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MEMORANDUM

May 7, 2024

FROM: Scott Sinder
Kate Jensen
Nick Sutter

RE: The Department of Labor's Final Retirement Security Rule

On April 23, 2024, the Department of Labor (the "Department" or "DOL") published the final rule expanding the definition of an investment advice fiduciary under section 3(21) of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code (the "Code").[1] The Department previously published proposed regulations regarding the definition of fiduciary in November 2023 (the "Proposed Rule").[2] Along with the expanded fiduciary definition, the Department also released finalized amendments to two current class exemptions, PTE 84-24 and PTE 2020-02 (together, the "Final Rule"), intended to allow investment advisors to advise on certain transactions.[3]

The Final Rule, as expected and largely consistent with the Proposed Rule, significantly expands the long-standing test to determine who is an investment advice fiduciary. If an investment advisor is a "fiduciary" under this new test, then the advisor is prohibited from receiving commissions or other compensation from a third party that varies based on the investment that is made unless the advisor complies with a PTE.

The Final Rule will take effect on September 23, 2024, but provides an additional one-year transition period for complying with certain aspects of PTE 84-24 and PTE 2020-02. The two fundamental conditions of both PTEs – the impartial conduct standards and acknowledgment of fiduciary status -- must be met on the effective date. The Final PTE 84-24 and Final PTE 2020-02 only apply to new investment advice that is provided after the effective date and do not apply to ongoing compensation for a recommendation made before the effective date.[4]

This memorandum outlines the proposed re-definition of "fiduciary" and its ramifications and then discusses the manner in which an investment advice fiduciary – an insurance agent,

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[1] 89 Fed. Reg. 32,122 (Apr. 25, 2024).

[2] 88 Fed. Reg. 75,890 (Nov. 3, 2023).

[3] 89 Fed. Reg. 32,260 (Apr. 25, 2024) (Amendment to PTE 2020-02); 89 Fed. Reg. 32,302 (Apr. 25, 2024) (Amendment to PTE 84-24).

[4] *See* 89 Fed. Reg. at 32,262 n. 20; *see also* 89 Fed. Reg. at 32,304 n.12.

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insurance broker, or Broker-Dealer registered representative – will be able to satisfy the Final PTE 2020-02 or Final PTE 84-24.

This memorandum supplements the previous memorandum provided on May 2, 2024, to provide additional information regarding securities licensing requirements for Independent Producers.

I. Final Rule's New Definition of the Term "Fiduciary"

A. New Test

The Final Rule's new definition of fiduciary replaces the DOL's current five-part test that was created in 1975 with a broader definition. The Final Rule's definition of fiduciary is slightly different than the Proposed Rule's definition but the impact is the same. Under the Final Rule, a fiduciary is anyone providing investment recommendations regarding any securities transaction or other investments or investment strategy to a "Retirement Investor" related to money or other property of a plan or IRA and who:

- Makes professional investment recommendations "on a regular basis **as part of their business**"; and

- The investment recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the Retirement Investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the Retirement Investor's particular needs or individual circumstances, and may be relied upon by the Retirement Investor as intended to advance the retirement investor's best interest.[5]

The Final Rule also provides that an investment advisor will be considered a fiduciary if they represent or acknowledge that they are acting as a fiduciary under Title I or II or ERISA when making investment recommendations.[6] The Final Rule removes the Proposed Rule's provision that would have made an investment advisor a fiduciary if the recommendation is made by a person with discretionary authority over a plan.

Notably, the Final Rule does not require that the advice be provided regularly to an individual Retirement Investor to be considered a fiduciary (a key component of the old five-part fiduciary test that signified a relationship of trust between advisor and client), but rather, only that the person provides investment decisions "on a regular basis" as part of their business. Under the Final Rule, essentially every insurance agent, insurance broker or Broker-Dealer registered representative providing any advice or recommendation(s) in conjunction with investment of

[5] 89 Fed. Reg. at 32,256; *see also* § 2510.3-21(c)(1)(i).

[6] *Id.*; *see also* § 2510.3-21(c)(1)(ii).

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retirement assets – including one-time advice related to IRA rollovers or the one-time sale of an annuity, mutual fund or other investment to a retirement investor – would be classified as a "fiduciary."

1. IRA Rollovers Subject to the Final Rule

Advice provided in connection with a rollover decision is covered under the Final Rule. A recommendation of "any securities transaction, any other investment transaction or any investment strategy involving securities or other investment property" is defined in the Final Rule to include recommendations related to:

- The advisability of acquiring, holding, disposing of or exchanging securities or other investment property, including after a rollover, transfer, or distribution from a plan or IRA;[7]
- 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 a rollover, transfer, or distribution.[8]

The Final Rule requires the recommendation to involve securities or other "investment property." The Final Rule clarifies that investment property does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent that the policies or property do not contain an investment component.[9]

2. Limited Exceptions to Fiduciary Status

The Final Rule does clarify that providing investment information or education, without a recommendation, does not impose fiduciary obligations.

The Final Rule also adds the word "professional" to the facts-and-circumstances test to try to make clear that the person making the recommendation must be in the business of making investment recommendations (i.e. not a family member, friend, or a company's HR staffer). The recommendation also needs to be individualized. The Final Rule indicates that a cold call not based on the investor's individualized circumstances or particular needs is not fiduciary investment advice. Similarly, the Final Rule indicates that a mere list of what might be available in the market or from a particular investment firm would not rise to the level of fiduciary investment advice.

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[7] § 2510.3-21(f)(10)(i).

[8] § 2510.3-21(f)(10)(iii).

[9] § 2510.3-21(f)(12); *see also* 89 Fed. Reg. at 32,123 n.7.

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3. The Definition of Fee Remains Broad

Fiduciary status applies to a person who provides investment advice for a fee or other compensation. The Final Rule's definition of fee remains broad and includes:

> …commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation. A fee or compensation is paid "in connection with or as a result of" such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or the provision of investment advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of investment advice.[10]

4. Definition of Retirement Investor

The Final Rule adds a new definition of "Retirement Investor" to mean "a plan, plan participant or beneficiary, IRA, IRA owner or beneficiary, plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA."[11] The Final Rule clarifies that an IRA fiduciary does not include an IRA owner or beneficiary who is merely receiving investment advice.[12]

Under the Final Rule, an insurer or mutual fund company that discusses with investment advisors information about the products they offer will not be considered a fiduciary because the person cannot make decisions on behalf of the plan and would not be based on the individual needs or particular circumstances of any plan or IRA.[13]

B. Potential Litigation Challenging the Final Rule

It is widely expected the Final Rule will be challenged in court on grounds that DOL has exceeded its statutory authority in changing the definition of fiduciary and that the Final Rule is inconsistent with the opinion of the 5th Circuit Court of Appeals in 2018 vacating the Obama Administration's 2016 Fiduciary Rule.

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[10] § 2510.3-21(e).

[11] § 2510.3-21(f)(11).

[12] § 2510.3-21(f)(5).

[13] 89 Fed. Reg. at 32,161.

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In 2016, the Obama Administration finalized regulations changing the definition of fiduciary similar to the definition included in the Final Rule.[14] The 2016 Fiduciary Rule was vacated by the U.S. Court of Appeals for the Fifth Circuit in *Chamber of Commerce of the USA v. U.S. Dep't of Labor* in 2018.[15] The Fifth Circuit found that the Department's definition of fiduciary in the 2016 Fiduciary Rule was inconsistent with the statutory text in both ERISA and the Internal Revenue Code as well as the common-law meaning of fiduciary.[16] In vacating the rule, the court stated "[m]oreover, all relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence—and nothing in the statute "requires" departing from the touchstone."[17]

The Final Rule is inconsistent with this long-standing definition of fiduciary status discussed by the 5th Circuit. The Final Rule changes the requirement that an investment advisor must have a relationship with the client to create a fiduciary relationship by removing the requirements from the current test that the investment advisor provides advice "on a regular basis" and "pursuant to a mutual agreement, arrangement, or understanding."

Instead, the Final Rule, similar to the 2016 Fiduciary Rule that was vacated, applies fiduciary status on a transaction basis to cover virtually any compensated investment recommendation and applies to any investment advisor who makes investment recommendations to investors regularly as part of their business.

C. Impact on Agents and Brokers

There are two primary ramifications for advisors who become "fiduciaries" under the Final Rule:

- To receive commissions or other variable compensation from third parties for the sale of investment products to retirement investors (i.e. any compensation other than fees paid to the advisor by the Retirement Investor), an advisor would have to satisfy the requirements of PTE 2020-02 or PTE 84-24, which are discussed in more detail below.

- There will be expanded litigation and other liability exposure for such "fiduciaries." Potential penalties for the breach of fiduciary duties would include private rights of action under federal law for allegations related to employer plans and under state common law for IRAs. In addition, investment advisors that do not satisfy the PTE requirements also could be subject to the imposition of excise taxes under section 4975 of the Internal Revenue Code of 15 percent per year of the amount involved in

[14] 81 Fed. Reg. 20,946 (Apr. 8, 2016).

[15] 885 F. 3d 360 (5th Cir. 2018).

[16] *Id*. at 368-69.

[17] *Id*. at 369.

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the transaction – typically the value of the impacted product or accounts – from the date of the "prohibited transaction."[18]

II. Amendments to PTE 84-24 and PTE 2020-02

If an investment advisor is deemed a fiduciary under the Final Rule, the investment advisor would not be able to engage in "prohibited transactions" (e.g., receive variable compensation such as commissions or third-party compensation, among other things) unless a PTE is satisfied. Investment advisors who are deemed fiduciaries under the Final Rule will be required to rely either on PTE 2020-02 or on PTE 84-24 to be permitted to receive the otherwise prohibited compensation.

A. Key Differences Between PTE 84-24 and PTE 2020-02

The Final Rule affirms that PTE 84-24 is limited for use only by independent agents and brokers (defined as "Independent Producers" in the Final Rule) who sell fixed annuities or other non-securities insurance investment products for two or more unrelated Insurers.[19] However, the Final PTE 84-24 makes a significant change vis-à-vis the proposed version by allowing some statutory employees to use the exemption:

- The Final PTE 84-24 modified the definition of "Independent Producer" from the Proposed PTE 84-24 to allow an agent who is a statutory employee of one insurance company to use the PTE if the insurance company does not have a "financial interest" in the covered transaction.[20] This would mainly be used by an agent who is an employee of one company but who occasionally sells products of an unrelated company.

PTE 2020-02, on the other hand, is broadly available to investment advisers, banks, insurance companies, and broker-dealers.

Several PTE 84-24 provisions mirror the PTE 2020-02 requirements (see discussion below), but there are some material differences. Most critically, under PTE 2020-02, both the "Financial Institution" (i.e. the Insurer or Broker-Dealer) and the investment advisor are required to acknowledge in the requisite disclosure that they are acting as "fiduciaries" but only the investment advisor is required to make this fiduciary acknowledgment under the Final PTE 84-24. The Final PTE 84-24 also would impose restrictions and requirements that go beyond the PTE 2020-02 requirements, including:

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[18] 26 U.S.C. § 4975(a) (tax on prohibited transactions).

[19] PTE 84-24, Sec. VI(a), X(d)(1).

[20] PTE 84-24, Sec. X(d)(2).

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- An additional rollover documentation requirement comparing the fees and expenses of the proposed transaction with the alternatives;[21]
- Insurer approval before the sale of a fixed annuity or other non-securities retirement insurance product;[22] and
- Expanded Insurer policies and procedures obligations.[23]

To the benefit of Independent Producers, the Final PTE 84-24 removes a restriction that was included in the Proposed PTE 84-24 regarding compensation payments. The Proposed PTE 84-24 would not have allowed Independent Producers to claim revenue-sharing payments, administrative fees and marketing payments, and any payments from someone other than the Insurer and its Affiliates.

- Under the Final Rule, an Independent Producer can rely on the exemption for the indirect or direct receipt of reasonable compensation. PTE 84-24 is available for (a) the direct or indirect receipt of reasonable compensation by the Independent Producer and (b) the sale of a non-security annuity contract or other insurance product that does not meet the definition of "security" under federal securities laws.[24]

The Final PTE 84-24 removes the Proposed Rule's requirement to disclose the Independent Producer's compensation and instead requires the Independent Producer to provide, if requested by the Retirement Investor, a reasonable estimate of the compensation.[25]

The Final PTE 2020-02 also removes limitations related to equity IPOs. The Proposed PTE 2020-02 defined a "Covered Principal Transaction" to limit recommendations to debt securities that have "no greater than moderate credit risk and sufficient liquidity." The Final PTE 2020-02 removes this provision.

It is important to note that, for Independent Producers, the Insurer will dictate whether PTE 2020-02 or PTE 84-24 will be used but, because PTE 84-24 excludes the Insurer from the scope of the "fiduciary" acknowledgment, the strong expectation is that Insurers will rely on PTE 84-24 whenever they are in a position to do so. But, to the extent that an advisor is selling fixed annuities or other non-securities insurance products to Retirement Investors through its Broker-Dealer, only PTE 2020-02 will apply.

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[21] PTE 84-24, Sec. VII(b)(6).

[22] PTE 84-24, Sec. VII(c)(1).

[23] PTE 84-24, Sec. VII(c)(2)-(4).

[24] PTE 84-24, Sec. III(g)(1)-(2).

[25] PTE 84-24, Sec. VII(b)(3)(A).

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B. Common Core Requirements of PTE 84-24 and PTE 2020-02

Both PTEs have four core sets of requirements:

a) Impartial Conduct standards
b) Disclosure obligations
c) Policies and Procedures (including Retrospective Self-Audits)
d) Recordkeeping/Self-Correction/Good Faith Compliance/Eligibility

As noted above, the Final PTE 84-24 and 2020-02 include a one-year transition period after their effective dates under which parties have to comply only with the Impartial Conduct Standards and provide a written acknowledgment of fiduciary status for relief under these PTEs. After a year, all requirements of the PTE must be met.

Each is discussed below.[26]

1. Impartial Conduct Standards

a. PTE 2020-02

The Final PTE 2020-02 Impartial Conduct Standards closely track the Proposed PTE 2020-02 and the current law. The Final PTE 2020-02 will require Financial Institutions and investment advisors to:

- Provide advice that satisfied the Care Obligation and Loyalty Obligation;
- The compensation received "does not exceed reasonable compensation"; and
- Statements made to the Retirement Investor are not "materially misleading."[27]

The Final Rule retains the "Best Interest Standard" included in the Proposed Rule but refers to this standard as the "Care Obligation" and "Loyalty Obligation." The standard is generally unchanged and is not materially different from the Securities and Exchange Commission's ("SEC") Regulation Best Interest ("Reg BI")[28] or the "Best Interest Obligation" imposed under the National Association of Insurance Commissioners ("NAIC") "Suitability in Annuity Transactions Model Regulation"[29] and requires the proffered advice to:

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[26] The Final PTE amendments would not replicate the 2016 Fiduciary Rule's requirements that the Insurer or Broker-Dealer and the advisor enter into a formal contract with the retirement investor and expressly warrant compliance with the exemption obligations. *See* 81 Fed. Reg. 21,002, 21,076-77 (Apr. 8, 2016).

[27] PTE 2020-02, Sec. II(a)(1)-(3).

[28] *See* 17 C.F.R. § 240.15l–1.

[29] *See* NAIC Model Law 275-1 ("Suitability in Annuity Transactions Model Regulation"), Section 6(A) (NAIC 2020).

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> As defined in Section V(b), to meet the Care Obligation, advice must reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in Section V(h), to meet the Loyalty Obligation, the advice must not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own.[30]

The Final PTE 2020-02 clarifies that statements can be materially misleading if they omit information that is needed to prevent a statement from being misleading.[31]

b. PTE 84-24

The Final PTE 84-24 Impartial Conduct Standards replicate those of the Final PTE 2020-02. As noted above, the Final PTE 84-24 removes the limitation contained in the Proposed Rule that would have prohibited Independent Producers from receiving any compensation other than sales commissions.[32]

2. Disclosure Requirements

a. PTE 2020-02

The Final PTE 2020-02 Disclosure Requirements would continue to require a specified set of disclosures to be made to the Retirement Investor before engaging in a covered transaction:

- A written statement that "the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I or Title II of ERISA, or both when making an investment recommendation."[33]
- A written statement of the Care Obligation and Loyalty Obligation that is owed by the Investment Professional and Financial Institution.[34]

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[30] PTE 2020-02, Sec. II(a)(1).

[31] PTE 2020-02, Sec. II(a)(3).

[32] PTE 84-24, Sec. VII(a)(1)-(3).

[33] PTE 2020-02, Sec. II(b)(1).

[34] PTE 2020-02, Sec. II(b)(2).

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- All material facts relating to the scope and terms of the relationship, including:
  - The 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 made to them.[35]
- All material facts relating to Conflicts of Interest that are associated with the recommendation.[36]

The Final PTE 2020-02 removes the Proposed PTE 2020-02's provisions that would have allowed Retirement Investors to request disclosure of compensation information, including costs and fees.

The Final PTE 2020-02 also includes a rollover disclosure but the Final PTE 2020-02 narrows the requirement to only apply the disclosure requirements to recommendations to roll over from Title I plans.[37] For these rollovers, PTE 2020-02 requires a written document to be provided to the Retirement Investor stating the basis for their recommendation to engage in the rollover.[38]

The preamble to the Final PTE 2020-02 notes that although the Department "is not applying the same documentation and disclosure requirements on rollovers from IRA-to-IRA or from one account type to another, it is not relieving the fiduciary of its obligations under the Care Obligation and Loyalty Obligation."[39]

b. PTE 84-24

The Final PTE 84-24 Disclosure Requirements include all of the required PTE 2020-02 disclosures except that, under PTE 84-24, only the Independent Producer (and not the Financial Institution) provides a written acknowledgment of fiduciary status to the Retirement Investor. In addition, the Final PTE 84-24 adds additional disclosures for Independent Producers that are not included in the Final PTE 2020-02 disclosures:

- The Independent Producer must provide to the Retirement Investor notice of the Retirement Investor's right to request information regarding commissions or fees and, upon the Retirement Investor's request, the Independent Producer must provide a reasonable estimate of compensation which may provide in percentages or a range of

[35] PTE 2020-02, Sec. II(b)(3)(A)-(B).

[36] PTE 2020-02, Sec. II(b)(4). This provision modifies the Proposed PTE 2020-02 that would have required a written statement to the Retirement Investor that it has the right to obtain specific information regarding fees, costs, and compensation.

[37] PTE 2020-02, Sec. II(b)(5).

[38] *Id.*

[39] 89 Fed. Reg. at 32,273.

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amounts and 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 stated as a range of amounts or percentages.[40]

- A description of all the products the Independent Producer is licensed and authorized to sell.[41]
- Before the sale of the recommended annuity, the Independent Producer must document and provide to the Retirement Investor the basis for the recommendation.[42]

The Final PTE 84-24 includes the same rollover disclosure as PTE 2020-02 except the Independent Producer must consider and document the basis for its recommendation to engage in the rollover transaction.[43]

Commenters on the Proposed PTE 84-24 expressed concern that the required rollover documentation to use the exemption may require Independent Producers to become registered investment advisors and obtain a Series 65 or other securities license because federal securities law prohibits individuals from recommending or providing detailed information or advice about securities without a license.[44] The Department disagrees with this characterization and the preamble to the Final Rule notes that "[w]hile Independent Producers are required to consider alternatives to the rollover from the Title I Plan into an annuity, they are not required to recommend or provide detailed information or advice about securities."[45]

Absent further guidance, it is unlikely Independent Producers will have to become registered investment advisors to rely on PTE 84-24, provided a specific securities recommendation or strategy is not provided along with the rollover documentation. The SEC's Reg. BI applies to making a recommendation of "any securities transaction" or "investment strategy involving securities to a retail customer."[46] The preamble to the Final Reg. BI includes several examples of communications that are not recommendations of any securities transaction or investment strategy as long as they do not include, standing alone or in combination with other communications, a recommendation of a particular security or securities or particular investment strategy involving securities:

- General financial and investment information, including basic investment concepts
- Historic differences between asset classes based on standard market incides

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[40] PTE 84-24, Sec. VII(b)(3)(A)(iii).

[41] PTE 84-24, Sec. VII(b)(3)(B).

[42] PTE 84-24, Sec. VII(b)(5).

[43] PTE 84-24, Sec. VII(b)(6).

[44] 89 Fed. Reg. at 32,313-14.

[45] *Id*. at 32,314.

[46] 17 C.F.R. § 240.15l–1(a)(1).

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- Estimates of future retirement income needs; and
- Assessments of a customer's investment profile. [47]

The Independent Producer's documentation is likely to fall within these exceptions because the required documentation and comparison is likely to provide general or broad information regarding how an annuity functions rather than an analysis of the underlying securities investments.

3. Policies and Procedures

a. PTE 2020-02

The Final PTE 2020-02 Policies and Procedures largely adopts the Proposed PTE 2020-02 and maintains the current Financial Institution written policies and procedures framework that requires the Financial Institution (and not the investment advisor) to maintain and enforce policies that ensure compliance with the PTE and to mitigate Conflicts of Interest.[48]

The Final PTE 2020-02 adopts the Proposed PTE 2020-02's amendments that prohibit the Financial Institution's use of "quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives."[49] which is already prohibited for transactions governed by the SEC's Reg BI.[50] The Final PTE 2020-02 also includes a requirement for Financial Institutions to provide their policies and procedures to DOL within 30 days upon request.[51]

The Final PTE 2020-02 also adopts the retrospective review requirements. The Final PTE 2020-02 continues to require Financial Institutions to conduct, on at least an annual basis, a retrospective review that is designed to ensure that its policies are effective and to update those policies on an as-needed basis.[52] The Financial Institution must document the results of the retrospective review in a written report and a "Senior Executive Officer of the Financial Institution" (defined as one of the Financial Institution's three most senior officers or its CEO, President or CFO) is required to certify that they have reviewed the report.[53] The Final PTE 2020-02 also adds to the existing retrospective review requirement and requires the Financial

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[47] 84 Fed. Reg. at 33,337-38.

[48] PTE 2020-02, Sec. II(c)(1)-(2).

[49] PTE 2020-02, Sec. II(c)(2).

[50] 17 C.F.R. § 240.15l–1(a)(2)(iii)(D).

[51] PTE 2020-02, Sec. II(c)(3). The Proposed PTE 2020-02 would have required the documents to be provided within 10 business days.

[52] PTE 2020-02, Sec. II(d)(1)

[53] PTE 2020-02, Sec. II(d)(2), (3)(A); *see also* PTE 2020-02, Sec. V(m).

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Institution to file a Form 5330 Excise Tax Return if it discovers any nonexempt prohibited transaction and pay any resulting excise tax.[54]

b. PTE 84-24

Similar to the Proposed FTE 84-24, the Final PTE 84-24 does not require the Insurer to acknowledge fiduciary status but instead imposes new supervisory provisions over Independent Producers. The Final PTE 84-24 generally tracks with the Final PTE 2020-02 but PTE 84-24 includes several additional requirements intended to bolster an Insurer's oversight and review of the Independent Producer's conduct and requires the Insurer to:

- Review each of the Independent Producer's specific recommendations before an annuity is issued to a Retirement Investor (but the Insurer is not required to review the Independent Producer's sale of another Insurer's products).[55]
- Develop a "prudent process" for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts 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 Final PTE requires the Insurer to review "customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer", as well as "the Independent Producer's training, education, and conduct with respect to the Insurer's own products."[56]
- Determine whether it can rely on the Independent Producer to adhere to the Impartial Conduct Standards and review such determination annually. [57]

The Final PTE 84-24 also requires Insurers to have a process for conducting an annual retrospective review of each Independent Producer but the Final PTE 84-24 adds additional language to the Proposed PTE 84-24 to allow the Insurer to rely on sampling to conduct their retrospective review. [58]

The Insurer must review the Independent Producer's rollover recommendations.[59] The Insurer also must certify it has written policies and procedures that meet the PTE's requirements.[60]

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[54] PTE 2020-02, Sec. II(d)(3)(B).

[55] PTE 84-24, Sec. VII(c)(1).

[56] PTE 84-24, Sec. VII(c)(3).

[57] *Id.*

[58] PTE 84-24, Sec. VII(d)(1)

[59] *Id.*

[60] PTE 84-24, Sec. VII(d)(4)(C).

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The Final PTE 84-24 includes new provisions that require the Insurer to provide the retrospective review to the Independent Producer and instruct the Independent Producer to correct the prohibited transactions, file a Form 5330 with the IRS, and pay the resulting excise taxes, and provide the Insurer with a copy of the filed Form 5330 within 30 days.[61]

4. Everything Else – Recordkeeping/Self-Correction/Good Faith Compliance/Eligibility Rules

Recordkeeping: The Final PTE 2020-02 maintains the current PTE 2020-02 requirement for Financial Institutions to retain records for six years following the covered transaction.[62]

The Final PTE 84-24 removed the Proposed PTE 84-24 recordkeeping requirements and now includes a similar recordkeeping provision to PTE 2020-02 by requiring the Independent Producer and Insurer to retain records for six years.[63] The Final PTE 84-24 removed the requirement to make records available to all state and federal regulators, any plan fiduciary, any contributing employer, and any participant, beneficiary, or IRA owner.

Self-Correction: The Final PTE 2020-02 allows Financial Institutions to self-correct potential PTE violations and avoid liability that would otherwise attach.[64] The Final PTE 84-24 provides Independent Producers with a similar self-correction provision.[65] Both Final PTEs eliminate the requirement to notify the Department to use the self-correction procedures.

Good Faith Compliance: The Final PTE 2020-02 and PTE 84-24 include good faith exceptions specifying there is no PTE violation if an error or omission is made in good faith and with reasonable diligence.[66] This provision was not included in the Proposed PTE 84-24. Under PTE 2020-02, Financial Institutions and investment advisors may rely in good faith on assurances from unaffiliated entities.[67] Similarly, under PTE 84-24, Independent Producers and Insurers can also rely in good faith on information and assurances from each other.[68]

Eligibility Rules: The Final PTE 2020-02 includes provisions that bar the use of the exemption if the Financial Institution or Investment Professional is convicted of crimes related to

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[61] PTE 84-24, Sec. VII(d)(2)(A)-(C).

[62] PTE 2020-02, Sec. IV.

[63] PTE 84-24, Sec. IX.

[64] PTE 2020-02, Sec. II(e).

[65] PTE 84-24, Sec. VII(e).

[66] PTE 2020-02, Sec. II(b)(6); PTE 84-24, Sec. VII(b)(7).

[67] PTE 2020-02, Sec. II(b)(7);

[68] PTE 84-24, Sec. VII(b)(8).

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202 429 3000 main
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investment advice to a Retirement Investor.[69] The Final PTE 2020-02 makes a few significant changes from the Proposed PTE 2020-02, including:

- Clarifying that covered crimes include foreign convictions but not convictions that occur within a jurisdiction that is on the Department of Commerce's list of foreign adversaries.[70]
- Under the Proposed PTE 2020-02, the eligibility rules applied to crimes committed by a Financial Institution's Affiliates. The Final PTE 2020-02 narrows this to only apply to those members of a Financial Institution's Controlled Group and relies on the definition of a "Controlled Group" under section 414 of the Code.[71] This is a significant change that will sweep in significantly fewer entities that would otherwise make the Financial Institution ineligible to use PTE 2020-02.
- The Final PTE 2020-02 removes the opportunity for the Financial Institution to petition the Department for relief and removes the opportunity to be heard provisions.

The Final PTE 84-24 eligibility provision mirrors the Final PTE 2020-02 eligibility provisions.[72]

[69] PTE 2020-02, Sec. III(a)(1)-(2).

[70] PTE 2020-02, Sec. III(a)(1)(B).

[71] PTE 2020-02, Sec. III(a); (a)(3).

[72] PTE 84-24, Sec. VIII(a).