions would be granted "in order not to disrupt the established business practices of financial institutions which often perform … fiduciary functions in connection with these plans, consistent with adequate safeguards to protect employee benefit plans." In 1975, DOL immediately responded to that expectation with PTE 75-1, which has faithfully served retirement investors for 49 years.
- As modified, PTE 75-1 now provides the relief discussed below. In particular, the revocation of relief for the receipt of compensation by investment advice fiduciaries was limited to the exemptions for underwritings and market making.
- In the chart below, references in the first column are to the respective Part of PTE 75-1, an idiosyncratic structural convention used only in the first two class PTEs issued by DOL.

<table>
<tr><td colspan="2">I</td><td>Agency transactions and services</td><td>Provides §§406(a) and (b) relief.</td></tr>
<tr><td rowspan="3"></td><td>I(a)</td><td>Pre-May 1978 securities transactions</td><td>Grandfathered relief retained.</td></tr>
<tr><td>I(b)</td><td>Non-fiduciary agency transactions</td><td rowspan="2">The Final Rule made no change to these provisions, although it should be noted that the existing §406(b) relief under I(b) and (c) has always been superfluous by definition, and the relief provided by §408(b)(2) may suffice as an alternative for the §406(a) relief.</td></tr>
<tr><td>I(c)</td><td>Research and other services, other than as a fiduciary</td></tr>
<tr><td colspan="2">II(1)</td><td>Principal transactions with a broker-dealer, reporting dealer or bank</td><td>The Final Rule made no change to the §406(a) relief provided by this provision or to any of its conditions, including the extra-statutory recordkeeping requirement. It should be noted that, together, §§408(b)(2) and (17) likely provide comparable relief, without the extra-statutory recordkeeping requirement.</td></tr>
<tr><td colspan="2">II(2)</td><td>Transactions in nonproprietary mutual funds</td><td>The Final Rule made no change to the §§406(a) and (b) relief provided by this provision. In particular, relief for the receipt of compensation is still available under this exemption.</td></tr>
<tr><td colspan="2">II</td><td>Underwritings</td><td rowspan="2">The Final Rule retained the §§406(a) and (b) relief provided by these exemptions, other than the §406(b) relief for the receipt of compensation by investment advice fiduciaries, which was revoked. To obtain complete relief, the exempted investment advice fiduciary would need to comply with both PTE 75-1 and PTE 2020-02, but not with §408(b)(2) (since these PTE 75-1 exemptions provide §406(a) relief).</td></tr>
<tr><td colspan="2">IV</td><td>Market making</td></tr>
<tr><td colspan="2">V</td><td>Margin loan by a broker or dealer</td><td>The Final Rule made no change to the §§406(a) and (b) relief provided by this exemption or to its conditions, other than (i) clarifying its application to IRAs, and (ii) conditionally permitting investment advice fiduciaries to receive reasonable compensation for extending credit to avoid a failed purchase or sale of securities (even if "caused" by the firm).</td></tr>
</table>

PTE 77-4

PTE 77-4, another early class exemption, provides §§406(a) and (b) relief that permits investment advisers and managers to continue their practice of investing plans and IRAs in proprietary mutual funds for which the fiduciary (or affiliate) also served as investment adviser. The exemption provided §§406(a) and (b) relief, subject to conditions that (i) an independent fiduciary approves the transaction after certain disclosures, and (ii) neither sales commissions/redemption fees nor "double dipped" investment advisory/management fees are paid. PTE 77-4 is one of the exemptions available to both investment advice fiduciaries (defined in §3(21)(A)(ii) and redefined in the Final Rule) and discretionary asset management fiduciaries (defined in §3(21)(A)(i), which has never been the subject of a regulation).

The Final Rule revokes the §406(b) relief for compensation received by an investment advice fiduciary. To obtain complete relief, these fiduciaries will need to meet both PTE 77-4 and PTE 2020-02 but not §408(b)(2) (since PTE 77-4 provides §406(a) relief).

PTE 80-83

As originally adopted, PTE 80-83 provides §§406(a) and (b) relief for a fiduciary that acquires securities in an IPO for a plan/IRA where the issuer of the securities will use the proceeds to retire indebtedness to a party in interest other than a fiduciary, or to a bank or affiliate acting as the fiduciary. Like PTE 77-4, this exemption is available to investment advice fiduciaries and discretionary asset management fiduciaries.

The consequences of the Rule 4.0 amendment track those of PTE 77-4. For investment advice fiduciaries, the import of the amendment is that they must resort to PTE 2020-02 for §406(b) relief as to their compensation, but otherwise can continue to rely on PTE 80-83 for prohibited transaction relief and need not make use of §408(b)(2) for this specific transaction.

PTE 83-1

PTE 83-1 variously provides §406(a) and/or §406(b) exemptions for four transactions involving mortgage pools. The only revision to PTE 83-1 is to revoke, in respect of all four transactions, the relief for the receipt of compensation by investment advice fiduciaries, with the following effect.

Transaction	Relief provided	Amendment and effect
Sale, exchange or exchange of pass-through certificates in their initial offering where the mortgage pool sponsor/trustee/insurer is a party in interest, and continued holding of the certificates	§406(a)	No change
Sale, exchange or exchange of pass-through certificates in their initial offering where the mortgage pool sponsor/trustee/insurer is a fiduciary with respect to the transaction	§406(b)(1) and (2)	§406(b) relief revoked for the receipt of compensation by investment advice fiduciaries. The relief provided by PTE 2020-02 may suffice as a replacement.
Certain transactions in the servicing and operation of mortgage pools	§§406(a) and (b)	§406(b) relief revoked for the receipt of compensation by investment advice fiduciaries. It is unclear to us whether PTE 2020-02 provides a practical alternative, where one is needed, e.g., how a PTE 2020-02 fiduciary acknowledgment and disclosure could be practicably provided.
Transactions with a person deemed to be certain parties in interest solely because of a plan's ownership of a certification	§406(a)	No change

PTE 86-128

As amended over time, PTE 86-128 provides conditional §406(b) relief for (i) the receipt by an investment advice fiduciary, discretionary asset management fiduciary or an affiliate of a reasonable fee to effect or execute a securities transaction on behalf of a plan/IRA, and (ii) the fiduciary acting as the agent in an agency cross transaction for both the plan and a party in interest and receiving reasonable compensation from the counterparty. No §406(a) relief was included in the existing exemption, on the basis that §408(b)(2) provided all the necessary relief.

The amendments to PTE 86-128 in Rule 4.0 differ from those proposed.

- The revocation of §406(b) relief for investment advice fiduciaries was limited to the receipt of compensation, in favor of PTE 2020-02. These fiduciaries can otherwise rely on PTE 86-128 for §406(b) relief, and discretionary asset management fiduciaries rely on PTE 86-128 for complete §406(b) relief.
- The exclusions from the general conditions of the exemption for IRA's and most plans that do not cover employees (e.g., solo Keogh plans) were retained.
- A clarification was made to the "recapture of profits" exception as to discretionary trustees.
- The Final Rule did not add a recordkeeping requirement to this exemption.

The Path Forward

For convenience, the discussion below notes exemptions available for specific types of investment transactions after the Final Rule. This is not to say that these are the only available compliance solutions, or that they are necessarily a complete solution, for a specific transaction; instead, they are meant as a starting point for further analysis. References are to the statutory exemptions included in ERISA §408(b) or to class PTE's.

"Universal" Solution for Advice to Participants

As a reminder, ERISA §408(b)(14) provides a product-agnostic exemption for participant investment advice provided through a level-fee or computer model arrangement meeting certain conditions, which is primarily designed for asset allocation advice within the finite boundaries of a plan or IRA investment menu. As was the case with Final Rule 2.0, some Financial Institutions may find it worthwhile to consider whether that solution, where applicable, is preferable to the class exemption solutions following Final Rule 4.0. The following chart provides a high-level overview of the statutory exemption with its implementing regulation.

	Computer Model	Level Fee
Definitions	**Fiduciary adviser** is a registered broker-dealer or investment adviser, bank or insurance company that meets specified conditions, or an affiliate **Affiliate** is defined similarly to the Investment Company Act definition, and differs from the usual ERISA PTE definition.	
Plans covered	ERISA plans/IRA's that are participant-directed individual account plans. Any investment activity pursuant to the advice must occur solely at the direction of the participant.	
Relief provided	ERISA 406(a) and (b) relief for: • Investment advice provided to a participant (including IRA owner) • Acquisition/holding/sale of an investment pursuant to the advice • Direct/indirect receipt of reasonable compensation by a fiduciary adviser/affiliate/employee/agent/registered representative/IAR	
Fiduciary adviser	Advice is provided by a financial adviser pursuant to a computer model or level fee arrangement	
Investment advice	Level fee advice must be based on, or the computer model must be designed and operated to apply and utilize, generally accepted investment theories that take into account historic returns of different asset classes over defined time periods. The investment advice must take into account: • Fees and expenses attendant to the recommended investments; • Information, to the extent furnished by participant, relating to age, time horizons, risk tolerance, current investments in designated investment options, other assets or sources of income, and investment preferences.	

This definition tracks the Financial Institution definition in PTE 2020-02, but without including non-bank trustees and with fewer hoops for insurance companies.

This formulation of relief is more inclusive than the PTE 2020-02 formulation, and obviates the need for §408(b)(2) relief.

These conditions harken back to the ERISA investment advice regulation issued under the statutory "prudent expert" standard.

	Computer Model	Level Fee
Conditions specific to each alternative	The computer model must be designed and operated to utilize "appropriate objective criteria" in providing asset allocation portfolios composed of plan investment options, and to avoid recommendations that "inappropriately" favor options: • Offered by fiduciary adviser, or person with material affiliation/ contractual relationship with fiduciary adviser; or • That may generate greater income for fiduciary adviser, or person with material affiliation/contractual relationship with the fiduciary adviser. The model must take into account all "designated investment options" under the plan, with limited exceptions, and without giving "undue weight" to any option. The computer model must receive a specified written certification in advance and before any modification by an "eligible investment expert."	Fees or other compensation for investment advice or investment activity received • directly or indirectly by an employee, agent or registered representative who provides advice on behalf of the fiduciary adviser; or • by the fiduciary adviser may not vary depending on the investment option selected by the participant. Level fee requirement does not extend to affiliates of the fiduciary adviser.
Independent fiduciary authorization	The investment advice arrangement must be "expressly" approved by an independent fiduciary, after receipt of a specified notice from the fiduciary adviser.	
Participant disclosure	The fiduciary adviser must provide specified disclosures (a model form is available) to participants, both before the initial advice is provided or reasonably contemporaneously with a material change.	
Annual audit	The financial adviser must annually engage an independent auditor to conduct a compliance audit/opinion with respect to of the advice arrangement and the advice provided to participants. The opinion must be delivered to authorizing plan fiduciaries and publicly posted for IRA owners.	
Other conditions	• The fiduciary adviser must provide applicable securities law disclosures. • The investment activity must meet an arms-length standard.	
Recondkeeping	6-year recordkeeping requirement applicable to the fiduciary adviser, with no specific provision regarding access to the records.	

Like PTE 2020-02, the computer model arrangement does not require levelized compensation. The level fee arrangement does require that the compensation to the fiduciary adviser and the individuals involved in providing the advice may not vary with the participant's investment choices, but does permit the economics to affiliates of the fiduciary adviser to so vary.

Compare the computer model blueprint and certification to the PTE 2020-02 Impartial Conduct standards and policies and procedures requirement.

PTE 2020-02 does not have a comparable requirement.

The PTE 2020-02 disclosure requirement differs materially.

The annual compliance audit differs, in helpful and unhelpful ways, from the PTE 2020-02 retrospective review.

In the Final Rule, the PTE 2020-02 recordkeeping requirement is comparable.

Bank Products and Services

There are three statutory exemptions that provide exemptive relief for at least some conflicted investment advice fiduciaries in the bank setting, as an alternative to PTE 2020-02.

- Section 408(b)(4): investment of all or part of a plan's assets in deposits which bear a reasonable rate of interest in a bank or similar institution, if expressly authorized in the plan or by an independent fiduciary.
- Section 408(b)(6): solicitation for and provision of ancillary bank services where the bank is a plan fiduciary, if the bank receives no more than reasonable compensation for the service; the bank has adopted adequate internal safeguards that assure the providing of ancillary service is consistent with sound banking practice; and the service is subject to specific guidelines that reasonably preclude the bank from providing the service in an excessive or unreasonable manner or in a manner inconsistent with the best interest of plan participants and beneficiaries.
- Section 408(b)(8): purchase or sale of an interest in a bank common or collective trust fund, if the bank receives no more than reasonable compensation and the transaction is expressly permitted by the plan document or an independent fiduciary.

Insurance Products

The relief available after the Final Rule for fiduciary investment advice as to insurance products varies by the securities law classification of the product and the relationship between the issuing insurance company and the insurance agent or broker, and is generally divided between PTE 84-24 and PTE 2020-02.

- In addition, the §408(b)(8) exemption for bank common or collective trust funds, noted above, also applies to "pooled investment funds" (e.g., separate accounts) of an insurance company.

Mutual Funds

Prior to the Final Rule, the distribution of mutual funds to retirement investors had successfully accommodated to the complex of exemptions (including PTE's 75-1 Part II(2), 77-4, 84-24 and 86-128) for the conflicts that can arise, including:

- Transactional compensation to a fiduciary in the distribution channel;
- Distribution of proprietary funds; and
- Distribution in either an agency or a principal form of transaction.

The Final Rule modified only the PTE 84-24 and 86-128 exemptions, albeit in potentially material ways as discussed above, and added the possibility of using PTE 2020-02 for the receipt of compensation by or investment product transactions with an Investment Professional or Financial Institution and its Affiliates or Related Entities.

Referrals/Solicitation

There has not been any ERISA exemption specific to a compensated referral of a third party provider of investment services – as distinguished from an investment product – that is treated as fiduciary investment advice. Depending on the circumstances, some relief might be found in more general exemptions. Otherwise, PTE 2020-02 generally provides an exemptive solution if the referral is provided on a nondiscretionary basis.

Securities Transactions

In general, the relief provided by PTE's 75-1, 77-4, 80-83, 83-1, and 86-128 remained intact with at most modest refinements, except that, in some (but not all) cases, relief for the receipt of compensation by an investment advice fiduciary was shifted from the extant exemption to PTE 2020-02. This shift did not affect any existing relief for compensation paid to discretionary asset management fiduciaries.

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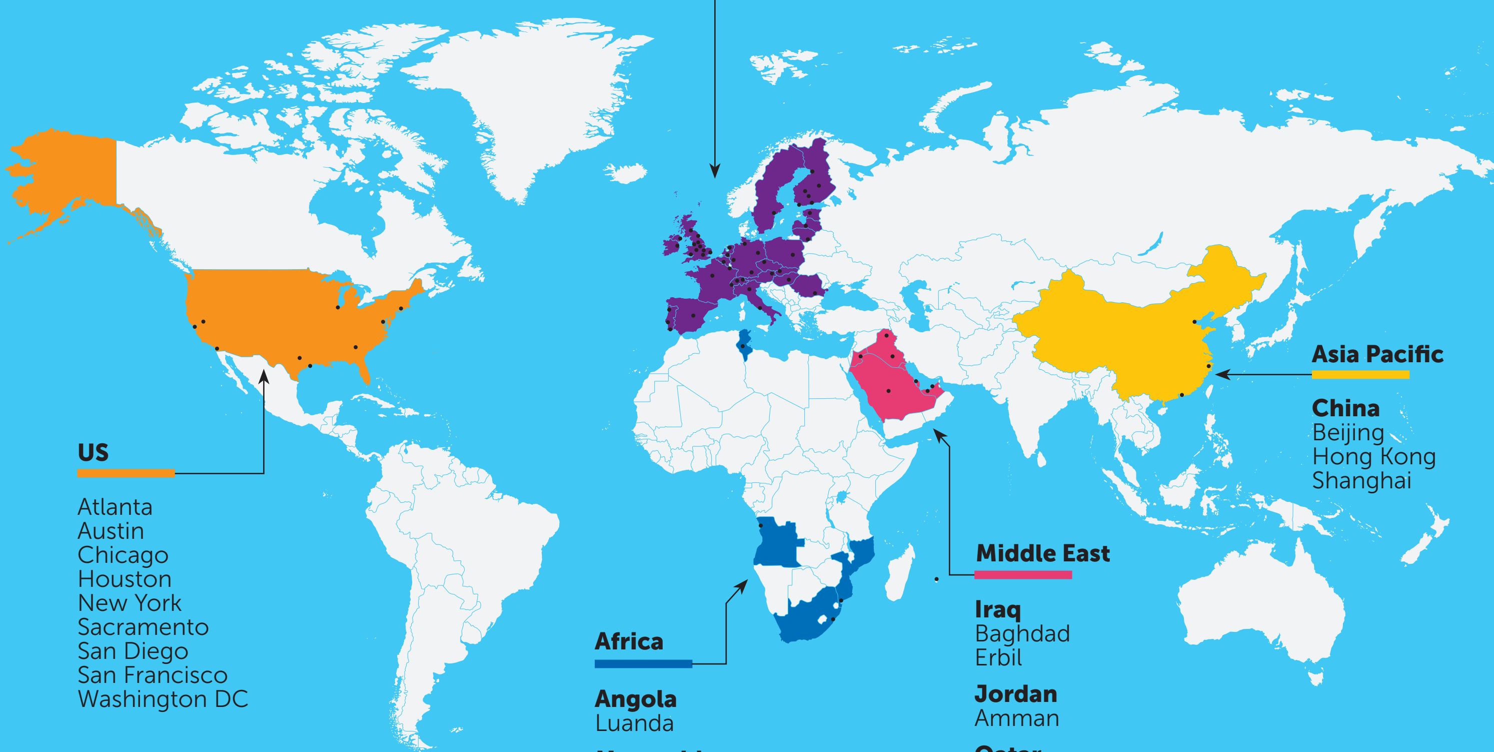

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