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**4510-29-P**

**DEPARTMENT OF LABOR**

**Employee Benefits Security Administration**

**29 CFR Part 2550**

**[Application No. D-12060]**

**ZRIN 1210-ZA33**

**Amendment to Prohibited Transaction Exemption 84-24**

**AGENCY:** Employee Benefits Security Administration, U.S. Department of Labor.

**ACTION:** Amendment to Prohibited Transaction Exemption 84-24.

**SUMMARY:** This document contains a notice of amendment to Prohibited Transaction Exemption (PTE) 84-24, an exemption from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The amendment affects participants and beneficiaries of plans, individual retirement account (IRA) owners, and certain fiduciaries of plans and IRAs.

**DATES:** The amendment is effective [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Susan Wilker, (202) 693-8540 (not a toll-free number), Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The Employee Retirement Income Security Act of 1974 (ERISA) provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent they render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so. Title I of the ERISA (referred to herein as Title I), which generally applies to employer-sponsored plans, includes this provision in ERISA section 3(21)(A)(ii).<sup>1</sup> ERISA's Title II (referred to herein as the Code), includes a parallel provision in Code section 4975(e)(3)(B), which defines a fiduciary of a tax-qualified plan, including individual retirement accounts (IRAs).

In addition to fiduciary obligations, ERISA and the Code “categorically bar[]” plan fiduciaries from engaging in transactions deemed “likely to injure the pension plan.”<sup>2</sup> These prohibitions broadly forbid a fiduciary from “deal[ing] with the assets of the plan in his own interest or for his own account,” and “receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.”<sup>3</sup> Congress also gave the Department of Labor (the Department) authority to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its

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<sup>1</sup> Section 3(21)(A)(ii) of the Act is codified at 29 U.S.C. 1002(3)(21)(A)(ii). As noted above, Title I of the Act was codified in Title 29 of the U.S. Code. As a matter of practice, this preamble refers to the codified provisions in Title I by reference to the sections of ERISA, as amended, and not by its numbering in the U.S. Code.

<sup>2</sup> *Harris Trust Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241–42 (2000) (citation and quotation marks omitted).

<sup>3</sup> ERISA section 406(b)(1), (3), 29 U.S.C. 1106(b)(1), (3).

participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.<sup>4</sup>

On October 31, 2023, the Department released the proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary, along with proposed amendments to PTE 2020-02 and other administrative prohibited transaction exemptions available to investment advice fiduciaries.<sup>5</sup> The proposed rule was designed to ensure that the protections established by Titles I and II of ERISA would uniformly apply to all advice that Retirement Investors ( receive concerning investment of their retirement assets in a way that ensures that Retirement Investors' reasonable expectations are honored when they receive advice from financial professionals who hold themselves out as trusted advice providers (Retirement Investors are defined to include Plans, Plan participants and beneficiaries, IRAs, IRA owners and beneficiaries, Plan fiduciaries 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 fiduciaries within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA).

At the same time, the Department released the proposed amendment to PTE 84-24 (the Proposed Amendment) and invited all interested persons to submit written comments.<sup>6</sup> The Department also proposed amendments to PTEs 75-1, 77-4, 80-83, 83-1, 86-128, and 2020-02.

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<sup>4</sup> ERISA section 408(a), 29 U.S.C. 1108(a). Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984, Sec. 1, Pub. L. 98-532, 98 Stat. 2705 (Oct. 19, 1984), Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975. 5 U.S.C. App. (2018).

<sup>5</sup> The proposals were released on the Department's website on October 31, 2023. They were published in the *Federal Register* on November 3, 2023, at 88 FR 75890, 88 FR 75979, 88 FR 76004, and 88 FR 76032.

<sup>6</sup> The Proposed Amendment was released on October 31, 2023, and was published in the *Federal Register* on November 3, 2023. 88 FR 75979.

The Department received written comments on the Proposed Amendment, and on December 12 and 13, 2023, held a virtual public hearing at which witnesses provided commentary on the Proposed Amendment. After carefully considering the comments it received and the testimony presented at the hearing, including representations Insurers have made to the Department regarding impediments they have confronted in complying with the current conditions of PTE 2020-02 when distributing annuities through independent agents (Independent Producers), the Department is granting this amendment to PTE 84-24 as provided herein (the “Final Amendment”) on its own motion pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with its exemption procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).<sup>7</sup> Elsewhere in this edition of the *Federal Register*, the Department is finalizing (1) its proposed rule defining when a person renders “investment advice for a fee or other compensation, direct or indirect” with respect to any moneys or other property of an employee benefit plan for purposes of the definition of a “fiduciary” in ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (the “Regulation”), and (2) amendments to several existing prohibited transaction exemptions (PTEs)—namely PTEs 75-1, 77-4, 80-83, 83-1, 86-128, and 2020-02—that apply to the provision of fiduciary investment advice.

### **PTE 2020-02**

As described elsewhere in this edition of the *Federal Register*, the Department is also adopting amendments to PTE 2020-02. That exemption remains generally available

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<sup>7</sup> Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, Subpart B (89 FR 4662 (January 24, 2024))).

for all investment advice, including recommendations of insurance products. The Department maintains its long-held position that insurance companies can effectively exercise fiduciary oversight with respect to Independent Producers' recommendations of the insurance company's own products under PTE 2020-02. PTE 2020-02 offers a broad, flexible, and principles-based approach that applies across different financial sectors and business models and provides relief for multiple categories of financial institutions and investment professionals, including insurance companies selling their products through Independent Producers. As fully discussed below, however, the Department is amending PTE 84-24 to provide a specially tailored, alternative exemption allowing an Independent Producer to receive commissions from an insurance company with respect to annuity recommendations of the insurance company's products.

## **Comments and Overview of the Amendment to PTE 84-24**

### **Overview of Amended Exemption**

The Department is amending PTE 84-24 to exclude sales and compensation received as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder from the existing relief provided in Section II, which the Department has redesignated as Section II(a). The amendment adds new Section II(b), which provides relief from the restrictions of ERISA sections 406(a)(1)(A), (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(A), (D), (E) and (F) for Independent Producers that provide fiduciary investment advice and engage in the following transactions, including as part of a rollover, as a result of providing investment advice within the

meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder:

(1) The receipt, directly or indirectly, by an Independent Producer of reasonable compensation; and

(2) the sale of a non-security annuity contract or other insurance product that does not meet the definition of “security” under Federal securities laws.

The exemption is subject to certain conditions. These conditions are similar to the conditions contained in amended PTE 2020-02, but the Department has tailored the conditions to protect Retirement Investors from the specific conflicts that can arise when Independent Producers that are compensated through commissions and other compensation provide investment advice to Retirement Investors regarding the purchase of an annuity. The amended exemption includes an eligibility provision in Section VIII for investment advice transactions and a new recordkeeping condition in Section IX that is similar to the recordkeeping provision in PTE 2020-02.

### **The Department’s Role Related to the Sale of Insurance Products to Retirement Investors**

Several commenters raised concerns with the Department’s approach to amending PTE 84-24 and insurance recommendations more generally. Some commenters argued that the Federal Government should not be regulating the sales of insurance products. They argued that the McCarran-Ferguson Act assigns to the States, not the Federal Government, primary authority to regulate the business of insurance. Furthermore, several commenters pointed out that many States have adopted the 2020 National Association of Insurance Commissioners (NAIC) Suitability In Annuity Transactions

Model Regulation 275 (the NAIC Model Regulation), which imposes a “best interest” standard on insurance producers. Some commenters argued that the Department should rely entirely on the NAIC Model Regulation instead of relying on the specific standards in ERISA and the Code.

However, many of these same commenters also noted that Insurers have long relied on the relief provided in PTE 84-24, thereby implicitly acknowledging that the Department has long regulated the business of insurance with respect to the sale of insurance products to Retirement Investors. ERISA and the Code broadly regulate Plan and IRA investments, including investments in insurance. As the Supreme Court held in *Hancock v. Harris Trust*,<sup>8</sup> Congress enacted ERISA with the broad purpose of protecting retirement benefits, including benefits supported by insurance contracts. During the more than 45 years that has passed since the Department issued PTE 77-9, the predecessor to PTE 84-24, it has consistently imposed conditions on insurance companies and agents receiving commissions and other compensation that would otherwise be prohibited under ERISA. Indeed, the interaction between the NAIC Model Regulation and the fiduciary protections under Title I and Title II of ERISA is explicitly recognized in the NAIC Model Regulation’s safe harbor, which provides that recommendations and sales of annuities in compliance with comparable standards to the NAIC Model Regulation satisfy its requirements, including those applicable to fiduciaries under ERISA section 3(21) and Code section 4975(e)(3).<sup>9</sup>

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<sup>8</sup> See *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993) (noting ERISA’s “broadly protective purposes” regarding retirement benefits and that fiduciary status applies to “persons whose actions affect the amount of benefits retirement plan participants will receive”).

<sup>9</sup> NAIC Model Regulation at section 6.E.4.c.

In recent years, many States have increased investor protections with respect to recommendations to purchase annuities. These increased protections reflect a recognition by the States of the increased importance of ensuring that investors receive sound investment advice, as insurance products have grown in complexity and individuals have increasingly become dependent upon receiving sound advice from investment professionals, including insurance agents. The amendments to this exemption and related amendments to PTE 2020-02 supplement those State-law protections by ensuring that trusted professionals' recommendations of insurance products to Retirement Investors are subject to the same stringent standards of conduct that apply to recommendations of other investment products.

Titles I and II of ERISA reflect a strong Federal interest in the regulation and protection of retirement investments and Retirement Investors. Critical to this Federal regulatory system are the prohibited transaction provisions, which preclude fiduciaries from engaging in a wide range of conflicted transactions with Retirement Investors, unless there is an applicable statutory exemption or the Department grants an administrative exemption with protective conditions carefully designed to protect Retirement Investors from injury associated with unregulated conflicts of interest. As compared to State insurance law, ERISA and the Code place greater emphasis on the stringent regulation of conflicts of interest and impose fiduciary obligations on persons who engage in important activities related to investment management or advice. PTE 84-24, together with PTE 2020-02, reflects the Department's independent statutory authority and obligation under ERISA section 408(a) and Code section 4975(c)(2) to ensure that it only grants exemptive relief for prohibited transactions that is protective of the rights of



plan participants and beneficiaries and in their interests. The Department is finalizing this amendment consistent with its statutory obligation.

Taken together, amended PTE 84-24 and PTE 2020-02 ensure that when trusted advisers,<sup>10</sup> including Independent Producers, recommend insurance products to Retirement Investors, they will adhere to fundamental standards of fiduciary conduct subject to supervision by a responsible financial institution. Under the core standards of both amended exemptions investment professionals advice must:

- acknowledge their fiduciary status<sup>11</sup> in writing to the Retirement Investor;
- disclose their services and material conflicts of interest to the Retirement Investor;
- adhere to Impartial Conduct Standards requiring them to:
  - investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances (the “Care Obligation”);
  - never place their own interests ahead of the Retirement Investor’s interest or subordinate the Retirement Investor’s interests to their own (the “Loyalty Obligation”);
  - charge no more than reasonable compensation and, if applicable, comply with Federal securities laws regarding “best execution”; and

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<sup>10</sup> When using the term “adviser,” the Department does not refer only to investment advisers registered under the Investment Advisers Act of 1940 or under state law, but rather to any person rendering fiduciary investment advice under the Regulation. For example, as used herein, an adviser can be an individual who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

<sup>11</sup> For purposes of this disclosure, and throughout the exemption, the term “fiduciary status” is limited to fiduciary status under Title I of ERISA, the Code, or both. While this exemption uses some of the same terms that are used in the SEC’s Regulation Best Interest and/or in the Investment Advisers Act of 1940 and related interpretive materials issued by the SEC or its staff, the Department retains interpretive authority with respect to satisfaction of this exemption.

- avoid making misleading statements about investment transactions and other relevant matters;
- adopt firm-level policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest that could otherwise cause violations of those standards;
- document and disclose the specific reasons for any rollover recommendations; and
- conduct an annual retrospective compliance review.

As discussed in greater detail below, the Department has concluded that amended PTEs 84-24 and 2020-02 flexible and workable exemptions that provide a sound and uniform framework for financial institutions and investment professionals to provide fiduciary investment advice to Retirement Investors. Taken together, these amended exemptions are broadly available for fiduciary investment advice, without regard to business model, fee structure, or type of product recommended, subject to financial institutions' and investment professionals' compliance with the fundamental standards for the protection of Retirement Investors set forth above. To the extent the terms of the exemptions are honored, Retirement Investors will benefit from the application of a common standard, applicable to all fiduciary recommendations to Retirement Investors, that ensures prudent and loyal investment recommendations from fiduciary investment advice providers competing on a level playing field that is protective of Retirement Investors. The chief difference between amended PTEs 2020-02 and 84-24, as discussed below, is that the Department amended PTE 84-24 to provide a pathway to compliance with the prohibited transaction rules for Independent Producers who recommend the

products of multiple Insurers to Retirement Investors, without requiring those Insurers to assume or acknowledge their fiduciary status under ERISA and the Code.

### **Applicability Date**

This Final Amendment is applicable to transactions pursuant to investment advice provided on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] (the “Applicability Date”). For transactions pursuant to investment advice provided before the Applicability Date, the prior version of PTE 84-24 will remain available for all insurance agents and insurance companies that currently rely on the exemption.<sup>12</sup> Also, no party would be held to the amended conditions in Sections VII, VIII, IX or XI for a transaction that occurred before the Applicability Date of the amended exemption.

Several commenters stated that the Proposed Amendment’s Applicability Date, which was set for 60 days after publication, did not provide sufficient time for parties to fully comply with the new conditions for receipt of reasonable compensation for investment advice. In response to these comments, the Department is adding a new Section XI, which provides a phase-in period for the one-year period beginning [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Thus, an Independent Producer may receive compensation under Section II(b) during the phase-in period if it complies with the Impartial Conduct Standards condition in Section VII(a) and the fiduciary acknowledgment condition under Section VII(b)(1). This one-

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<sup>12</sup> To the extent a party receives ongoing compensation for a recommendation that was made before the Applicability Date, including through a systematic purchase payment or trailing commission, the amended PTE 84-24 would not apply unless and until new investment advice is provided.

year phase-in period is the same as the one-year compliance period the Department provided when it originally granted PTE 2020-02.

### **Excluding Investment Advice**

The amended PTE 84-24 excludes sales and compensation received as a result of the provision of investment advice from relief for the transactions described in Section III(a) through (f) of the exemption. However, relief remains available under those provisions for non-advice transactions. Investment advice fiduciaries must comply with the conditions in Sections VI–VIII that are tailored specifically for investment advice transactions. For clarity, the Department has included this limitation in each subsection of Section III(a) through (f) by adding the phrase “if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (and the regulations issued thereunder)” to the end of each subsection in Section III(a) through (f). The Department also is revising the disclosure conditions in Section V to reflect that these sections are not available for the receipt of compensation as a result of the provision of fiduciary investment advice.

The Department notes that many types of fiduciaries are already excluded from the transactions in Sections III(a)–(d) of PTE 84-24. After the Applicability Date of the Final Amendment, the relief provided in these sections would remain available for non-fiduciaries and nondiscretionary trustees.<sup>13</sup>

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<sup>13</sup> Nondiscretionary trustees were added in 1984, in response to a request from the Investment Company Institute listing typical nondiscretionary or trustee services. In an April 21, 1980 letter, “ICI states nondiscretionary trustees and custodians:

- (a) Open and maintain plan accounts and, in the case of defined contribution plans, individual participant accounts, pursuant to the employer's instructions that those providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) would be excluded under Section II(a).
- (b) Receive contributions from the employer and credit them to individual participant accounts in accordance with the employer's instructions;

The relief for the transaction described in Section III(e) remains available for any insurance company that is a fiduciary or service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-Approved Plan, if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder. The relief for the transactions described in Section III(f) remains available for any insurance company, Principal Underwriter, or investment company adviser that is a fiduciary or service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-Approved Plan; or (2) the provision of nondiscretionary trust services to the plan; or (3) both (1) and (2), if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.<sup>14</sup>

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- (c) Invest contributions and other plan assets in shares of a mutual fund or funds or other products such as insurance or annuity contracts designated by the employer, plan trustee, or participants, and reinvest dividends and other distributions in such investments;
  - (d) Redeem, transfer, or exchange mutual fund shares or surrender insurance or annuity contracts as instructed by the employer, plan trustee, or participant;
  - (e) Provide or maintain “designation of beneficiary” forms and make distributions from the trust or custodial account to participants or beneficiaries in accordance with the instructions of the employer, plan trustee, participants, or beneficiaries;
  - (f) Deliver to participants or their employer all notices, prospectuses, and proxy statements, and vote proxies in accordance with the participants' instructions.
  - (g) Maintain records of all contributions, investments, distributions, and other transactions and report them to the employer and participants;
  - (h) Make necessary filings with the Internal Revenue Service and other government agencies;
  - (i) Keep custody of the plan's assets;
  - (j) Reply to and prepare correspondence, either directly or through the mutual fund distributor or adviser, regarding the investment account and the operation and interpretation of a master or prototype plan sponsored by the complex to which the nondiscretionary trustee or custodian belongs.
- In some situations, the trustee or custodian is empowered to amend the master or prototype plan; in others, this power resides in the sponsor of the master or prototype plan. ICI further describes the duties of the nondiscretionary trustees as “ministerial” and indicates that such trustees possess no decisional authority with respect to a plan's funding medium or subsequent purchases or sales.”

<sup>14</sup> The Department is not amending Section III(f) to remove the phrase “investment company adviser,” but notes that this relief is not available if the purchase is a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

## **Description of Changes to Existing PTE 84-24**

Section II of existing PTE 84-24 provides exemptive relief for the covered transactions described in Section III(a) through (f), which, as amended, does not include relief for the receipt of otherwise prohibited compensation in connection with the provision of investment advice. In the Proposed Amendment, the Department requested comments on whether parties will continue to use the relief in proposed section II(a) for the transactions outlined in Section III(a)-(f) and whether parties are currently relying on Section III(f) for Pre-Approved Plans. The Department received some comments indicating that Section III(f) is still relied on in the marketplace. Commenters described this relief as important for Pre-Approved Plan providers in connection with the purchase of mutual fund shares with plan assets when the principal underwriter of the mutual fund acts as the sponsor of the “Pre-Approved Plan” document that is utilized by the plan, or the pre-approved provider plan provides nondiscretionary trustee services to the plan. These commenters claim that the loss of Section III(f) relief would make it difficult to continue to offer these products to the marketplace and urge the Department to retain the provision. After consideration of these comments, the Department is retaining Section III(f) in the Final Amendment with a revision that changes references to a “master or prototype plan” to a “Pre-Approved Plan,” which is consistent with a change in terminology the IRS adopted in IRS Rev. Proc. 2017-41.

The Department also received several comments on the terms Mutual Fund Commission and Insurance Sales Commission that the Department used in the Proposed Amendment. These commenters generally asserted that the proposed definition of Insurance Sales Commission was unduly narrow and should have included a broader

range of compensation, as permitted under State insurance laws and, they argued, the Department's prior interpretations of PTE 84-24. These commenters argued that other forms of compensation were commonplace, and could be reasonable, beneficial to Retirement Investors, and fully disclosed.

Some commenters asserted that the Proposed Amendment's definition of Insurance Sales Commission would prohibit the use of services provided by independent marketing organizations in connection with annuity sales marketing support, lead generation, technological assistance, back office and compliance support, and practice building and that, in the absence of these services, many Independent Producers would not survive. Some other commenters claimed that various benefits subject to continuing production and service requirements, such as health and retirement plan coverage and contributions, office allowances, travel expense reimbursements, and other benefits customary in the industry may not be allowed given the narrowness of these definitions.

After consideration of the comments, the Department has removed the terms "Mutual Fund Commission" and "Insurance Sales Commission" from the exemption. To achieve consistency with existing PTE 84-24, the Department has reverted to using the term "sales commission" in Section III(a) through (f) of the Final Amendment, which is the same term that the Department used in PTE 84-24 before this amendment. Additionally, the Department clarifies the disclosures required by Section V(b)(1) for transactions under Section III(a) through (f) involving IRAs may be provided to the IRA owner instead of an unrelated fiduciary.

Finally, the Department is making minor editorial changes by capitalizing defined terms where they are used in the existing sections of PTE 84-24, and moving the

definitions from existing Section VI to new Section X. As amended, Section III(a)-(f) reads:

(a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a sales commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract, if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(b) The receipt of a sales commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(c) The effecting by an insurance agent or broker, pension consultant or investment company Principal Underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-Approved Plan if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when such investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-Approved Plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2); and the purchase is not as a



result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

The Department notes that references to “plan assets” in Section III(a)-(f) include IRA assets and are not limited to “Plans” as defined in ERISA section 3(3) and described in Code section 4975(e)(1)(A).

### **Recordkeeping**

The Department proposed revising all the recordkeeping provisions for PTE 84-24 by adding a new Section IX that would have required additional parties to be able to access the records. Many commenters expressed concern that the amended recordkeeping provisions would create unnecessary burden for Independent Producers. In response to these comments, the Department has scaled back the amended recordkeeping conditions in the exemption in a similar manner to changes the Department made to PTE 2020-02. In this Final Amendment, the Department is retaining the existing recordkeeping language in Section V(e) for transactions that do not involve the provision of fiduciary investment advice. The Department also is making minor editorial changes to this section for clarity, but generally is keeping the substantive requirements the same.

In a new Section IX, the Department is adding recordkeeping language for Independent Producers providing fiduciary investment advice. Under this provision, the Independent Producer must maintain for a period of six years records demonstrating that it has complied with the conditions of this exemption and make such records available, to the extent permitted by law, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service (IRS). This condition is consistent with the recordkeeping requirement in amended PTE 2020-02.

### **Fiduciary Investment Advice Exemption**

The Department is finalizing its Proposed Amendment for investment advice fiduciaries who are independent insurance agents, with certain changes discussed below, based on the comments. The conditions for investment advice are similar to those in PTE 2020-02, but take into account the unique compliance challenges faced in the independent agent distribution channel, while promoting a level playing field for all investment advice professionals.

Several commenters criticized the Department's emphasis on uniformity. One commenter in particular stated that the Department was creating disadvantages for the insurance industry by amending PTE 84-24. Several commenters argued that because insurance companies and producers have been relying on PTE 84-24 for 40 years, they should be able to continue doing so. Some of these same commenters also questioned the Department's authority to regulate the business of insurance in this manner.

The Department disagrees with these commenters. Retirement Investors are no less in need of the protective conditions simply because the individual who is advising them relies on a different business model. Additionally, as discussed above, the Department has authority to regulate the business of insurance with respect to investment advice provided to Retirement Investors and has carefully tailored the conditions of this exemption to address the specific conflicts that can arise for Independent Producers that are compensated through commissions and other compensation when providing investment advice to Retirement Investors regarding the purchase of an annuity. Furthermore, the Department is providing additional time for insurance companies and producers that were relying on PTE 84-24 to come into compliance with the new conditions of this exemption or PTE 2020-02.

As required by ERISA section 408(a) and Code section 4975(c)(2), the Department may only issue an exemption if it is protective and in the interests of Retirement Investors. This Final Amendment ensures that Retirement Investors receive advice subject to the same core fiduciary obligations when the investments are insurance products recommended by Independent Producers, as when they receive advice about other competing investment alternatives. In the Department's view, Retirement Investors are best protected by a uniform standard assuring them that recommendations by fiduciaries are prudent, loyal, and free from misrepresentations or excessive compensation. Retirement Investors equally need these fiduciary protections and safeguards against dangerous conflicts of interest, whether the trusted Investment Professional is recommending an insurance product or a security. And there is no reason to believe that an insurance agent is any less susceptible to conflicts of interest than other categories of investment professionals.

The relief for fiduciary investment advice in Section II(b) for the covered transactions described in Section III(g) is generally similar to the relief provided in PTE 2020-02. Section VI provides conditions for transactions described in Section III(g) and requires the advice to be provided by an Independent Producer that is authorized to sell annuities from two or more unrelated Insurers. However, while PTE 2020-02 is available for almost any fiduciary investment advice provider, the conditions in amended PTE 84-24 Sections VII-IX are tailored for investment advice that is provided to a Retirement Investor by an Independent Producer who works with multiple insurance companies to sell non-securities annuities or other insurance products that do not meet the definition of "security" under Federal securities laws.

Some commenters questioned the administrative feasibility of the exemption pursuant to ERISA Section 408(a)(1) and Code section 4975(c)(2), taking issue with the added or expanded conditions of proposed PTE 84-24. One commenter stated that the PTE's conditions would force covered entities to instead seek relief via individual exemptions and noted that the Department has been issuing fewer administrative exemptions in recent years.

The Department disagrees with these assertions. The core conditions of PTE 84-24, including all the Impartial Conduct Standards, reflect core fiduciary obligations that have been in ERISA since its passage nearly fifty years ago. The Department is confident that Independent Producers, who satisfy the fiduciary definition, can recommend covered insurance products in accordance with basic standards of care and loyalty, and without overcharging or misleading retirement investors.

As described in detail below, the disclosure and conduct obligations imposed on Independent Producers are measured and achievable, and Insurers' oversight obligations are flexible, principles-based, and build on existing oversight responsibilities under State law. The Department has narrowed the scope of many of the amended PTE 84-24's conditions, also easing administration. These updates are discussed in detail in the sections to follow. The Department does not believe Independent Producers or Insurers will be unable to comply with PTE 84-24 or driven to seek individual exemptions. The amended PTE is not intended to push covered entities to apply for individual exemptions but is instead intended to require Independent Producers who provide investment advice for a fee to abide by a series of conditions uniquely crafted to mitigate conflicts of interest and protect Retirement Investor interests in these types of transactions.

Moreover, the Department has accommodated Insurers that rely upon independent agents by providing that the supervising Insurer does not have to assume fiduciary responsibility for investment recommendations by Independent Producers. Also, PTE 2020-02 remains available both to Independent Producers and Insurers for transactions that fall outside the scope of PTE 84-24, or to the extent the Insurer takes on fiduciary responsibility.

### **Retirement Investors**

The Department is revising the definition of Retirement Investor in Section X(n) to be consistent with the definition in the final Regulation defining fiduciary investment advice. As revised, both the final Regulation and Final Amendment define 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. The preamble to the final Regulation includes additional discussion of “Retirement Investor,” which is defined in the same terms in this Final Amendment to ensure its broad availability to investment advice fiduciaries.

### **Related Entity**

The Department is clarifying the definition of “Related Entity” in Section X(m). Related Entity includes two components: (i) a party that has an interest in an Investment Professional or Financial Institution; and (ii) a party in which an Investment Professional or Financial Institution has an interest, in either case when that interest may affect the fiduciary’s best judgment as a fiduciary. The Department has also made ministerial

changes, such as changing “described” to “defined” in referencing ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B).

### **Independent Producers**

The term “Independent Producer” is defined in Section X(d) as a person or entity that is licensed under the laws of a State to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies and (1) is not an employee of an insurance company (including a statutory employee under Code section 3121(d)(3)); or (2) is a statutory employee of an insurance company that has no financial interest in the covered transaction. The Department is revising the definition of Independent Producer to clarify that the exemption is available only when the Independent Producer is not an employee of an insurance company (including a statutory employee under Code section 3121(d)(3)) or the Independent Producer is a statutory employee of an insurance company that has no financial interest in the covered transaction. Accordingly, the statutory employee would be treated as an Independent Producer, for purposes of this exemption, with respect to the recommended sale of an insurance product in which the statutory employer has no financial interest. To the extent, however, the statutory employee recommends products in which the employing insurance company has a financial interest, both the insurance company and the statutory employee would have to rely on PTE 2020-02 for relief from any resulting prohibited transactions.

The Proposed Amendment would have limited the definition to exclude statutory employees entirely, but the Department is revising the definition in response to comments. Many commenters expressed concern that the proposed definition was too

limited, and several commenters specifically requested that the Department make PTE 84-24 available for statutory employees of insurance companies. Some of these commenters sought broad relief for all recommendations by statutory employees, including recommendations in which their employing insurance company had a financial interest. These commenters described the relationship that an insurance company has with its statutory employees as the equivalent of the relationship between insurance companies and wholly independent producers who are not statutory employees. These commenters argued that a statutory employer cannot supervise statutory employees under PTE 2020-02. The Department also received comments, however, arguing for a narrower clarification permitting statutory employees to rely upon PTE 84-24 as Independent Producers only to the extent they were recommending the products of other insurance companies that did not employ them as statutory employees.

In response to these comments, the Department has revised this definition to permit statutory employees to rely upon PTE 84-24 when they are recommending transactions in which the statutory employer does not have a financial interest. In such cases, the statutory employer is similarly situated to insurance companies that are working with wholly independent agents. The Final Amendment does not, however, allow statutory employees to rely on PTE 84-24 when they are recommending transactions with the insurance company that acts as their statutory employer. As reflected in the Treasury's implementing regulations,<sup>15</sup> the statutory employee's principal

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<sup>15</sup> 26 CFR § 31.3121(d)-1(d)(3)(ii) Full-time life insurance salesman. An individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company is a full-time life insurance salesman. Such a salesman ordinarily uses the office space provided by the company or its general agent, and stenographic assistance, telephone facilities, forms, rate books, and advertising materials are usually made available to him without cost. An

business activity involves the solicitation of contracts for that one insurance company which ordinarily provides facilities and support to the statutory employee for that purpose, and these statutory employees often receive health and other benefits from the “employing” insurance companies. Accordingly, the employing insurance company has a degree of potential control and influence over the conduct of the statutory employee, and the statutory employee has a corresponding commitment to that company that is not necessarily the same as in a relationship between a wholly independent agent and other Insurers.

Given these differences, the Department has concluded that PTE 84-24 is insufficiently protective of Retirement Investors with respect to recommendations of products in which the statutory employer has a financial interest. In such cases, both the employing insurance company and the statutory employee must rely on PTE 2020-02 for relief for prohibited transactions, just as similarly situated Financial Institutions rely on PTE 2020-02 with respect to recommendations of their proprietary products.

Accordingly, statutory employees and the insurance companies would need to meet all the protective conditions of PTE 2020-02, including the requirement that the insurance company, acting as the supervising financial institution, acknowledge its fiduciary status with respect to the recommendation. However, when a statutory employee recommends transactions with an unrelated and unaffiliated insurance company, the statutory employee can rely on PTE 84-24 and make the fiduciary acknowledgment as an

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individual who is engaged in the general insurance business under a contract or contracts of service which do not contemplate that the individual's principal business activity will be the solicitation of life insurance or annuity contracts, or both, for one company, or any individual who devotes only part time to the solicitation of life insurance contracts, including annuity contracts, and is principally engaged in other endeavors, is not a full-time life insurance salesman.



Independent Producer. Consistent with the conditions of PTE 84-24, those transactions would be subject to the supervision of the unrelated insurance company. To the extent that statutory employers or other insurance companies believe that neither PTE 2020-02 nor PTE 84-24 is appropriate for their particular circumstances, they can also apply to the Department for an individual or class exemption, which may be subject to different or additional protective conditions.

### **Insurers**

The term “Insurer” as defined in Section X(f) is similar to the term “Financial Institution” defined in PTE 2020-02, except it would be limited to insurance companies. Even though amended PTE 84-24 does not require Insurers to be fiduciaries, an Independent Producer cannot rely on the exemption unless it is subject to oversight by an Insurer that satisfies the conditions set out in this Final Amendment. As under the NAIC Model Regulation and discussed in the policies and procedures section below, the Independent Producer must be subject to oversight by the Insurer whose products it recommends to the Retirement Investor, if the Independent Producer wants to rely on the exemption. As stated in Section VI(b), the Insurer will not necessarily become a fiduciary under ERISA or the Code merely by complying with this exemption’s conditions. However, the Department cautions that Insurers selling insurance and annuity products through Independent Producers could become investment advice fiduciaries under ERISA and/or the Code through other actions they take. If the Insurers are fiduciaries, they could not rely on amended PTE 84-24 and would need to rely on a different prohibited transaction exemption, such as PTE 2020-02, for relief from ERISA section

406(b) and Code section 4975. The investment advice provisions of PTE 84-24 are solely available to the Independent Producer.

To facilitate compliance with the amended exemption, Independent Producers and Insurers may rely on factual representations from each other, as long as they are reasonable in doing so. For example, an Independent Producer may generally rely on an Insurer's written report generated as part of its retrospective review required by Section VII(d), unless the Independent Producer knows (or should know) that the report is inaccurate or incomplete.

Although the Department is creating a pathway for compliance for Independent Producers that permits insurance companies to oversee the conduct of Independent Producers under this Final Amendment without assuming fiduciary status, the Department remains concerned that without fiduciary status, insurance companies may not take the same measures to ensure that recommendations are sound and untainted by the Insurer's conflicts of interest. Accordingly, the Final Amendment does not provide prohibited transaction relief for the Insurer. If the Insurer itself is an investment advice fiduciary, it would instead have to rely on PTE 2020-02. In such a situation, the Independent Producer would still be able to receive compensation in connection with fiduciary investment advice related to the products of other Insurers, as long as those other Insurers complied with all conditions of amended PTE 84-24.

### **Exclusions**

The advice provisions of PTE 84-24 have exclusions that are similar to those in PTE 2020-02. Under Section VI(c)(1), relief under PTE 84-24 is not available if the Plan is covered by Title I of ERISA and the Independent Producer, Insurer, or any Affiliate is

(A) the employer of employees covered by the Plan, or (B) the Plan's named fiduciary or administrator. For example, an Independent Producer that sponsors a plan for its employees and provides investment advice to the Plan can only receive direct expenses and not reasonable compensation for the advice. However, there is an exception from this restriction in Section VI(c)(1)(B) that applies when the Plan's named fiduciary or administrator is selected by an independent fiduciary to provide investment advice to the Plan. Unlike PTE 2020-02, there is no specific exclusion for pooled employer plans in PTE 84-24, because the Department does not expect that pooled employer plans will need to rely on the limited relief provided in this exemption.

Section VI(c)(2) excludes from Section III(g) transactions when the Independent Producer is serving in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (and the regulations issued thereunder).

#### **Impartial Conduct Standards of Amended PTE 84-24**

Similar to the final amendment to PTE 2020-02, amended PTE 84-24 requires Independent Producers to comply with the Impartial Conduct Standards, which include the Care Obligation, Loyalty Obligation, and obligations to receive no more than reasonable compensation and not make misleading statements to Retirement Investors. These standards form the core protections of both exemptions that are available to investment advice fiduciaries.

#### **Care Obligation and Loyalty Obligation**

The Department is adopting the substance of the Proposed Amendment's Best Interest standard. However, as in PTE 2020-02, the Department is replacing the term

“Best Interest” with its two separate components: the Care Obligation and the Loyalty Obligation. Under the amended provision, investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. The Final Amendment specifically refers to each obligation separately, although they are unchanged in substance. Both the Care Obligation and the Loyalty Obligation must be satisfied when investment advice is provided. As defined in Section X(b), to meet the Care Obligation, an 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 X(g), to meet the Loyalty Obligation, the Independent Producer must not place the financial or other interests of the Independent Producer, Insurer, or any Affiliate, Related Entity, or another party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor’s interests to those of the Independent Producer, Insurer, or any Affiliate, Related Entity, or another party. For example, in choosing between annuity products offered by Insurers whose products the Independent Producer is authorized to sell, the Independent Producer may not recommend a product that is worse for the Retirement Investor but better or more profitable for the Independent Producer or Insurer.

As discussed in the preamble to the final amendment to PTE 2020-02, the Department is changing the way it refers to these two obligations in response to comments that the phrase “best interest” was used in many contexts throughout this rulemaking and by various regulators with possibly different shades of meaning. For

example, in paragraph (c)(1)(i) of the Regulation, fiduciary status is based, in part, on whether a recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation “may be relied upon by the retirement investor as intended to advance the retirement investor’s best interest.” In the context of the Regulation, however, “best interest” is not meant to refer back to the elements of the precise regulatory or statutory definitions of prudence or loyalty, but rather to refer more colloquially to circumstances in which a reasonable investor would believe the advice provider is looking out for them and working to promote their interests.

Several commenters stated that the Department does not have the authority to include the Impartial Conduct Standards in either PTE 84-24 or PTE 2020-02 because doing so would improperly expand Title I fiduciary standards to entities solely covered by Title II. The Department disagrees with these commenters. As previously stated in this grant notice as well as the grant notice for PTE 2020-02 published elsewhere in today’s issue of the *Federal Register*, Congress expressly permits the Department to issue exemptions to prohibited transactions as per ERISA Section 408(a) and, pursuant to the Reorganization Plan No. 4 of 1978, Code section 4975(c)(2).<sup>16</sup> For a more detailed description of the comments received regarding the Department’s authority to include the Impartial Conduct Standards in these prohibited transaction exemptions, please see the grant notice for PTE 2020-02 published elsewhere in today’s issue of the *Federal Register*.

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<sup>16</sup> Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984, Sec. 1, Pub. L. 98-532, 98 Stat. 2705 (Oct. 19, 1984), Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975. 5 U.S.C. App. (2018).

In addition to the general comments discussed in the preamble to the final amendment to PTE 2020-02, some commenters questioned the specific ability of Independent Producers to meet the proposed standards, and thus argued that the amendments to PTE 84-24 failed to meet the requirements laid out in ERISA section 408(a) and Code section 4975(c)(2). Many of these same commenters stated that the NAIC standard was sufficiently protective and should be relied upon rather than the standards in PTE 84-24. Some commenters also raised objections to the Department imposing these standards on IRAs. Other commenters expressed support for the proposed standards, and one commenter argued that the Department's Proposed Amendment was necessary because the NAIC Model Regulation imposes a "best interest" standard in name only.

The Department has considered these comments and determined that it is essential for Independent Producers to comply with the Care Obligation and Loyalty Obligation. The Department notes that these obligations are similar to the standard imposed by New York State in a rule issued by the New York Department of Financial Services entitled "Suitability and Best Interest in Life Insurance and Annuity Transactions" (referred to as Rule 187). Section 242.4(b) of Rule 187 provides that "[t]he producer, or insurer where no producer is involved, acts in the best interest of the consumer when: (1) the producer's or insurer's recommendation to the consumer is based on an evaluation of the relevant suitability information of the consumer and reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing. Only the interests of the consumer shall be considered in making the recommendation." Although Rule 187 has not been in

force for a long time, the Department has not found any evidence suggesting that insurance producers, including Independent Producers, cannot comply with this standard. Nor is the Department aware of any evidence suggesting that this standard has inappropriately limited or restricted access to advice or insurance products in New York.

The Department is confident that Independent Producers can comply with the Section VII(a) of amended PTE 84-24 and rejects any suggestion that Independent Producers cannot compete under the same framework of Impartial Conduct Standards that apply to other investment professionals and financial institutions under PTE 2020-02, including commission-based broker-dealers. Certainly, the Department believes that insurance products and annuities are often sound and valuable investments for Retirement Investors. There is nothing intrinsic to annuities or inherent in the Independent Producer distribution channel that suggests that Independent Producers cannot recommend annuities consistent with the Care Obligation and Loyalty Obligation, or that they cannot comply with the obligation to avoid overcharging or misleading Retirement Investors. To the contrary, Retirement Investors are best served by having recommendations governed by a common standard, applicable to all fiduciary investment advisers irrespective of investment product, that is focused on adherence to these basic obligations. By ensuring that fiduciary investment advice providers compete on a level playing field subject to a uniform standard, the Regulation and exemptions ensure that Retirement Investors' legitimate expectations of trust and confidence are honored, irrespective of the particular type of product recommended. Fiduciary recommendations to Retirement Investors should be uniformly driven by the investors' interests, rather than differences in

regulatory stringency that give one class of investment professionals the unique ability to depart from basic standards of care and loyalty. Reasonable Compensation

The Department is revising the reasonable compensation standard in Section VII(a)(2). The Proposed Amendment would have limited the compensation that an Independent Producer could receive to an “Insurance Sales Commission,” defined to mean a sales commission paid by the Insurance Company or an Affiliate to the Independent Producer for the service of recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees, but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees.

The Department received several comments supporting this proposed limitation. One commenter noted the “particularly acute conflicts of interest” associated with sales of non-security annuities and supported not only limiting the compensation that could be paid, but also supported enhanced disclosure so that the Retirement Investors can understand the amount of money that the Independent Producer will make on the transaction. Another commenter similarly supported the Department’s tailored approach that addresses the unique circumstances and challenges presented by these “lightly regulated salespeople” when they provide investment recommendations to Retirement Investors. The same commenter noted that limiting PTE 84-24 in this way would also further ensure a level playing field because any producer receiving other types of compensation would rely on PTE 2020-02. Yet another commenter criticized the NAIC Model Regulation’s approach because it does not require insurers and producers to



mitigate their compensation-related conflicts of interest that often lead to consumers buying annuities that are not suitable for them.

Many insurance industry commenters described this definition as overly narrow, noting that State insurance law does not limit compensation to commissions. Some commenters pointed to the NAIC Model Regulation, which specifically permits assistance with marketing, office support, retirement benefits, or other reasonable compensation, and other non-cash compensation. One commenter described the impact of the proposed limitation as contrary to the NAIC's work to develop a best interest standard, suggesting that it would reduce the investor choice that the NAIC had intended to preserve.

Many commenters also objected to the limited compensation covered when compared to the broad relief provided in PTE 2020-02. These commenters asserted that it would be arbitrary for the Department to prohibit Independent Producers from receiving legal and disclosed compensation that would be permissible for a financial institution or investment professional to receive under PTE 2020-02. One specifically stated that this limitation was contrary to the Department's stated intent of creating a level playing field, arguing that with similar conditions in both exemptions, there was no valid reason for the Department to prohibit legal and disclosed compensation when received by independent insurance professionals, but not when it is received by other types of financial professionals.

Some commenters argued that the limited definition was inconsistent with the Department's statement in footnote 10 of the Proposed Amendment's preamble that third party intermediary marketing organizations (IMOs) could compensate Independent

Producers, presumably with compensation other than insurance commissions, as narrowly defined. In response to this comment, the Department confirms that all compensation under PTE 84-24 may be paid directly to IMOs or field market organizations (FMOs) which then compensate the individual Independent Producer who has provided investment advice. The Department also notes that ERISA section 408(b)(2) and Code section 4975(d)(2) are available for intermediaries providing non-fiduciary services.

Another commenter stated that the proposed limitations on the types of compensation available for exemptive relief under PTE 84-24 would be so disruptive that it would call the continued availability of fixed annuity product distribution channels into question. This commenter stated that the compensation limits imposed by the Proposed Amendment would deprive investors of access to fixed annuities as a source of protection against the risks associated with market volatility and outliving one's assets. The commenter went on to state that, while the preamble language to the Proposed Amendment acknowledges the presence and vital role served by IMOs and FMOs in the training and support of Independent Producers, the Proposed Amendment would have provided no relief for any compensation received in connection with the sale of a recommended product other than so-called "simple" insurance commissions, directly paid by or on behalf of the insurance company.

According to this same commenter, IMOs and FMOs support Independent Producer success and productivity through a variety of cash and non-cash compensation structures, including revenue sharing and marketing allowances. This same commenter stated that non-cash compensation frequently includes the provision of value-added

support including website construction and maintenance, sales leads, various forms of commercial advertising and computer software. According to this commenter, eligibility to receive such compensation is calibrated—at least to some extent—on Independent Producer productivity and on that basis is likely to be deemed by the Department under its new fiduciary definition as compensation received by an Independent Producer in connection with covered recommendations, necessitating prohibited transaction exemptive relief, but no such relief would be available under PTE 84-24 as it was proposed to be amended.

After consideration of the public comments on limiting covered compensation to Insurance Sales Commissions, the Department has removed the proposed limitation to Insurance Sales Commissions and expanded the scope of the exemption to cover compensation as broadly as PTE 2020-02, including cash and non-cash compensation. In the Department's view, the Impartial Conduct Standards and other conditions of the exemption should adequately safeguard Retirement Investors from abuse, irrespective of the specific type of compensation. At the same time, the Department emphasizes that all compensation the Independent Producer receives in connection with a transaction pursuant to PTE 84-24 must be reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2), and consistent with stringent policies and procedures designed to ensure Insurance Producers make recommendations to Retirement Investors that are consistent with the exemption's Care Obligation and Loyalty Obligation.

### **No Materially Misleading Statements**

Section VII(a)(3) provides the same prohibition on misleading statements that is part of PTE 2020-02. The Department is also clarifying that the prohibition against misleading statements applies to both written and oral statements. This provision requires that an Independent Producer's statements to the Retirement Investor (whether written or oral) about the recommended transaction and other relevant matters must not be materially misleading at the time the statements are made. For purposes of this condition, the term "materially misleading" includes the omission of information that is needed to prevent the statement from being misleading to the Retirement Investors under the circumstances.

To the extent the Independent Producer provides materials, including marketing materials that are prepared and provided by the Insurer, this condition also would require such materials not to be materially misleading to the Independent Producer's knowledge.

### **Disclosure**

The Department is generally finalizing the disclosure conditions with some modifications to the Proposed Amendment that are discussed below. As discussed in the preamble to the final amendment to PTE 2020-02, while many commenters raised concerns about the burden imposed on financial institutions if the Department required additional disclosure, others expressed support for the Department imposing additional disclosure obligations. It is important that Retirement Investors have a clear understanding of the compensation, services, and conflicts of interest associated with recommendations so that they have sufficient information to make fully informed investment decisions. Additionally, clear and accurate disclosures can deter fiduciary investment advice providers from engaging in otherwise abusive practices that they

would prefer not to expose to the light of day. Likewise, requiring a clear disclosure of otherwise hidden fees and conflicts involved in the sale of insurance products may serve to dissuade certain Insurers and Independent Producers from engaging in abusive sales practices, resulting in lower overall costs to consumers.<sup>17</sup>

In the preamble to the Proposed Amendment, the Department requested comments regarding whether Insurers or Independent Producers should be required to provide additional disclosures on third-party compensation to Retirement Investors on a publicly available website. One potential benefit of such disclosure would be to provide information about conflicts of interest that could be used, not only by Retirement Investors, but by consultants and intermediaries who could, in turn, use the information to rate and evaluate various advice providers in ways that would assist Retirement Investors. Industry commenters generally opposed the condition, stating that it would impose significant costs to continuously maintain such a website without a commensurate benefit to the Retirement Investors.

After review of these comments, the Department has determined not to include a website disclosure requirement as an exemption condition at this time. While the Department may reconsider this decision at some future date based on its experience with the Regulation and related exemptions, any such future amendments would be subject to public notice and comment through a rulemaking process. Consistent with the Recordkeeping conditions in Section IX, the Department intends, however, to regularly request that Independent Producers provide their investor disclosures to the Department

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<sup>17</sup> See, e.g., Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market*, 99(1) *The Review of Economics and Statistics* 1-15, (2015), [https://doi.org/10.1162/REST\\_a\\_00625](https://doi.org/10.1162/REST_a_00625).

to ensure that they are providing sufficient information in a manner that the Retirement Investor can understand, and that the disclosures are serving their intended purpose.

### **Fiduciary Acknowledgment**

The disclosures in PTE 84-24 are similar to those in PTE 2020-02. This ensures that all Retirement Investors receiving fiduciary investment advice have the same information before engaging in a transaction, irrespective of product type. PTE 84-24 requires Independent Producers to provide certain disclosures at or before the time an investment advice transaction occurs. Section VII(b)(1) requires a fiduciary acknowledgement, but unlike PTE 2020-02, only the Independent Producer (and not the Insurer) must acknowledge in writing that it is a fiduciary providing investment advice to the Retirement Investor under Title I or II of ERISA or both.<sup>18</sup> Section VII(b)(2) requires the Independent Producer to provide the Retirement Investor with a written statement of the Care Obligation and Loyalty Obligation that the Independent Producer owes to the Retirement Investor. For purposes of the disclosures required by Section II(b)(1)-(4), the Independent Producer is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Independent Producer becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.

The fiduciary acknowledgment requirement is intended to make it unambiguously clear that the Independent Producer is making a recommendation to the Retirement Investor in a fiduciary capacity under ERISA or the Code. It would not be sufficient, for example, to have an acknowledgement say that “I acknowledge fiduciary status under

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<sup>18</sup> The Department cautions that an Insurer cannot insulate itself from fiduciary status merely by not making this acknowledgment. As noted above, an Insurer may become a fiduciary based on its actions.

ERISA with respect to the recommendation to the extent the recommendation is treated by ERISA or Department of Labor regulations as a fiduciary recommendation,” because that statement does not inform the investor whether the Independent Producer is making the recommendation as a fiduciary. The point of the acknowledgment is to ensure that both the fiduciary and the Retirement Investor are clear that the particular recommendation is in fact made in a fiduciary capacity under ERISA or the Code, so that there is no doubt as to the nature of the relationship or the associated compliance obligations. Anything short of definitive fiduciary acknowledgment would fail the exemption condition. It is not enough to alert the Retirement Investor to the fact that there may or may not be fiduciary obligations in connection with a particular recommendation, without stating that, in fact, the Independent Producer is making the recommendation in the requisite fiduciary capacity.

As described in the preamble to PTE 2020-02, many commenters argued that the fiduciary acknowledgment requirement imposes contractual or warranty requirement on Independent Producers. Several other commenters noted, however, that neither PTE 84-24 nor PTE 2020-02 impose any contract or warranty requirements on fiduciary investment advice providers. Instead, the requirement simply ensures up-front clarity about the nature of the relationship and services being provided. The Department agrees with these commenters that this up-front clarity is important and does not impose any contract or warranty requirement. The fiduciary acknowledgment condition stands in marked contrast to the Department’s 2016 rulemaking on fiduciary advice; the Department has imposed no obligation on fiduciary advice providers to enter into enforceable contracts with or to provide enforceable warranties to their customers. The

only remedies for violations of the exemption's conditions, and engaging in a non-exempt prohibited transaction, are those provided by Title I of ERISA, which specifically provides a cause of action for fiduciary violations with respect to ERISA-covered Plans, and Title II of ERISA, which provides for imposition of the excise tax. Nothing in the exemption compels Independent Producers to make contractually enforceable commitments, and as far as the exemption provides, they could expressly disclaim any enforcement rights other than those specifically provided by Title I of ERISA or the Code, without violating any of the exemption's conditions.

For that reason, arguments that the fiduciary acknowledgment requirement is inconsistent with the Fifth Circuit's opinion in *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360, 384-85 (5th Cir. 2018) (*Chamber*) are unsupported. In that case, the Fifth Circuit faulted the Department for having effectively created a private cause of action that Congress had not provided for violations of the exemptions' terms. Under this Final Amendment, the Department does not create new causes of actions, mandate enforceable contractual commitments, or expand upon the remedial provisions of ERISA or the Code. Requiring clarity as to the nature of the services and relationship between Independent Producers and Retirement Investors is a far cry from the creation of a whole new cause of action or remedial scheme.

Rather than compel fiduciary status or create new causes of action, the Department merely conditions the availability of the exemption, which is only necessary for plan fiduciaries to receive otherwise prohibited compensation, on clarity that the transaction involves a fiduciary relationship. In addition, the Department does not purport to bind State or other Federal regulators in any way or to condition relief on the



availability of remedies under other laws. It no more creates a new cause of action than any other exemption condition or regulatory requirement that requires full and fair disclosures of services and fees. Moreover, the requirement promotes and supports Retirement Investor choice by requiring clarity as to the precise nature of the relationship that the firm or advice professional is undertaking.

The Department additionally notes that conditions requiring entities to acknowledge their fiduciary status have become commonplace in recent exemptions the Department has granted over the past two years. For example, in 2022 and 2023, the Department granted over a dozen exemptions to private parties in which an entity was required to acknowledge its fiduciary status in writing as a requirement for exemptive relief.<sup>19</sup> Written acknowledgement of fiduciary status was first required by the Department as early as 1984, when the Department published PTE 84-14, requiring an entity acting as a “qualified professional asset manager” (a QPAM) to have “acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.”<sup>20</sup>

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<sup>19</sup> See, e.g., PTE 2023-03, Blue Cross and Blue Shield Association Located in Chicago, Illinois (88 FR 11676, Feb. 23, 2023); PTE 2023-04, Blue Cross and Blue Shield of Arizona, Inc., Located in Phoenix, Arizona (88 FR 11679, Feb. 23, 2023); PTE 2023-05, Blue Cross and Blue Shield of Vermont Located in Berlin, Vermont (88 FR 11681, Feb. 23, 2023); PTE 2023-06, Hawaii Medical Service Association Located in Honolulu, Hawaii (FR 88 11684, Feb. 23, 2023); PTE 2023-07, BCS Financial Corporation Located in Oakbrook Terrace, Illinois (88 FR 11686, Feb. 23, 2023); PTE 2023-08, Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company Located in Flowood, Mississippi (88 FR 11689, Feb. 23, 2023); PTE 2023-09, Blue Cross and Blue Shield of Nebraska, Inc. Located in Omaha, Nebraska (88 FR 11691, Feb. 23, 2023); PTE 2023-10, BlueCross BlueShield of Tennessee, Inc. Located in Chattanooga, Tennessee (88 FR 11694, Feb. 23, 2023); PTE 2023-11, Midlands Management Corporation 401(k) Plan Oklahoma City, OK (88 FR 11696, Feb. 23, 2023); PTE 2023-16, Unit Corporation Employees’ Thrift Plan, Located in Tulsa, Oklahoma (88 FR 45928, July 18, 2023); PTE 2022-02, Phillips 66 Company Located in Houston, TX (87 FR 23245, Apr. 19, 2022); PTE 2022-03, Comcast Corporation Located in Philadelphia, PA (87 FR 54264, Sept. 2, 2022); PTE 2022-04, Children’s Hospital of Philadelphia Pension Plan for Union-Represented Employees Located in Philadelphia, PA. (87 FR 71358, Nov. 22, 2022).

<sup>20</sup> PTE 84-14, Part V, Section (a), (49 FR 9494, March 13, 1984).

One commenter additionally opined that the fiduciary acknowledgement condition constitutes “compelled” and “viewpoint-based” speech in violation of the First Amendment and warrants application of a ‘strict scrutiny’ standard of review. As discussed in greater detail in the preamble to the Regulation published elsewhere in today’s *Federal Register*, neither the Regulation nor the final PTE amendments prohibit speech based on content or viewpoint in any capacity. Instead, the Regulation and PTEs simply impose fiduciary duties on covered parties, and insist on adherence to Impartial Conduct Standards.

### **Model Disclosure**

To assist Independent Producers in complying with these conditions of the exemption, the Department confirms that the following model language will satisfy Section VII(b)(1) and (2).

We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money or otherwise are compensated creates some conflicts with your financial interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.

Under this special rule’s provisions, we must:

- Meet a professional standard of care when making investment recommendations (give prudent advice) to you;

- Never put our financial interests ahead of yours when making recommendations (give loyal advice);
- Avoid misleading statements to you about conflicts of interest, fees, and investments;
- Follow policies and procedures designed to ensure that we give advice that is in your best interest;
- Charge you no more than what is reasonable for our services; and
- Give you basic information about our conflicts of interest.

This model language generally applies to the Independent Producer’s recommendations, however, the Independent Producer could also tailor the acknowledgment to limit it to an individual recommendation or subset of recommendations for which the Independent Producer is seeking prohibited transaction relief. However, Independent Producers can only rely on this exemption with respect to particular recommendations to the extent they have acknowledged their fiduciary status to Retirement Investors with respect to those recommendations.

While some commenters requested additional model language, the Department is not providing model language for the specific material facts relating to the scope and terms of the relationship, conflict of interest, and basis for determination to recommend the annuity disclosures in Section VII(b)(3), (4), and (5), because those disclosures will need to be tailored to the specific business model.

### **Relationship and Conflict of Interest Disclosure**

Under Section VII(b)(3), the Independent Producer must disclose in writing all material facts relating to the scope and terms of the relationship with the Retirement

Investor. This includes the material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts. The Independent Producer must also disclose the type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to the Retirement Investor. This description must include the products the Independent Producer is licensed and authorized to sell, inform the Retirement Investor in writing of any limits on the range of insurance products recommended, and identify the specific Insurers and specific insurance products available to the Independent Producer for recommendation to the Retirement Investor. Further, under Section VII(b)(4), the Independent Producer must also disclose all material facts relating to Conflicts of Interest that are associated with the recommendation.

One difference from PTE 2020-02 is that Independent Producers must also provide a notice describing the Retirement Investor's right to request additional information regarding cash compensation. If the Retirement Investor makes that request, the Independent Producer must give the investor 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 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. Although this is an additional obligation in PTE 84-24 that is not in PTE 2020-02, the Department notes this disclosure requirement closely parallels the obligations of an Independent

Producer under Section 6.A.2.a.v and 6.A.2.b of the NAIC Model Regulation<sup>21</sup> and is similar to, but more limited than, the standard imposed by New York State in Section 30.3 of a rule issued by the New York Department of Financial Services entitled “Producer Compensation Transparency” (referred to as Rule 194).<sup>22</sup>

The Department thinks that this additional transparency is especially important in the context of PTE 84-24 because, in contrast to PTE 2020-02, the Insurer has not assumed fiduciary responsibility with respect to the recommendation or its compensation and incentive practices, and because of the importance of these financial incentives in driving investment recommendations. As noted above, it is important that Retirement Investors have a clear understanding of the compensation, services, and conflicts of interest associated with recommendations so that they have sufficient information to make fully informed investment decisions. Additionally, clear and accurate disclosures can deter Independent Producers and Insurers from engaging in otherwise abusive practices that they would prefer not to expose to the light of day. Likewise, requiring a clear disclosure of otherwise hidden fees and conflicts involved in the sale of insurance

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<sup>21</sup> NAIC Model Regulation Section 6.A.2.a.v. provides that “[p]rior to the recommendation or sale of an annuity, the producer shall prominently disclose to the consumer. . . (v) A notice of the consumer’s right to request additional information regarding cash compensation described in Subparagraph (b) of this paragraph.” Section 6.A.2.b states that “[u]pon request of the consumer or the consumer’s designated representative, the producer shall disclose: (i) A reasonable estimate of the amount of cash compensation to be received by the producer, which may be stated as a range of amounts or percentages; and (ii) Whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages.”

<sup>22</sup> Section 30.3(a)(4) of Rule 194 provides that “an insurance producer selling an insurance contract shall disclose the following information to the purchaser: . . . (4) that the purchaser may obtain information about the compensation expected to be received by the producer based in whole or in part on the sale, and the compensation expected to be received based in whole or in part on any alternative quotes presented by the producer, by requesting such information from the producer.” If such a request is made, Section 30.3(b) requires the producer to provide the following information: “(1) a description of the nature, amount, and source of any compensation to be received . . . ; (2) a description of any alternative quotes presented by the producer . . . ; (3) a description of any material ownership interest the insurance producer . . . has in the insurer . . . ; (4) a description of any material ownership interest the insurer . . . has in the insurance producer . . . ; and (5) a statement whether the insurance producer is prohibited by law from altering the amount of compensation received from the insurer based in whole or in part on the sale.”

products may serve to dissuade Insurers and Independent Producers from making imprudent recommendations that are driven by outsized financial incentives, rather than the Retirement Investor's best interests, resulting in lower overall costs to consumers.<sup>23</sup>

### **Best Interest Documentation and Rollover Disclosure**

Section VII(b)(5) additionally requires Independent Producers to consider and document their basis for the determination to recommend an annuity product to the Retirement Investor before the recommended annuity is sold. The Independent Producer must also provide this documentation to both the Retirement Investor and to the Insurer. The Department notes that the NAIC Model Regulation also requires producers to make a written record of any recommendation and document the basis for the recommendation.<sup>24</sup>

Consistent with the changes the Department is making to PTE 2020-02, Section VII(b)(6) of the Final Amendment requires that, before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I of ERISA the Independent Producer must consider and document the bases for its recommendation that the Retirement Investor engage in the rollover transaction and must provide that documentation to both the Retirement Investor and the Insurer. Relevant factors the Independent Producer must consider include, to the extent applicable but not limited to (A) the alternatives to a rollover, including leaving the money in the Plan, if applicable; (B) the fees and expenses associated with the Plan and the recommended investment; (C)

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<sup>23</sup> See, e.g., Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market*, 99(1) *The Review of Economics and Statistics* 1-15, (2015), [https://doi.org/10.1162/REST\\_a\\_00625](https://doi.org/10.1162/REST_a_00625).

<sup>24</sup> Section 6.A.4

whether an employer or other party pays for some or all of the Plan's administrative expenses under the Plan; and (D) the different levels of fiduciary protection, services, and investments available.

The Department received many comments on this condition. As discussed in the preamble to the final amendment to PTE 2020-02, the Department received support for the rollover disclosure provision. For example, one commenter highlighted the significance of a rollover decision and said that a "careful analysis" is needed, along with information about fees, expenses, and other investment options, in order to provide Retirement Investors with a "well-supported" recommendation. Some commenters supporting the condition noted the conflicts of interest inherent with respect to many annuity sales and that annuity transactions can be extremely difficult and costly to reverse. The written documentation requirement ensures that Independent Producers undertake a careful analysis and document their reasoning for recommending these transactions, which will help ensure that their recommendations are well-supported and comply with the Impartial Conduct Standards.

Other commenters expressed concern with the required rollover disclosure. For example, one commenter stated that it is unclear how an Independent Producer could compare fees and expenses of employer plans without an annuity option with a recommended annuity. According to this commenter, comparing annuities to other investment options are "an apples-to-oranges comparison that would likely confuse a participant more than help." Another commenter characterized the condition as potentially requiring Independent Producers to violate the law, because as described by the commenter Federal securities laws prohibit individuals from recommending or

providing detailed information or advice about securities unless they have a securities license. Thus, according to the commenter, Independent Producers who do not have a securities license (as most do not) would be forced to either break the law to comply with this condition or undertake the expense and burden of obtaining the appropriate securities licenses.

The Department disagrees with this characterization of the exemption condition. While 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. Nothing in the exemption requires or suggests that Independent Producers are obligated to make advice recommendations as to investment products they are not qualified or legally permitted to recommend. The Department notes that nothing in the exemption or the Impartial Conduct Standards prohibits investment advice by “insurance-only” agents or requires such insurance specialists to render advice with respect to other categories of assets outside their specialty or expertise. There may be circumstances when the best advice an Independent Producer can give an investor is to bring in or work with another Investment Professional who can make a recommendation that is consistent with the Impartial Conduct Standards. A rollover recommendation should not be based solely on the Retirement Investor’s existing investment allocation without any consideration of other investment options in the Retirement Investor’s Title I Plan. The Independent Producer must carefully consider the options available to the investor, including options other than the Retirement Investor’s existing Plan investments, before recommending that the participant roll assets out of the Title I Plan. Similarly, if an Independent Producer limits its recommendations to annuities or to a



limited menu of annuities provided by specific insurers, it could not justify a recommendation that was imprudent on the basis that it was the most appropriate alternative from the Independent Producer's range of available investment alternatives. If none of the available annuity options could be recommended, without violating the Independent Producer's Care Obligation or Loyalty Obligation, it would need to refrain from recommending any of the offerings, even though it would mean turning away business.

Other commenters expressed concern about the level of detail required and suggested that when enforcing this condition, the Department should take into account that fact that many Independent Producers are small businesses with minimal resources. Another commenter suggested that the Department should rely instead on language from the NAIC Model Regulation or the SEC's Regulation Best Interest.

While the Department acknowledges these comments, it has determined to retain the rollover disclosure in amended PTE 84-24. As identified by some commenters, this disclosure provides important protections and information to Retirement Investors. This condition, which also matches Section II(b)(5) of the final amendment to PTE 2020-02, reflects the clear importance of sound advice with respect to rollovers. Recommendations to roll assets out of an ERISA-covered Plan often involve a Retirement Investor's lifetime savings and are critical to the investor's retirement security. For many Retirement Investors, the recommendation to roll their savings out of the Plan and invest those savings in an annuity expected to provide income for the rest of their life is the single most important recommendation they will ever receive.

The importance of the rollover documentation and disclosure requirement is proportional to the importance of the advice, and rightly focuses the Independent Producer's attention on reasonable alternatives to the rollover and annuity purchase, comparative fees and expenses, and different levels of fiduciary protections, services, and investments available before and after the roll-over. Documenting the bases for the recommendations also enables the Insurer to verify compliance with its policies and procedures, and ensure they are adequate.

As discussed in the preamble to amended PTE 2020-02, the Department is making a significant change to the disclosure provisions in the final amendments to both PTE 2020-02 and PTE 84-24 in response to comments. The Proposed Amendment specified that the rollover documentation and disclosure requirement would have extended to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (e.g., from a commission-based account to a fee-based account). In response to comments, the Department is narrowing the required rollover disclosure in the Final Amendment so that it only applies to rollovers from Title I Plans. Under amended PTE 84-24, Independent Producers are not required to document and disclose recommendations to roll assets over from one Title I Plan to another Title I Plan, from one IRA to another IRA or to change account types. Of course, these types of transactions may require Independent Producers' special attention, and as discussed further below, Insurers may wish to specify in their policies and procedures how they will manage these types of transactions.

### **Good Faith and Exception for Disclosures Prohibited by Law**

The Department is adding clarifications in Section VII(b)(7) of the Final Amendment that an Independent Producer will not fail to satisfy the disclosure conditions in Section VII(b) solely because they make an error or omission in disclosing the required information while acting in good faith and with reasonable diligence, provided that the Independent Producer discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. Similarly, Section VII(b)(8) allows Independent Producers to rely in good faith on information and assurances from each other and from other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate. Additionally, under Section VII(b)(9), the Independent Producer is not required to disclose information pursuant to Section VII(b) if such disclosure is otherwise prohibited by law. These provisions are consistent with PTE 2020-02. The Department did not receive substantive comments on these provisions and is finalizing them as proposed.

### **Policies and Procedures**

While Independent Producers are free to recommend a variety of Insurers' products, they do not operate outside the control and influence of the Insurers whose products they recommend. To the contrary, these Insurers set the Independent Producers' compensation and incentives, provide training, oversee compliance with State law obligations and the Insurer's policies and procedures, and substantially determine how and whether an Independent Producer will be able to recommend the Insurers' products. Because of their authority over the sale of their products and over the conduct of

Independent Producers, the Insurer's actions and the financial incentives they create can promote or undermine participant interests.

Despite the central and obvious importance of the Insurers themselves to the Independent Producer distribution channel, the Department has decided not to condition relief under this exemption on Insurers' acknowledgment of fiduciary status with respect to Independent Producers' recommendations. This decision takes into account many Insurers' strong concerns about being held accountable as fiduciaries for the actions of Independent Producers who are not subject to their control in the same way that, for example, common law employees are subject to their employer's control. However, the Department's ability to structure the exemption to cover Independent Producers and protect the interests of Retirement Investors importantly depends on the Independent Producers' ability to make recommendations that are subject to careful compliance-oriented institutional oversight by Insurers that is focused on Retirement Investors' best interests, and on the mitigation and avoidance of conflicts of interest.

It is critically important to the success of this exemption that the Insurers, whose products Independent Producers recommend as fiduciaries, pay careful attention to any conflicts associated with Independent Producers' recommendations of their products, appropriately manage those conflicts of interest, and adopt and implement appropriate supervisory oversight mechanisms, as set forth below. Without these protections, the Department would be unable to conclude that this exemption is sufficiently protective of Retirement Investors and their interests and would have to consider imposing more stringent protective conditions or simply require Independent Producers and Insurers to

rely on PTE 2020-02, which is broadly available to them even in the absence of this exemption.<sup>25</sup>

Accordingly, Section VII(c)(1) conditions relief on the actions of the Insurer to establish, maintain, and enforce written policies and procedures for the review of each recommendation made by an Independent Producer before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation. The policies and procedures must be prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The Insurer must prudently review the Independent Producer's recommendations of its products, and this review must be made without regard to the Insurer's own interests.

Section VII(c)(2) further conditions relief on a requirement that the Insurer's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate or Related Entity, ahead of the Retirement Investor's interest. In this regard, the Insurer must 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 are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation to the Retirement Investor.

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<sup>25</sup> While this exemption does not require Insurers to acknowledge fiduciary status, Insurers can, by their own conduct, effectively make recommendations and assume fiduciary responsibility for those recommendations. When they do so, they should rely upon PTE 2020-02 for relief, inasmuch as this exemption provides relief only to the Independent Producers. The Department believes that the relief provided by this exemption is appropriately tailored to the Independent Producer distribution channel, but it will monitor performance under the exemption closely to ensure that it meets its protective purposes.

As further explained below, this condition applies an objective standard focused on whether a reasonable person would conclude that the Insurer's actions or incentives were likely to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. Insurers and Independent Producers must avoid and mitigate conflicts of interest to the extent possible and rely on oversight structures that prevent those conflicts of interest from driving investment recommendations, rather than the financial interests of Retirement Investors.

Under Section VII(c)(3), the Insurer's policies and procedures must also include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors. Specifically, the Insurer must have a prudent process for identifying Independent Producers who have failed to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill to provide investment advice to Retirement Investors. A prudent process includes careful review of objective material, such as customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards and must review that determination at least annually as part of the retrospective review set forth in subsection (d) below.

### **Discussion of Comments**

The Department has made minor edits to the Policies and Procedures requirement in Section II(c) in response to commenters. To ensure Retirement Investors receive the

same protections, whether they receive advice under PTE 2020-02 or PTE 84-24, the Department has made the policies and procedures conditions substantively identical, with a few specific obligations tailored to the insurance industry.

### **Obligation on Insurers**

Many commenters expressed concern that the Policies and Procedures requirement would be too difficult to meet for Insurers, who are not fiduciaries under the exemption. Some commenters argued the Policies and Procedures requirement was in conflict with State law. One commenter contrasted the Department's conditions with the NAIC requirements, which the commenter described as specific, actionable, and proportional to the relationship between insurer and agent. Another commenter described the proposed policies and procedures conditions as unworkable and objected to their departure from less demanding State laws, which the commenter said would not require the insurer to directly supervise each Independent Producer. A few commenters urged the Department to adopt the NAIC Model Regulation as a safe harbor.

Other comments focused on practical challenges associated with some interpretations of the exemption's requirements. For example, one commenter argued that use of the term "ensure" was unacceptable because Insurers do not control Independent Producers and therefore cannot guarantee their compliance. Another commenter stated that requiring an insurer to review the recommendations of third-party products is an impossible task because they do not know those products and the products are not and cannot be in their system for review. This commenter further questioned how an insurer can determine whether the recommendation is in the best interest of the Retirement Investor as compared to other products the Independent Producer is authorized to sell, if

the Insurer is not required to supervise an Independent Producer's recommendations of other Insurers' products. This same commenter urged the Department to specify in the operative text that supervision does not include an obligation to consider and compare other companies' products. Another commenter also characterized the exemption as requiring Insurers to review all conduct of Independent Producers and stressed the fact that Insurers are not able to control all the actions of Independent Producers to the same degree as, for example, broker-dealers can regulate the conduct of their registered representatives.

Other commenters supported the obligation imposed on Insurers. One commenter pointed to the greater risk that a recommendation in the independent channel will be tainted by conflicts of interest because there is no single institution overseeing each recommendation. To address these conflicts without imposing fiduciary status on all Insurers, each Insurer must exercise oversight over Independent Producers to the extent the Independent Producer is selling the Insurer's own products. To do this, the Insurer must have reasonably designed policies and procedures and must not encourage or reward producers for violating the Impartial Conduct Standards. Another commenter expressed significant concerns with the NAIC Model Regulation. Under the NAIC Model Regulation, insurers and producers are not required to mitigate the compensation-related conflicts of interest that are often responsible when consumers are given bad advice and end up buying annuities that are not suitable for them.

The Department has considered these comments and continues to believe that the policies and procedures requirement is essential to the exemption. The Department is similarly not adopting the NAIC Model Regulation as a safe harbor. If trusted



Independent Producers are to recommend insurance products to Retirement Investors, it is important that they are subject to proper oversight by the Insurer whose products they are recommending, and that those Insurers pay careful attention to financial incentives they create or administer that are misaligned with Retirement Investors' interests. Insurers choosing to rely on Independent Producers for distribution of their products should be able to comply with the protective and workable oversight obligations set out in Section VII(c). Moreover, while there are important differences between the requirements in Section VII(c) and the NAIC Model Regulation, as discussed below, the NAIC Model Regulation itself requires a significant level of supervision demonstrating that Insurers can (and already must) supervise producers. The NAIC Model Regulation specifically says, "An insurer shall establish and maintain a supervision system that is reasonably designed to achieve the insurer's and its producers' compliance with this regulation."<sup>26</sup>

Even if Insurers were not already required to supervise Independent Producers under State law, the conditions in Section VII(c) do not place an excessive burden on Insurers. Section VII(c)(1) specifies that the policies and procedures must be prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The "prudently designed" standard does not require perfection with respect to every recommendation by every Independent Producer overseen by the

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<sup>26</sup> Section 6.C(2). Similarly, Rule 187 Section 224.6 requires "An insurer shall establish, maintain, and audit a system of supervision that is reasonably designed to achieve the insurer's and producers' compliance." While Rule 187 imposes a higher standard of care than the NAIC Model Regulation and contains other provisions that are more protective of consumers than the NAIC Model Regulation, the Department has not identified statements from industry participants or other publicly available information indicating that carriers or distributors are withdrawing from the New York annuity market as a result of Rule 187.

Insurer. The Department recognizes that, even prudent oversight structures will not prevent every instance of inappropriate advice, and use of the word “ensure” was not intended to suggest otherwise. When an Independent Producer violates the terms of this exemption, notwithstanding the Insurer’s adoption and implementation of a prudent oversight structure, the consequence is that the Independent Producer is responsible for the resulting prohibited transaction, not that the Insurer is disqualified from continuing to act as a supervisory Insurer under the exemption. On the other hand, if the Insurer fails to implement policies and procedures and conflict-management measures consistent with this exemption, Independent Producers could not rely on this exemption for relief from ERISA’s prohibited transaction rules.

In response to comments, the Department also confirms that Insurers are not required to police Independent Producers’ recommendations of competitors’ products. As specified in Section VII(c)(1), “[a]n Insurer is not required to supervise an Independent Producer’s recommendations to Retirement Investors of products other than annuities offered by the Insurer.” Furthermore, Insurers could choose to comply with the policies and procedures requirement by creating oversight and compliance systems through contracts with insurance intermediaries such as IMOs, FMOs or brokerage general agencies (BGAs). Such intermediaries, for example, could eliminate compensation incentives across all the Insurers that work with the intermediary, review Independent Producers’ documentations, and/or use of third-party industry comparisons available in the marketplace to help independent insurance agents recommend products that are prudent for their Retirement Investor customers.

The Department acknowledges, however, that this exemption’s policies and procedures requirement is significantly more stringent than the standards imposed by the NAIC Model Regulation. This reflects the difference in ERISA’s regulatory structure, which is profoundly concerned about the dangers posed by conflicts of interest as expressed in the prohibited transaction provisions of Title I and Title II of ERISA. Under ERISA Section 408(a) and Code section 4975(c)(2), the Department can grant an exemption only if the exemption is in the interest of plans and their participants and beneficiaries and protective of the rights of participants and beneficiaries. The more stringent requirements of this exemption’s policies and procedures are necessary for the Department to make these findings, and to ensure uniform protection of Retirement Investors.

In contrast to ERISA’s stringent approach to conflicts of interest, the NAIC Model Regulation’s requirements regarding mitigation of material conflicts of interest is not as protective as either the Department’s approach under ERISA or the SEC’s approach under Regulation Best Interest. This is made clear in the NAIC Model Regulation’s definition of a “material conflict of interest” which expressly carves out all “cash compensation or non-cash compensation” from treatment as sources of conflicts of interest.<sup>27</sup> “Cash compensation” that is excluded from the definition of a material conflict of interest is broadly defined to include “any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer,” and “non-cash compensation” is also broadly defined to

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<sup>27</sup> NAIC Model Regulation at section 5.I.(2).

include “any form of compensation that is not cash compensation, including, but not limited to, health insurance, office rent, office support and retirement benefits.”<sup>28</sup> The NAIC also expressly disclaimed that its standard creates fiduciary obligations, and the obligations in its NAIC Model Regulation differ in significant respects from those applicable to broker-dealers in the SEC’s Regulation Best Interest or to investment advisers pursuant to the Advisers Act’s fiduciary duty.<sup>29</sup> For example, in addition to disregarding all forms of compensation as a source of material conflicts of interest, the NAIC Model Regulation’s “best interest” standard is treated as satisfied if four component obligations are met – the care, disclosure, conflict of interest, and documentation obligations – but these components do not repeat the NAIC Model Regulation’s best interest obligation not to put the producer’s or insurer’s interests before the customer’s interest. Instead, they include a requirement “to have a reasonable basis to believe the recommended option effectively addresses the consumer’s financial situation, insurance needs, and financial objectives . . . .”

### **Obligation on Independent Producers**

Other commenters expressed concern that the obligation for Insurers to establish, maintain and enforce policies and procedures is too much of a burden for the Independent Producers who must comply with those policies and procedures. One commenter asserted that, from a practical perspective, it would be impossible for an Independent Producer to set up a system requiring the producer to follow different policies and procedures from different insurers, stating that it would inevitably lead to the producer’s failure to meet

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<sup>28</sup> *Id.* at section 5.B. and J.

<sup>29</sup> Section 6.A.(1)(d) of the NAIC Model Regulation provides, “[t]he requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation.”

the requirements of the Proposed Amendment. Another commenter stated that the obligation to figure out how to operate within different policies and procedures developed by different Insurers would drive many Independent Producers to reduce the number of Insurers for whom they sell and the number of different products they recommend. The commenter warned that this reduction could harm Retirement Investors because it would be based on the Independent Producer's own compliance burden, rather than the needs of Retirement Investors.

The Department acknowledges that there may be variations in the requirements that Insurers impose on Independent Producers or intermediaries as a result of the requirements of this Final Amendment. However, Independent Producers already have the obligation to comport their conduct to the varying contractual arrangements and policies of different Insurers. As a practical matter, Independent Producers, either directly, or indirectly through their relationship with an IMO or other intermediary, must already conform their conduct to the requirements of the potentially varying policies and procedures of the different Insurers whose products they recommend. Similarly, as Independent Producers, they necessarily have to master the intricacies of varying—and often quite complex—annuity products, compensation policies and structures, and contractual requirements provided by multiple insurance companies. The additional burden, if any, of complying with some additional variation in these same Insurers' policies and procedures, all of which are aimed at promoting the uniform goal of ensuring compliance with the Impartial Conduct Standards, is amply justified by Retirement Investors' interest in receiving sound advice from trusted Investment Professionals that is prudent, loyal, and free from misleading statements and excessive compensation.

## **Incentives**

Commenters expressed particular concern about the requirement that Insurers may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. As noted in the preamble to PTE 2020-02, which contains essentially the same obligation, some commenters incorrectly read the Proposed Amendment as conditioning reliance on the exemption on elimination of all differentials in compensation. Other commenters viewed the exemption as prohibiting or limiting the use of Insurer-funded training and educational conferences and programs. For example, some commenters expressed concern that, under the exemption's terms, Insurers would not be able to exclude Independent Producers from training conferences even though they did not make significant sales of the Insurer's products. Several commenters additionally suggested that the Department's approach to conflicts of interest is inconsistent with that of other regulators. These commenters described the preamble to the Proposed Amendment as reflecting a judgment call by the Department that such conflicts cannot be sufficiently mitigated and therefore must be eliminated, and one challenged the Department's authority to impose such anti-conflict policies on Insurers who had not acknowledged fiduciary status or undertaken to act in a fiduciary capacity to the extent the policies exceeded the requirements of State law. One commenter described the Department's requirements as conflicting with the NAIC Model Regulation, which the commenter said

only prohibits incentives that are based on sales of specific annuities within a limited period of time.<sup>30</sup>

However, as noted in the preamble to the final amendment to PTE 2020-02, which contains essentially the same requirement as this exemption, the exemption provision neither categorically bans differential compensation, nor prohibits Insurers from funding educational meetings. The exemption merely requires reasonable guardrails for conferences, especially if they involve travel. The exemption applies an objective standard focused on whether a reasonable person would conclude that the Insurer's actions or incentives were likely to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. The Department 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. Instead, the Department is requiring Insurers and Independent Producers to avoid and mitigate conflicts of interest to the extent possible and to rely on oversight structures that prevent those conflicts of interest from driving investment recommendations, rather than the financial interests of Retirement Investors. The Department further confirms that an Independent Producer may receive reasonable and customary deferred compensation or subsidized health or pension benefit arrangements such as typically provided to a statutory "employee" as defined in Code section 3121(d)(3) without, in and of itself, violating the conditions of this exemption. However, Insurers working with these statutory employees must ensure that their policies and procedures and incentive practices are reasonably and prudently designed as required by Section VII(c).

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<sup>30</sup> NAIC Model Regulation section 6.C(2)(h).

While the Department acknowledges that the exemption imposes more stringent standards on Independent Producers than many State laws and the NAIC Model Rule, the exemption is fully consistent with the Department’s authority and responsibilities under ERISA. The Department has conditioned relief from ERISA’s prohibited transaction provisions on compliance with the exemption conditions based on its separate authority under Federal law, which governs Plan and IRA investments and fiduciary investment recommendations, irrespective of the type of investment product recommended, including insurance products and non-insurance products alike.

ERISA imposes an obligation on the Department to safeguard Retirement Investors from conflicts of interest. Under ERISA, in contrast to most State insurance laws, fiduciary advice providers are categorically prohibited from making investment recommendations that result in their receipt of variable compensation, unless permitted by a special exemption granted by statute or the Department. The Department can only grant exemptions that it finds are in the interest of and protective of Retirement Investors.<sup>31</sup>

Moreover, the conflicts of interest that give rise to prohibited transactions under Titles I and II of ERISA, include conflicts of interest associated with compensation, such as commissions and fees that the NAIC Model Regulation expressly excludes from treatment as material conflicts of interest. Specifically, the NAIC Model Regulation’s definition of a “material conflict of interest” expressly carves out all “cash compensation or non-cash compensation” from treatment as sources of material conflicts of interest.<sup>32</sup> This “cash compensation,” which is excluded from the definition of a material conflict of

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<sup>31</sup> ERISA section 408(a)(2), (3); 29 U.S.C. 1108(a)(2), (3); Code section 4975(c)(2)(B), (C).

<sup>32</sup> NAIC Model Regulation at section 5.I.



interest, is broadly defined to include “any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.”<sup>33</sup> “Non-cash compensation” is also broadly defined to include “any form of compensation that is not cash compensation, including but not limited to, health insurance, office rent, office support and retirement benefits.”<sup>34</sup>

In contrast, the SEC, like the Department of Labor, recognizes that such compensation creates significant conflicts of interest, as recognized in its Regulation Best Interest and under the fiduciary duty of the Investment Advisers Act of 1940. In an FAQ regarding this regulation, SEC staff provided examples of common sources of conflicts of interest for broker-dealers, investment advisers, or financial professionals, and specifically included “compensation, revenue or other benefits (financial or otherwise).”<sup>35</sup>

This Final Amendment appropriately follows Federal law, as expressed in ERISA, to protect Plan and IRA investors. The more stringent Federal protections adopted here with respect to Federally regulated retirement investments fully accord with ERISA’s requirements and the authority conferred by Congress to the Department in ERISA section 408(a) and Code section 4975(c)(2) to protect Retirement Investors from harmful conflicts of interest.

The Department has specifically granted this Final Amendment to permit Independent Producers to receive compensation that may vary based on their specific

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<sup>33</sup> NAIC Model Regulation at section 5.B.

<sup>34</sup> NAIC Model Regulation at section 5. J.

<sup>35</sup> See Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, Q2, available at <https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest>

investment recommendations, such as sales commissions, that otherwise would be prohibited by ERISA's broad categorical prohibitions on the receipt of such conflicted compensation by fiduciaries. However, in order to receive such compensation when acting as fiduciaries, Independent Producers must recommend products only from Insurers that pay attention to the conflicts that are inherent in their compensation models and take special care to avoid creating or implementing compensation practices that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation of this Final Amendment.

However, as discussed above, because of Insurer concerns about being held responsible as fiduciaries for the conduct of Independent Producers whom they do not hire or control as common law employees, the Department has not conditioned relief on the Insurer's acknowledgement of fiduciary status with respect to the Independent Producer's recommendation of its insurance products. Instead, it simply requires that Independent Producers that receive otherwise prohibited compensation subject to appropriate oversight and incentive structures. Under the Final Amendment, the oversight is conducted by the same Insurers who create the incentive structures for the products in the first place and generally already have oversight responsibility over Independent Producers under State law.

The Department understands that Insurers significantly rely on educational conferences for Independent Producers, as commenters indicated, and that such conferences and training can promote Retirement Investors' interests. Accordingly, the Department stresses that it is not prohibiting such conferences. However, participation in

and reimbursement for these conferences must be structured in a manner to ensure they are not likely to cause Independent Producers to make recommendations that violate this exemption's Care Obligation or Loyalty Obligation. In addition, the Department notes that properly designed incentives that are simply aimed at increasing the overall amount of retirement saving and investing, without promoting specific products, would not violate the policies and procedures requirement.

As noted in the preamble to the Final Amendment to PTE 2020-02, the Department also recognizes that it can be proper to tie attendance at conferences to appropriate sales thresholds in certain circumstances (for example, insurance companies could not reasonably be expected to provide training for independent agents who are not recommending their products). On the other hand, parties must take special care to ensure that training conferences held in vacation destinations are not designed to incentivize recommendations that run counter to Retirement Investor interests. Firms should structure training events to ensure that they are consistent with the Care and Loyalty Obligations. Recommendations to Retirement Investors should be driven by the interests of the investor in a secure retirement. Certainly, parties should avoid creating situations where the training is merely incidental to the event, and an imprudent recommendation to a Retirement Investor is the only thing standing between an Investment Professional and a luxury getaway vacation.

### **Reviewing Independent Producers**

Some commenters raised specific concerns with the requirement in Section VII(c)(3), which provides that the Insurer whose product is recommended has a prudent process for determining whether to authorize an Independent Producer to sell the

Insurer's annuity contracts and to protect the Retirement Investor from Independent Producers who have failed to adhere to the Impartial Conduct Standards or who lack the necessary education, training, or skill. A prudent process would include review of such objective materials as customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. Section VII(d)(1) specifies that Insurers may rely in part on sampling to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

Some commenters objected to provisions in this proposed requirement that would have required a prudent process "for taking action to protect Retirement Investors from Independent Producers who are likely to fail to adhere to the Impartial Conduct Standards," and several commenters said they do not know how to predict in advance the likelihood that a producer is "likely to fail" in the future. One commenter additionally asked the Department to state that these requirements could be limited to objective criteria such as a criminal background check, license verification, credit history check, and similar data readily available to the Insurer.

In response to these commenters, the Department has not included the phrase "or are likely to fail" after "who have failed" in the Final Amendment, because it may have been read to require predictive powers, which the Department did not intend. The Department also agrees that a prudent process for reviewing Independent Producers must include a careful review of "objective material," but the Department does not agree that a prudent process can be fully specified in advance by reference to a tightly limited set of

objective materials and therefore has not adopted changes requested by commenters to further narrow the requirements of Section VII(c)(3).

### **Providing Policies and Procedures to the Department**

Proposed Section VII(c)(4) would have required Insurers to provide their complete policies and procedures to the Department upon request within 10 business days of the request. The provision is also part of the Policies and Procedures condition in PTE 2020-02 and was subject to comments in connection with that exemption. As described in the preamble to the final amendment to PTE 2020-02, one commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are reasonably designed. Another commenter strongly urged the Department to eliminate this condition and instead rely on its subpoena authority, if necessary. Another comment requested more time to provide the certification to the Department. In response to this comment, although the Department expects that the policies and procedures should be easily located, the Department also recognizes the possibility of inadvertent non-compliance because of the tight timeline. After considering these comments, the Department has retained Section VII(c)(4) but extended the time for Insurers to provide their complete policies and procedures to the Department from within 10 business days as proposed to within 30 days of request.

### **Retrospective Review**

Under Section VII(d), the Insurer whose product the Independent Producer recommends must have a process for conducting a retrospective review of each Independent Producer at least annually that is reasonably designed to detect and prevent violations of, and achieve compliance with, the exemption's conditions. The retrospective

review also includes a review of Independent Producers' documentation of rollover recommendations and required rollover disclosure. As part of this review, the Insurer is expected to prudently determine whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer must update its policies and procedures as business, regulatory, and legislative changes and events dictate, and ensure that its policies and procedures remain prudently designed, effective, and compliant with Section VII(c). To ensure Retirement Investors receive the same protections, whether they receive advice under PTE 2020-02 or PTE 84-24, the Department has made the retrospective review conditions substantively identical, with a few specific obligations tailored to the insurance industry. In addition, under the Proposed Amendment, the Insurer was expected to give the Independent Producer the methodology and results of the retrospective review, including a description of any non-exempt prohibited transaction the Independent Producer engaged in with respect to investment advice defined under Code section 4975(e)(3)(B), and instruct the Independent Producer to correct those prohibited transactions, report the transactions to the IRS on Form 5330, pay the resulting excise taxes imposed by Code section 4975, and provide the Insurer with a certification that the Independent Producer has filed the Form 5330 within 30 days after the form is due (including extensions).

Under the Proposed Amendment, the methodology and results of the retrospective review had to be reduced to a written report that is provided to a Senior Executive Officer of the Insurer. As proposed, that Senior Executive Officer also had to certify, annually, that:

- (A) The officer has reviewed the retrospective review report;

(B) The Insurer has provided Independent Producers with the information required under (d)(2) and has received a certification that the Independent Producer has filed Form 5330 within 30 days after the form is due (including extensions);

(C) The Insurer has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and

(D) The Insurer has in place a prudent process to modify such policies and procedures as set forth in Section VII(d)(1).

The review, report, and certification was proposed to be completed no later than six months following the end of the period covered by the retrospective review. The Proposed Amendment would have required the Insurer to retain the report, certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department within 10 business days of request.

Some commenters supported the retrospective review condition and supported having Insurers undertake a regular process to ensure that their policies and procedures are reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption. However, other commenters raised concerns, viewing the condition as excessive and inefficient. Commenters asserted that it is both impractical and unnecessary for Insurers to review each recommendation and expressed concern about the volume of recommendations. One commenter requested confirmation that testing done as part of the retrospective review could rely on standard sampling and testing techniques. Another commenter pointed to the language in the preamble to the

Proposed Amendment acknowledging that insurance companies working with Independent Producers have less direct control over the conduct and compensation of Independent Producers than over their employees. As a result, they stated that Insurers would not have access to the information they would need to effectively ensure that Independent Producers fully complied with the Impartial Conduct Standards and the other exemption conditions. One commenter expressed concern that under the exemption, Independent Producers are not required to provide Insurers with sufficient information for them to be able to conduct the retrospective review. Some commenters argued that the Department should instead rely on the NAIC Model Regulation's written report to senior management which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the insurer's supervision system, the exceptions found, and corrective action taken or recommended, if any.

Some commenters also raised specific concerns with the Senior Executive Officer certification requirement. They noted that other regulators typically require that certifications provide assurance that company systems or procedures are "reasonably designed to achieve compliance," a standard that they asserted was lower than what is required for Independent Producers to achieve compliance with impartial conduct standards. Other commenters stated that the retrospective review should not consider the filing of the IRS Form 5330, arguing this is beyond the Department's regulatory authority. A few commenters raised specific concerns that Insurers were not the appropriate party to file Form 5330 under the Code. Others argued that requiring Insurers to file Form 5300 interfered with State regulation of insurance.



One commenter requested more time to provide the certification to the Department. In response to this comment, although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement to give Insurers 30 days to provide the certification.

The Department is finalizing the retrospective review requirement because of the fundamental importance of a regular review process to ensure that the Policies and Procedures are working and that Independent Producers are complying with the Impartial Conduct Standards. In response to commenters, the Department has added to Section (d)(1) a clarification that Insurers may rely in part on sampling of each Independent Producer's transactions to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

The Department is also making several other changes to specifics of the retrospective review provision. To address concerns from some commenters about having the Insurer file Form 5330, the Department is revising the filing obligation to be the responsibility of the Independent Producer, which is a fiduciary, and thus a "disqualified person liable for the tax under Code section 4975 for participating in a prohibited transaction."<sup>36</sup> However, the Insurer is expected to instruct the Independent Producer to correct those prohibited transactions, report the transactions to the IRS on Form 5330, pay the resulting excise taxes imposed by Code section 4975, and provide the Insurer with a certification that it has filed Form 5330 within 30 days after the form is due

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<sup>36</sup> IRS Form 5330 instructions <https://www.irs.gov/pub/irs-pdf/i5330.pdf>

(including extensions). The Department is also revising Section VII(d)(3) for consistency with amended PTE 2020-02. The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Insurer. This is essential for Insurers to know that their Independent Producers are actually correcting prohibited transactions.

The Department is also revising the Senior Executive Officer certification to incorporate the amended provisions regarding Form 5330. Under the Final Amendment, the required certification states that the officer has reviewed the retrospective review report, the Insurer has provided Independent Producers with the information required under (d)(2), and the Insurer has received a certification that affected Independent Producers have filed Form 5330 within 30 days after the form is due (including extensions).

### **Self-correction**

Section VII(e) allows the Independent Producer to correct violations to avoid a non-exempt prohibited transaction in certain circumstances. Self-correction is allowed in cases when either (1) the Independent Producer has refunded any charge to the Retirement Investor; or (2) the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. The correction must occur no later than 90 days after the Independent Producer learned of the violation or reasonably should have learned of the violation; the Independent Producer must notify the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle; and the violation and correction must be specifically set forth in the written report of the retrospective review required under Section VII(d)(2).

The appropriate remedy for a non-exempt prohibited transaction involving an annuity purchase is rescission, which requires the insurer to cancel the contract and waive surrender charges. The correction must occur no later than 90 days after the Independent Producer learned, or reasonably should have learned, of the violation. Lastly, the Independent Producer must notify the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction must specifically be set forth in the written retrospective review report.

One commenter stated that it is unclear what is exactly meant by a “mis-sold” annuity and what is supposed to happen if an agent and Insurer disagree in that regard. Thus, according to this commenter, it is unclear how the agent or Insurer in the case of retrospective review would even discover any non-exempt prohibited transaction. This same commenter also questioned whether all non-exempt prohibited transactions require rescission or whether there is a materiality threshold. This commenter also stated that the Proposed Amendment did not address the common situation where an Insurer rescinds an annuity as a matter of customer service without determining or admitting any violation of laws or, in this case, noncompliance with impartial conduct standards. Finally, this commenter asked how situations would be handled where agents and Insurers disagree on the need for correction under PTE 84-24.

As discussed in the preamble to PTE 2020-02 in response to comments, the Department notes that no one is required to use the self-correction provision. Furthermore, not all violations of the exemption can be corrected under the self-correction provision. In addition, minor disclosure failures can be corrected under Section VII(b)((7), which provides that the Independent Producer will not fail to satisfy the

disclosure conditions solely because it makes an error or omission in disclosing the required information while acting in good faith and with reasonable diligence. To avoid a violation of the exemption, the Independent Producer must disclose the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. Lastly, the Department notes that merely rescinding an annuity as a matter of customer service is not self-correcting if there was no violation to correct.

While the Insurer may discover violations eligible for self-correction as part of its retrospective review under Section VII(d), it is the Independent Producer's obligation to self-correct under Section VII(e) to avoid the resulting prohibited transaction and imposition of an excise tax. If there is disagreement, the Independent Producer ultimately has the responsibility as a fiduciary to decide whether to take action. Based on what the Insurer learns through the review process, and the specific facts and circumstances, a reasonable Insurer may conclude that it is imprudent to continue authorizing that Independent Producer to sell its annuity contracts and act accordingly. To the extent that the Independent Producer does not or cannot correct the violation, the consequence is that a prohibited transaction has occurred with attendant liability for the excise tax.

As discussed in the proposal to PTE 2020-02, some commenters raised concerns about the lack of a materiality threshold, and the requirement that all mistakes be reported and remediated, no matter how minor or inadvertent. However, the self-correction provisions are measured and proportional to the nature of the injury. They simply require timely correction of the violation of the law and notice to the person responsible for retrospective review of the violation, so that the significance and materiality of the

violation can be assessed by the appropriate person responsible for assessing the effectiveness of the firm's compliance oversight. In addition, to address the commenters' concern about the burden associated with the self-correction provision, the Department has deleted the requirement to report each correction to the Department in this Final Amendment. This change should ease the compliance burden. Furthermore, to the extent parties are wary of utilizing the self-correction provision because they would have to report each self-correction to the Department, they should feel more comfortable correcting each violation they find that is eligible for self-correction after this modification. The Department notes that it may request Independent Producers to provide evidence of self-corrections through the recordkeeping provisions in Section IX.

### **Eligibility**

The Proposed Amendment added Section VIII which identifies circumstances under which an Independent Producer would have become ineligible to rely on the exemption for 10 years, and also circumstances when an entity would not have been permitted to serve as an Insurer under this exemption for 10 years. The proposed eligibility provisions were similar to the provisions of Section III of PTE 2020-02 and are intended to promote compliance with the exemption conditions. The Department continues to believe that the eligibility provisions are important to ensure that Independent Producers comply with the obligations of the exemption, subject to oversight by Insurers that take compliance with the exemption's conditions seriously. Therefore, after consideration of the comments, the Department has determined to retain the eligibility provision of Section VIII, but it has made several important modifications that are discussed below.

Under the Final Amendment, an Independent Producer or Insurer can become ineligible as a result of a conviction by: (A) a U.S. Federal or State court as a result 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 (B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of "foreign adversaries" that is codified in 15 CFR 7.4 as amended).

Independent Producers and Insurers also lose eligibility if they are found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general, to have participated in one or more of the following categories of misconduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited

transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or (C) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of the exemption.

In addition, Independent Producers (but not Insurers) will become ineligible if they are found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general, to have engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).

The Final Amendment specifies that an Insurer or Independent Producer that is ineligible to rely on this exemption may rely on an existing statutory or separate class prohibited transaction exemption if one is available or may apply for an individual prohibited transaction exemption from the Department.

Most of the comments the Department received on eligibility were combined with the comments submitted under PTE 2020-02 and were essentially the same. Those comments directly submitted under PTE 84-24 are also very similar to the comments under PTE 2020-02 regarding eligibility. For additional discussion of the comments received regarding eligibility please see the grant notice for PTE 2020-02 published

elsewhere in today's issue of the *Federal Register*. Many commenters variously asserted that the proposed addition of the eligibility provisions to the exemptions exceeded the Department's authority; undermined parties' ability to rely on the exemptions; unduly broadened the conditions for eligibility; and would result in reduced choice and access to advice for Retirement Investors. Generally, these commenters requested that the Department not include the proposed ineligibility sections in the Final Amendment and requested that, if the Department does move forward with these sections, that it apply the provisions prospectively.

### **Scope of Ineligibility**

One commenter claims that the Proposed Amendment would impose unreasonably harsh sets of conditions on both Independent Producers and on Insurers, under which both would be under constant threat of loss of the exemption for a 10-year period and, in the case of Insurers, loss of the exemption could be triggered by events involving other parties over whom the Insurer has no direct involvement. Another commenter expressed concern that the proposed ineligibility provisions applied too broadly to insurance producers, insurance carriers and their foreign and domestic affiliates.

Some commenters objected to the breadth of the provisions' application to "Affiliates" and requested that the Final Amendment instead use the term "controlled group," which has a clear and well-defined meaning. Some commenters similarly objected to the scope of conduct treated as disqualifying and asserted that disqualification should not extend to criminal conduct that does not involve the management of retirement assets.



In response to the commenters, the Department has decided to use the term “Controlled Group” for purposes of ineligibility of Insurers under Section VIII(b) of the exemption and has revised that Section accordingly. The Final Amendment also adds Section VIII(b)(3), which defines Controlled Group. Under this definition, an entity is in the same Controlled Group as an Insurer if the entity (including any predecessor or successor to the entity) would be considered to be in the same “controlled group of corporations” as the Insurer or “under common control” with the Insurer as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder). The Department declines, however, to narrow the Final Amendments’ definition of crimes to only those crimes that arise out of the provision of investment advice or the management of plan assets. The enumerated crimes in Section VIII reflect egregious misconduct, typically in a financial context, that is clearly relevant to the parties’ willingness and commitment to comply with important legal obligations. There is little basis for concluding that Retirement Investors should be sanguine or that the Department should be confident of compliance when the Independent Producer or Insurer engages in serious crimes, such as embezzlement or financial fraud, but the specific victims were non-Retirement Investors. However, to the extent Independent Producers or Insurers have continued need for an exemption notwithstanding such a conviction, they can apply with the Department for an individual prohibited transaction exemption that would include appropriate protective conditions based on the Department’s assessment of the particular facts and circumstances, and the remedial actions the parties have taken to ensure a prospective culture of compliance.

## **Foreign Convictions**

Several commenters claimed that the Department has no basis for expanding the ineligibility provisions to include “substantially equivalent” foreign crimes committed by foreign affiliates and that the inclusion of foreign affiliates is overbroad and will create unintended consequences, especially when the conduct does not need to relate directly to the provision of investment advice. These commenters stated that such inclusion will result in ineligibility for conduct that is unrelated to the provision of fiduciary investment advice and for conduct in which the fiduciary has not participated and about which it has no knowledge. Another commenter stated ineligibility could be triggered by events involving other parties over which the insurer has no direct involvement, such as the conviction of an affiliate company of any of the specified crimes under the laws of a foreign country.

Several comments regarding PTEs 2020-02 and 84-24 stated that the proposed ineligibility provisions raised serious questions of fairness, national security, and U.S. sovereignty. These commenters claimed that ineligibility could result from the conviction of an affiliate in a foreign court for a violation of foreign law without due process protections or without the same level of due process afforded in the United States. Some commenters state that it is not clear that the Department is equipped to make the “substantially equivalent” determination and doing so could result in inconsistency and unfairness. One commenter agreed that investment transactions that include retirement assets are increasingly likely to involve entities that may reside or operate in jurisdictions outside the U.S. and that reliance on the exemptions therefore must appropriately be tailored to address criminal activity, whether occurring in the U.S. or in a foreign

jurisdiction, but noted their concerns with the potential lack of due process in foreign jurisdictions.

Other commenters were concerned that some foreign courts could be vehicles for hostile governments to achieve political ends as opposed to dispensing justice and for interference in the retirement marketplace for supposed wrongdoing that is wholly unrelated to managing retirement assets. They further noted concerns that these governments could potentially assert political influence over fiduciary advice providers looking to avoid a foreign criminal conviction.

After considering these comments, the Department is retaining the inclusion of foreign convictions in the Final Amendment. Retirement assets are often involved in transactions that take place in entities that operate in foreign jurisdictions therefore making the criminal conduct of foreign entities relevant to eligibility under PTE 84-24. An ineligibility provision that is limited to U.S. Federal and State convictions would ignore these realities and provide insufficient protection for Retirement Investors. Moreover, foreign crimes call into question an Insurer's and Independent Producer's culture of compliance just as much as domestic crimes, whether prosecuted domestically or in foreign jurisdictions.

The Department does not expect that questions regarding "substantially equivalent" will arise frequently, especially given the Final Amendment's use of the term "Controlled Group" instead of "Affiliate," as discussed above. But, when these questions do arise, those impacted may contact the Office of Exemption Determinations for

guidance, as they have done for many years.<sup>37</sup> As discussed in more detail below, the one-year Transition Period that has been added to the exemption and the ability to apply for an individual exemption, give parties both the time and the opportunity to address any issues about the relevance of any specific foreign conviction and its applicability to ongoing relief pursuant to PTE 84-24. Insurers and Independent Producers should interpret the scope of the eligibility provision broadly with respect to foreign convictions and consistent with the Department's statutorily mandated focus on the protection of Plans in ERISA section 408(a) and Code section 4975(c)(2). In situations where a crime raises particularly unique issues related to the substantial equivalence of the foreign criminal conviction, the Insurers and Independent Producers may seek the Department's views regarding whether the foreign crime, conviction, or misconduct is substantially equivalent to a U.S. Federal or State crime. However, any Insurer or Independent Producer submitting a request for review should do so promptly, and whenever possible, before a judgment is entered in a foreign conviction.

The exemption for Qualified Professional Asset Managers (QPAMs), PTE 84-14, has a similar disqualification provision and the Department is not aware that any foreign convictions have occurred in foreign nations with respect to the QPAM exemption that are intended to harm U.S.-based financial institutions and believes there is a small likelihood of such occurrences. Further, the types of foreign crimes of which the

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<sup>37</sup> PTE 84-14 contains a similar eligibility provision which has long been understood to include foreign convictions. Impacted parties have successfully sought OED guidance regarding this eligibility provision whenever individualized questions or concerns arise. *See, e.g.*, Prohibited Transaction Exemption (PTE) 2023-15, 88 FR 42953 (July 5, 2023); 2023-14, 88 FR 36337 (June 2, 2023); 2023-13, 88 FR 26336 (Apr. 28, 2023); 2023-02, 88 FR 4023 (Jan. 23, 2023); 2023-01, 88 FR 1418 (Jan. 10, 2023); 2022-01, 87 FR 23249 (Apr. 19, 2022); 2021-01, 86 FR 20410 (Apr. 19, 2021); 2020-01, 85 FR 8020 (Feb. 12, 2020); PTE 2019-01, 84 FR 6163 (Feb. 26, 2019); PTE 2016-11, 81 FR 75150 (Oct. 28, 2016); PTE 2016-10, 81 FR 75147 (Oct. 28, 2016); PTE 2012-08, 77 FR 19344 (March 30, 2012); PTE 2004-13, 69 FR 54812 (Sept. 10, 2004).

Department is aware from its experience processing recent PTE 84-14 QPAM individual exemption requests for relief from convictions have consistently related to the subject institution's management of financial transactions and/or culture of compliance. For example, the underlying foreign crimes in those individual exemption requests have included: aiding and abetting tax fraud in France (PTE 2016-10, 81 FR 75147 (October 28, 2016) corrected at 88 FR 85931 (December 11, 2023), and PTE 2016-11, 81 FR 75150 (October 28, 2016) corrected at 89 FR 23612 (April 4, 2024)); attempting to peg, fix, or stabilize the price of an equity in anticipation of a block offering in Japan (PTE 2023-13, 88 FR 26336 (April 28, 2023)); illicit solicitation and money laundering for the purposes aiding tax evasion in France (PTE 2019-01, 84 FR 6163 (February 26, 2019)); and spot/futures-linked market price manipulation in South Korea (PTE 2015-15, 80 FR 53574 (September 4, 2015)).<sup>38</sup>

However, to address the concern expressed in the public comments that convictions have occurred in foreign nations that are intended to harm U.S.-based financial institutions, the Department has revised Section VIII(a)(1)(B) and VIII(b)(1)(B) in the Final Amendment to exclude foreign convictions that occur within foreign jurisdictions that are included on the Department of Commerce's list of "foreign adversaries."<sup>39</sup> Therefore, the Department will not consider foreign convictions that

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<sup>38</sup> On December 12, 2018, Korea's Seoul High Court for the 7th Criminal Division (the Seoul High Court) reversed the Korean Court's decision and declared the defendants not guilty; subsequently, Korean prosecutors appealed the Seoul High Court's decision to the Supreme Court of Korea, On December 21, 2023, the Supreme Court of Korea affirmed the reversal of the Korean Conviction, and it dismissed all judicial proceedings against DSK.

<sup>39</sup> 15 CFR 7.4. The list of foreign adversaries currently includes the following foreign governments and non-government persons: The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and Venezuelan politician Nicolás Maduro (Maduro Regime). The Secretary of Commerce's determination is based on

occur under the jurisdiction of the listed “foreign adversaries” as an ineligibility event and has added the phrase “excluding convictions and imprisonment that occur within foreign countries that are included on the Department of Commerce’s list of “foreign adversaries” that is codified in 15 CFR 7.4.

### **Due Process**

The Department also received several comments regarding the proposed ineligibility notice process. The Proposed Amendment would have provided that the Department could issue a written ineligibility notice for (A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally violating, or knowingly participating in violations of, the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or (D) providing materially misleading information to the Department in connection with the conditions of the exemption.

Generally, these comments reflected the view that the Department had inappropriately asserted authority to determine ineligibility without external review and

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multiple sources, including the National Security Strategy of the United States, the Office of the Director of National Intelligence's 2016–2019 Worldwide Threat Assessments of the U.S. Intelligence Community, and the 2018 National Cyber Strategy of the United States of America, as well as other reports and assessments from the U.S. Intelligence Community, the U.S. Departments of Justice, State and Homeland Security, and other relevant sources. The Secretary of Commerce periodically reviews this list in consultation with appropriate agency heads and may add to, subtract from, supplement, or otherwise amend the list. Sections VIII(a)(1)(B) and VIII(b)(1)(B) of the Final Amendment will automatically adjust to reflect amendments the Secretary of Commerce makes to the list.

without appropriate due process protections. Commenters stressed that disqualification effectively imposed a 10-year ban, and many expressed the view that more procedural protections were necessary for such a significant consequence and that disqualification should be more tightly linked to failure to meet the conditions of the exemption. Some commenters contended that, by leaving too much discretion to the Department, the process would create uncertainty and adversely affect the ability of Retirement Investors to get sound advice. Some commenters expressed concern that the Department's ineligibility process was insufficient because it did not provide a chance for a hearing before an impartial administrative judge or Article III judge, an express right of appeal, and formal procedures for the presentation of evidence.

Some commenters on both PTEs 2020-02 and 84-24 also stated that while the six-month period provided in the exemption may be adequate time to send a notice to Retirement Investors, it is insufficient time for a financial institution to determine an alternative means of complying with ERISA in order to continue to provide advice to Retirement Investors. These commenters requested the Department to revise the exemption to provide for at least 12 months to make the transition away from reliance on PTE 84-24 or to find an alternative means of complying with ERISA following a finding of ineligibility.

After consideration of the comments and to address the due process concerns, the Department has determined to modify Sections VIII(a)(2) and VIII(b)(2) of the ineligibility provisions. While maintaining the types of conduct that can lead to ineligibility, amended Section VIII(a)(2) and VIII(b)(2) of the Final Amendment removes

the discretion of the Department from making the determination of whether the conduct has occurred and limits disqualification to court-supervised determinations.

Under the provision as amended, ineligibility under Section VIII(a)(2) will occur as a result of an Independent Producer being found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the IRS, the Department of Justice, a State insurance regulator, or a State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or (D) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of this exemption.

Likewise, ineligibility under Section VIII(b)(2) will occur as a result of an Insurer being found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the IRS, the Department of Justice, a State insurance regulator, or a State



attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or (C) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of this exemption.

Ineligibility under Section VIII(a)(2) and (b)(2) will therefore operate in the same manner as ineligibility for a criminal conviction defined in Section VIII(a)(1) and (b)(1), subject to the timing and scope provisions in Section VIII(c). An Insurer or Independent Producer will become ineligible only after a court has found or determined in a final judgment or approved settlement that the conduct listed in Section VIII(a)(2) or (b)(2) has occurred. In response to concerns raised by commenters, the Department has made changes so that any ineligibility occurs only after a conviction, a court's final judgment, or a court approved settlement.

Thus, ineligibility will follow a determination in civil or criminal court proceedings subject to the full array of procedural protections associated with legal proceedings overseen by courts and will include the normal judicial oversight associated with convictions, final judgments, and court approved settlements. In addition to providing sufficient due process, this revised ineligibility provision (i.e., having ineligibility occur only after a conviction, a court's final judgment, or a court approved

settlement) gives those facing ineligibility ample notice and time to prepare for ineligibility and the resulting One-Year Transition Period discussed below. An ineligible Insurer or Independent Producer would become eligible to rely on this exemption again if there is a subsequent judgment reversing the conviction or final judgement.

### **Timing of Ineligibility and One-Year Transition Period**

Several commenters to both PTE 2020-02 and PTE 84-24 expressed concern that the eligibility provisions would apply retrospectively and urged the Department to confirm that ineligibility under the exemption would occur only on a prospective basis after finalization of the amendment to the exemption. Additionally, some commenters asserted that the six-month period provided in the Proposed Amendment following ineligibility would be insufficient for Insurers and Independent Producers to prepare for any inability to provide retirement investment advice for a fee, determine an alternative means of complying with ERISA, and to prepare and submit an individual exemption. Another commenter stated that providing a longer 12-month period would enable Insurers and Independent Producers to find alternative compliant means to help retirement investors and would enable retirement investors to continue to receive investment recommendations in their best interest.

One commenter claimed that the sudden real or impending loss of significant numbers of providers, or even a handful of the largest among them, as the result of their disqualification would cause significant disruption as Plans would have no more than six months to find suitable replacements and would impose harm on Retirement Investors who have hired a disqualified firm.

The Department confirms that ineligibility under Section VIII will be prospective such that only convictions, final judgments, or court-approved settlements occurring after the Applicability Date of this Final Amendment will cause ineligibility. In addition, the six-month lag period for eligibility has been replaced with the One-Year Transition Period in Section VIII(c)(2). Accordingly, while Section VIII(c) now provides that a party becomes ineligible upon the date of conviction, final judgment, or court-approved settlement that occurs after the Applicability Date of the exemption, the One-Year Transition period provides Insurers and Independent Producers ample time in which to prepare for the loss of the exemptive relief under PTE 84-24, determine alternative means for compliance, prepare and protect Retirement Investors, and apply for an individual exemption.

The Final Amendment indicates that relief under the exemption during the Transition Period is available for a maximum period of one year after the Ineligibility Date if the Insurers or Independent Producer, as applicable, submits a notice to the Department at PTE84-24@dol.gov within 30 days after ineligibility begins under Section VIII(c). No relief will be available for any transactions (including past transactions) effected during the One-Year Transition Period unless the Insurer or Independent Producer complies with all the conditions of the exemption during such one-year period. The Department notes that it included the One-Year Transition Period in the Final Amendment to reduce the costs and burdens associated with the possibility of ineligibility, and to give Insurers or Independent Producers an opportunity to apply to the Department for individual prohibited transaction exemptions with appropriate protective conditions.

The One-Year Transition Period begins on the date of the conviction, the final judgment (regardless of whether that judgment remains under appeal), or court approved settlement. Insurers or Independent Producers that become ineligible to rely on this exemption may rely on a statutory prohibited transaction exemption, such as ERISA section 408(b)(14) and Code section 4975(d)(17), or separate administrative prohibited transaction exemption if one is available, or may seek an individual prohibited transaction exemption from the Department. In circumstances where the Insurers or Independent Producers become ineligible, the Department believes the interests of Retirement Investors are best protected by the procedural protections, public record, and notice and comment process associated with the individual exemption applications process. When processing individual exemption applications, the Department has unique authority to efficiently gather evidence, consider the issues, and craft protective conditions that meet the statutory standard. If the Department concludes, consistent with the statutory standards set forth in ERISA section 408(a) and Code section 4975(c)(2), that an individual exemption is appropriate, Retirement Investors can make their own independent determinations whether to engage in otherwise prohibited transactions with the Insurers or Independent Producers.

The Department encourages any Insurers or Independent Producers facing allegations that could result in ineligibility to begin the individual exemption application process as soon as possible. If the applicant becomes ineligible and the Department has not granted a final individual exemption, the Department will consider granting retroactive relief, consistent with its policy as set forth in 29 CFR 2570.35(d); the

Department cautions that retroactive exemptions may require additional prospective compliance.

### **Form 5330**

The Department received comments that expressed concern over the imposition of ineligibility based on the Independent Producers' failure to make the required Code section 4975 excise tax filing and to comply with IRS Form 5330 filing requirements and excise tax payment obligations. Several commenters stated this provision is unreasonable and that the Department has no statutory or regulatory enforcement authority to base ineligibility on these Code provisions and claimed this was overreach by the Department. These commenters urged the Department to remove this provision from the exemption.

The Department is retaining ineligibility based on failure to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B). The excise tax is the Congressionally imposed sanction for engaging in a non-exempt prohibited transaction and provides a powerful incentive for compliance with the participant-protective terms of this exemption. Insisting on compliance with the statutory obligation to pay the excise tax provides an important safeguard for compliance with the tax obligation when violations occur and focuses the institution's attention on instances where the conditions of this exemption have been violated, resulting in a non-exempt prohibited transaction. Moreover, the failure to satisfy this condition calls into question the Independent Producer's commitment to regulatory compliance, as is critical to

ensuring adherence to the conditions of this exemption including the Impartial Conduct Standards.

By including this provision in the Final Amendment, the Department does not claim authority to impose taxes under the Code, and leaves responsibility for collecting the excise tax and managing related filings to the IRS. Since an obligation already exists to file Form 5330 when parties engage in non-exempt prohibited transactions, the Department is merely conditioning relief in the exemption on their compliance with existing law. The condition provides important protections to Retirement Investors by enhancing the existing protections of PTE 84-24.

Moreover, as discussed above, ineligibility under Section VIII(a)(2)(C) would only occur following a court finding that an Independent Producer engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975. Imposing ineligibility only after such determinations in connection with court proceedings removes the Department from the determination process and provides ample due process.

### **Alternative Exemptions**

An Insurer or Independent Producer that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The

Department may require additional prospective compliance conditions as a condition of providing retroactive relief. A few commenters also expressed concern that the Alternative Exemptions process was not sufficient. One commenter in particular expressed concern with the length and expense of seeking to obtain an individual exemption, claiming this would result in harm to Plans.

As discussed above, the violations that would trigger ineligibility are serious, call into question the parties' willingness or ability to comply with the obligations of the exemption, and have been determined in court supervised proceedings. In such circumstances, it is important that the parties seek individual relief from the Department if they would like to continue to have the benefit of an exemption that permits them to engage in conduct that would otherwise be illegal. As part of such an on the record process, they can present evidence and arguments on the scope of the compliance issues, the additional conditions necessary to safeguard Retirement Investor interests, and their ability and commitment to comply with protective conditions designed to ensure prudent advice and avoid the harmful impact of dangerous conflicts of interest.

One commenter also speculated that the loss of the exemption based on ineligibility would effectively require the Insurer to acknowledge fiduciary status in connection with any request for an individual exemption. The Department notes, however, that it would base any decisions on whether to grant such an exemption and the possible conditions it would include in such exemption, including the need for a fiduciary acknowledgment, on the particular facts and circumstances that were presented by an applicant.

### **Recordkeeping**

Section IX provides that Independent Producers and Insurers must maintain for a period of six years from the date of the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, including such employees of the Internal Revenue Service. While the Department had proposed a broader recordkeeping condition affording greater public access to the records, the Department has determined that the recordkeeping provisions for advice under PTE 84-24 should be narrowed consistent with those in PTE 2020-02.

Although the proposed broader recordkeeping condition was consistent with other exemptions, the Department understands commenters' concerns about broader access to the documents and has concern that broad access to the documents could have a counterproductive impact on the formulation and documentation of appropriate firm oversight and control of recommendations by Independent Producers. Therefore, the Department has determined this narrower recordkeeping language satisfies ERISA section 408(a) and Code section 4975(c)(2). However, the Department intends to monitor compliance with the exemption closely and may, in the future, expand the recordkeeping requirement if appropriate. Any future amendments would be preceded by notice and an opportunity for public comment.

#### **Executive Order 12866 and 13563 Statement**

Executive Orders 12866<sup>40</sup> and 13563<sup>41</sup> direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must

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<sup>40</sup> 58 FR 51735 (Oct. 4, 1993).

<sup>41</sup> 76 FR 3821 (Jan. 21, 2011).



choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity.

Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,<sup>42</sup> entitled “Modernizing Regulatory Review,” section 3(f) of Executive Order 12866 defines a “significant regulatory action” as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case. It has been determined that this amendment is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an

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<sup>42</sup> 88 FR 21879 (Apr. 6, 2023).

assessment of the amendment’s costs, benefits, and transfers, and OMB has reviewed the rulemaking.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection requirements (ICRs) included in the proposed rulemaking. The Department received comments that addressed the burden estimates used in the analysis of the proposed rulemaking. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

ICRs are available at [RegInfo.gov](https://www.reginfo.gov/public/do/PRAMain) (<https://www.reginfo.gov/public/do/PRAMain>). Requests for copies of the ICR or additional information can be sent to the PRA addressee:

<b>By mail</b>	James Butikofer Office of Research and Analysis Employee Benefits Security Administration U.S. Department of Labor 200 Constitution Avenue NW Room N-5718 Washington, DC 20210
<b>By email</b>	<a href="mailto:ebsa.opr@dol.gov">ebsa.opr@dol.gov</a>

The OMB will consider all written comments that they receive within 30 days of publication of this notice. Written comments and recommendations for the information collection should be sent to <https://www.reginfo.gov/public/do/PRAMain>. Find this

particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

As discussed in detail above, PTE 84-24, as amended, will exclude compensation received as a result of the provision of investment advice from the existing relief provided in Section II, which will be redesignated as Section II(a) and add new Sections VI and -XI and redesignate the definitions as Section X, which will provide relief for investment advice limited to the narrow category of transactions in which an independent, insurance-only agent, or Independent Producer, provides investment advice to a Retirement Investor regarding an annuity or insurance contract. Additionally, as amended, the exemption requires the Independent Producers engaging in these transactions to adhere to certain Impartial Conduct Standards, including acting in the best interest of the Plans and IRAs when providing advice.

Financial institutions and investment professionals that engage in all other investment advice transactions, including those involving captive or career insurance agents, will rely on PTE 2020-02 to receive exemptive relief for investment advice transactions. PTE 84-24 will require certain new disclosures, annual retrospective reviews, and compliance with policy and procedure requirements. These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.<sup>43</sup>

### **1.1 Preliminary Assumptions**

In the analysis discussed below, a combination of personnel will perform the tasks

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<sup>43</sup> For a more detailed discussion of the marginal costs associated with the Amendments to PTE 84-24, refer to the Regulatory Impact Analysis (RIA) in the Notice of Proposed Rulemaking published elsewhere in today’s edition of the *Federal Register*.

associated with the ICRs at an hourly wage rate of \$165.29 for an Independent Producer, \$65.99 for clerical personnel, and \$165.71 for a legal professional, and \$133.24 for a senior executive.<sup>44</sup>

The Department does not have information on how many Retirement Investors, including Plan beneficiaries and participants and IRA owners, receive disclosures electronically from investment advice fiduciaries. For the purposes of this analysis in the Proposed Amendment, the Department assumed that the percent of Retirement Investors receiving disclosures electronically would be similar to the percent of Plan participants receiving disclosures electronically under the Department's 2002 and 2020 electronic disclosure rules, which was 3.9 percent at the time.<sup>45</sup> The Department received comment regarding this assumption presenting anecdotal evidence that the rate would be substantially lower, presumably due to the different characteristics of IRA and annuity consumers compared with actively working Plan participants. Accordingly, the Department revisited and revised the estimate to 71.8 percent of the disclosures sent to Retirement Investors being sent electronically, and the remaining 28.2 percent sent by mail.<sup>46</sup> Furthermore, the Department estimates that communications between businesses

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<sup>44</sup> Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebbsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

<sup>45</sup> The Department estimates that 58.3 percent of Retirement Investors receive electronic disclosures under the 2002 electronic disclosure safe harbor and that an additional 37.8 percent of Retirement Investors receive electronic disclosures under the 2020 electronic disclosure safe harbor. In total, the Department estimates 96.1 percent (58.3 percent + 37.8 percent) of Retirement Investors receive disclosures electronically.

<sup>46</sup> The Department used information from a Greenwald & Associates survey which reported that 84 percent of retirement plan participants find electronic delivery acceptable, and data from the National Telecommunications and Information Administration Internet Use Survey which indicated that 85.5 percent of adults 65 and over use e-mail on a regular basis, which is used as a proxy for internet fluency and usage. Therefore, the assumption is calculated as: (84% find electronic delivery acceptable) x (85.5% are internet fluent) = 71.8% are internet fluent and find electronic delivery acceptable.

(such as disclosures sent from one financial institution to another) will be 100 percent electronic.

The Department assumes any documents sent by mail would be sent by First Class Mail, incurring a postage cost of \$0.68 for each piece of mail.<sup>47</sup> Additionally, the Department assumes that documents sent by mail would incur a material cost of \$0.05 for each page.

## **1.2 Costs Associated with Satisfying Conditions for Transactions Described in Section III(a)-(f)**

Insurance agents and brokers, pension consultants, insurance companies, and investment company principal underwriters are expected to continue to take advantage of the exemption for transactions described in Section III(a)-(f). The Department estimates that 3,030 insurance agents and brokers, pension consultants, and insurance companies will continue to take advantage of the exemption for transactions described in Section III(a)-(f). This estimate is based on the following assumptions:

- According to the Insurance Information Institute, in 2022, there were 3,328 captive agents, which are insurance agents who work for only one insurance company.<sup>48</sup> The Insurance Information Institute also found that life and annuity insurers accounted for 47.4 percent of all net premiums for the insurance industry

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<sup>47</sup> United States Post Service, *First-Class Mail*, (2023), <https://www.usps.com/ship/first-class-mail.htm>.

<sup>48</sup> Insurance Information Institute, *A Firm Foundation: How Insurance Supports the Economy - Captives by State, 2021-2022*, <https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/a-50-state-commitment/captives-by-state> (last visited August 25, 2023).

in 2022.<sup>49</sup> Thus, the Department estimates there are 1,577 insurance agents and brokers relying on the existing provisions.<sup>50</sup>

- The Department expects that pension consultants would continue to rely on the existing PTE 84-24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.<sup>51</sup>

In the Department's 2016 Regulatory Impact Analysis, it estimated that 398 insurance companies wrote annuities.<sup>52</sup> The Department requested information on how the number of insurance companies underwriting annuities has changed since then but received no meaningful insight. The Department revisited the estimate and settled on a revised approach to bring the estimate more current. To form a basis for its assumption of insurance companies affected by the rule, the Department looked at the estimate of 398 insurance companies writing annuities used in the 2016 RIA. This assumption was based on data of insurance companies that reported receiving either individual or group annuity considerations in 2014.<sup>53</sup> Comparatively, there were 710 firms in the direct life insurance

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<sup>49</sup> Insurance Information Institute, *Facts + Statistics: Industry Overview- Insurance Industry at-a-Glance*, <https://www.iii.org/fact-statistic/facts-statistics-industry-overview>.

<sup>50</sup> The number of captive insurance agents is estimated as: 3,328 captive agents x 47.4% = 1,577 captive insurance agents serving the annuity market.

<sup>51</sup> Internal Department of Labor calculations based on the number of unique service providers listed as pension consultants on the 2021 Form 5500 Schedule C.

<sup>52</sup> This estimate is based on 2014 data from SNL Financial on life insurance companies that reported receiving either individual or group annuity considerations. (See Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.)

<sup>53</sup> Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 108-109 & 136-137, (April 2016), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>.

carrier industry in 2014.<sup>54</sup> By these measures, in 2014, insurance companies writing annuities accounted for 56 percent of the direct life insurance carrier industry.

To gain more insight into annuity underwriting, as it pertains to the life insurance industry, the Department looked to the evolution of premiums. In 2014, annuity premiums accounted for 55 percent of life and annuity insurance premiums.<sup>55</sup> By 2020, annuities had fallen to 48 percent of life and annuity insurance premiums. Between 2020 and 2022, the percentage remained constant around 48 percent.<sup>56</sup>

- While premiums are not directly related to the number of firms, the Department thinks it is reasonable to assume that the percent of life insurance companies underwriting annuities may have declined slightly since 2014. For the purposes of this analysis, the Department assumed that approximately half of life insurance companies underwrite annuities. According to the 2021 Statistics of U.S. Businesses release, the most recent data available, there were 883 firms in the direct life insurance carrier industry.<sup>57</sup> The Department estimates that 442 life insurance companies underwrite annuities and will be affected by the amendments.

In addition, investment company principal underwriters may rely on the exemption. In the Department's experience, investment company principal underwriters

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<sup>54</sup> United States Census Bureau, *2014 SUSB Annual Data Tables by Establishment Industry*, (December 2016).

<sup>55</sup> Insurance Information Institute, *Life/Annuity Insurance Income Statement, 2014-2018*, <https://www.iii.org/table-archive/222464/file>.

<sup>56</sup> Insurance Information Institute, *Facts + Statistics: Life Insurance*, (2024), <https://www.iii.org/fact-statistic/facts-statistics-life-insurance#Direct%20Premiums%20Written%20By%20Line,%20Life/Annuity%20Insurance,%202020-2022>.

<sup>57</sup> United States Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry*, (December 2023).

almost never use PTE 84-24. Therefore, the Department assumes that 20 investment company principal underwriters will engage in one transaction annually under PTE 84-24, 10 of which are assumed to service Title I Plans and 10 are assumed to service IRAs.

Further, the Department estimates that there are approximately 765,124 ERISA covered pension Plans<sup>58</sup> and approximately 67.8 million IRAs.<sup>59</sup> The Department estimates that 7.5 percent of Plans are new accounts or new financial advice relationships<sup>60</sup> and that 3 percent of Plans will use the exemption for covered transactions.<sup>61</sup> Based on these assumptions, the Department estimates that 1,727 Plans would be affected by the Final Amendments to PTE 84-24.<sup>62</sup>

The Department requested, but did not receive, comments on the assumptions used in the Proposed Amendment regarding annuity contracts affected by the rulemaking. However, in conjunction with updating its estimate of the number of Independent Producers the Department has revised its estimate of annual annuity transactions affected by the amendments to PTE 84-24, increasing the estimate from 52,449 to 500,000.

While there are several sources of information regarding total sales or size of the annuity market that are generally consistent, the same is not true for transaction activity, which can vary dramatically across quarters and between sources. To improve its estimate of annual annuity transactions affected by the amendments to PTE 84-24, the

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<sup>58</sup> Employee Benefits Security Administration, United States Department of Labor, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports*, Table A1 (2023; forthcoming).

<sup>59</sup> Cerulli Associates, *2023 Retirement-End Investor*, Exhibit 5.12. The Cerulli Report, (2023).

<sup>60</sup> EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

<sup>61</sup> In 2020, 7 percent of traditional IRAs were held by insurance companies. (See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), <https://www.ici.org/system/files/attachments/pdf/per27-01.pdf>.) This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.

<sup>62</sup> 765,124 plans x 7.525 percent of plans are new x 3 percent of plans with relationships with insurance agents or pension consultants  $\approx$  1,727 plans.



Department tried two approaches which both relied on LIMRA total fixed annuity sales data. 2023 LIMRA data indicates that 34 percent of fixed annuity sales were fixed-indexed annuities.<sup>63</sup> Assuming sales are proportionate to transactions and using data from the Retirement Income Journal which reported roughly 109,863 fixed-indexed annuity products were sold in the fourth quarter of 2021,<sup>64</sup> annualizing this number to 439,452 the Department estimates that roughly 838,000 additional fixed-rate annuities (other than fixed-indexed) were sold over the same period, for a total of 1.3 million fixed annuity transactions in 2021 using this approach.

The Department considered an alternative approach which estimated the number of annual transactions by dividing the total sales data from LIMRA described above by the average contract size as reported by the Retirement Income Journal, which is \$147,860. Using the same proportional methodology described above, this approach yields an estimate of roughly 1.9 million transactions.

Using this average of these estimates, the Department then applied the following assumptions to arrive at its final estimate. Using McKinsey data on annuity distribution channels, the Department assumes that third-party distribution channels account for 81 percent of the annuity sales volume.<sup>65</sup> The Department further assumes that 80 percent of these annuities are held in ERISA covered accounts or purchased with ERISA Plan

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<sup>63</sup> LIMRA, Preliminary U.S. Individual Annuity Sales Survey, Fourth Quarter 2023, (2023), <https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q4/4q-annuity-sales.pdf>.

<sup>64</sup> Pechter, K., Moore, S., Fixed Indexed Annuities: What's Changed (or Not) in Ten Years, (June, 2022), <https://retirementincomejournal.com/article/fixed-indexed-annuities-a-retrospective/>.

<sup>65</sup> McKinsey & Company, Redefining the future of life insurance and annuities distribution, (January, 2024), <https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution>.

assets<sup>66</sup> and that 49 percent of transactions will rely on investment advice.<sup>67</sup> This results in an estimate of roughly 500,000 ERISA covered fixed annuity transactions involving an Independent Producers providing advice to an investor.<sup>68</sup>

The Final Amendment excludes some entities currently relying on the exemption to receive compensation in connection with the provision of investment advice. As such, the Department acknowledges that the estimates discussed above may overestimate the entities able to rely on the exemption for relief for the transactions described in Section III(a)-(f).

### **1.2.1 Written Authorization from the Independent Plan Fiduciary**

Based on the estimates discussed above, the Department estimates that authorizing fiduciaries for 1,727 Plans and authorizing fiduciaries for 500,000 IRA transactions will be required to send an advance written authorization to the 3,040 financial institutions for IRAs<sup>69</sup> for exemptive relief for the transactions described in Section III(a)-(f).

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<sup>66</sup> The Department recognized that not all annuities sold are covered by this rulemaking, however data is not available to estimate what portion are covered with any sense of precision. Examples of non-covered transactions include use of non-retirement account funds to purchase an annuity and noncovered public sector plans being rolled into an annuity. The Department views 80% as a reasonable assumption as it includes most transactions while acknowledging that not all transactions are covered under this rulemaking. As a point of reference, each percentage point this assumption is changed results in a 1.25 percentage point change in the resulting estimate of ERISA covered transactions involving an Independent Producer providing advice to an investor.

<sup>67</sup> U.S. Retirement-End Investor 2023: Personalizing the 401(k) Investor Experience Fostering Comprehensive Relationships,” The Cerulli Report, Exhibit 6.04.

<sup>68</sup> The final estimate is the rounded average of the two approaches described above. The calculations are as follows:  $[\{(109,863 \text{ fixed-indexed contracts written x 4 quarters}) \div 34\% \text{ as the percentage of fixed-indexed to all fixed-rate contracts}\} \times 81\% \text{ sold by Independent Producers} \times 49\% \text{ sold using investment advice} \times 80\% \text{ ERISA covered transactions}\} + \{(148,860 \text{ avg. contract size} \div 95.6 \text{ billion in annual fixed-indexed sales}) \div 34\% \text{ as the percentage of fixed-indexed to all fixed-rate contracts}\} \times 81\% \text{ sold by Independent Producers} \times 49\% \text{ sold using investment advice} \times 80\% \text{ ERISA covered transactions}\} \div 2] \approx 501,013$ , rounded to 500,000.

<sup>69</sup> This includes 3,030 insurance agents and brokers, pension consultants, and insurance companies and 10 investment company underwriters servicing IRAs.

In the Plan universe, it is assumed that a legal professional will spend five hours per Plan reviewing the disclosures and preparing an authorization form. In the IRA universe, it is assumed that a legal professional working on behalf of the financial institution for IRAs will spend three hours drafting an authorization form for IRA holders to sign. This results in an hour burden of 17,756 hours with an equivalent cost of \$2.9 million.<sup>70</sup>

The Department expects that Plans and IRAs will send the written authorization through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the authorization.

In total, as presented in the table below, the written authorization requirement, under the new conditions of relief, is expected to result in an annual total hour burden of 17,756 hours with an equivalent cost of \$2,942,374.

<b>Table 1: Hour Burden and Equivalent Cost Associated with the Written Authorization</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	17,756	\$2,942,374	17,756	\$2,942,374
<b>Total</b>	<b>17,756</b>	<b>\$2,942,374</b>	<b>17,756</b>	<b>\$2,942,374</b>

### 1.2.2 Disclosure

Based on the estimates discussed above, the Department estimates that approximately 3,050 financial institutions<sup>71</sup> will continue to utilize the exemption for

<sup>70</sup> The burden is estimated as:  $(1,727 \text{ plans} \times 5 \text{ hours}) + (3,040 \text{ financial institutions} \times 3 \text{ hours}) \approx 17,756$  hours. A labor rate of approximately \$165.71 is used for a legal professional. The labor rate is applied in the following calculation:  $[(1,727 \text{ plans} \times 5 \text{ hours}) + (3,040 \text{ financial institutions} \times 3 \text{ hours})] \times \$165.71 \text{ per hour} \approx \$2,942,374$ .

<sup>71</sup> This includes 3,030 insurance agents and brokers, pension consultants, and insurance companies and 20 investment company underwriters servicing plans and IRAs.

exemptive relief for the transactions described in Section III(a)-(f) for each plan and IRA. In total, the Department estimates that 3,040 entities will prepare disclosures for plans and 3,040 entities would prepare disclosures for IRAs. The Department assumes that an in-house attorney will spend one hour of legal staff time drafting the disclosure for plans and one hour of legal staff time drafting the disclosure for IRAs. This results in an hour burden of approximately 6,080 hours with an equivalent cost of \$1,007,508.<sup>72</sup>

The Department expects that the disclosures for Plans will be distributed through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the disclosures. The Department lacks information on the proportion of the IRA contracts that will occur via Plan rollovers and therefore assumes all disclosures will be sent directly to the IRA customer. As previously stated, the Department estimates that 71.8 percent of disclosures for IRAs will be sent electronically at no additional burden. The remaining 28.2 percent of authorizations will be mailed. For paper copies, a clerical staff member is assumed to require two minutes to prepare and mail the required information to the IRA customer. This information will be sent to the 122,318 IRA customers plus the 10 investment company principal underwriters for IRAs entering into an agreement with an insurance agent, pension consultant, or mutual fund principal underwriter, and based on the above, the Department estimates that this

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<sup>72</sup> The burden is estimated as: 3,040 financial institutions x (1 hour for plans + 1 hour for IRAs)  $\approx$  6,080 hours. A labor rate of approximately \$165.71 is used for a legal professional. The labor rate is applied in the following calculation: [3,040 financial institutions x (1 hour for plans + 1 hour for IRAs)] x \$165.71 per hour  $\approx$  \$1,007,508.

requirement results in an hour burden of 1,150 hours with an equivalent cost of \$75,881.<sup>73</sup>

In total, as presented in the table below, providing the pre-authorization materials is expected to impose an annual total hour burden of 7,230 hours with an equivalent cost of \$1,083,388.

<b>Table 2: Hour Burden and Equivalent Cost Associated with the Disclosure</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	6,080	\$1,007,508	6,080	\$1,007,508
Clerical	1,150	\$75,881	1,150	\$75,881
<b>Total</b>	<b>7,230</b>	<b>\$1,083,388</b>	<b>7,230</b>	<b>\$1,083,388</b>

The Department assumes that this information will include seven pages with 71.8 percent of disclosures distributed electronically through traditional electronic methods at no additional burden, and the remaining 28.2 percent of disclosures will be mailed. Accordingly, the Department estimates an annual cost burden of approximately \$35,531.<sup>74</sup>

<b>Table 3: Material and Postage Cost Associated with the Disclosure</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
	<b>Pages</b>	<b>Equivalent Burden Cost</b>	<b>Pages</b>	<b>Equivalent Burden Cost</b>
Material and Postage Cost	7	\$35,531	7	\$35,531
<b>Total</b>	<b>7</b>	<b>\$35,531</b>	<b>7</b>	<b>\$35,531</b>

<sup>73</sup> The burden is estimated as: [(122,318 IRAs + 10 investment company principal underwriters for IRAs x 28.2 percent paper) x (2 minutes ÷ 60 minutes)] ≈ 1,150 hours. A labor rate of \$65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [(122,318 IRAs + 10 investment company principal underwriters for IRAs x 28.2 percent paper) x (2 minutes ÷ 60 minutes)] x \$65.99 ≈ \$75,881.

<sup>74</sup> The material cost is estimated as: [(122,318 IRA authorizations + 10 investment company principal underwriters for IRAs) x 28.2 percent paper] x [\$0.68 + (\$0.05 x 7 pages)] = \$35,531.

### **1.3 Costs Associated with Satisfying Conditions for Transactions Described in Section III(g)**

The amendment provides relief for Independent Producers that provide fiduciary investment advice and engage in the following transactions, including as part of a rollover, as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder: (1) The receipt, directly or indirectly, by an Independent Producer of reasonable compensation; and (2) the sale of a non-security annuity contract or other insurance product that does not meet the definition of “security” under Federal securities laws. The Department expects that the Insurers covered by this Final Amendment will be insurance companies that directly write annuities.

The amendments outline conditions pertaining to disclosure, policies and procedures, and retrospective reviews that need to be satisfied to rely on the exemption. These conditions are tailored to protect Retirement Investors from the specific conflicts that arise for Independent Producers when providing investment advice to Retirement Investors regarding the purchase of an annuity. The Department received several comments suggesting that its estimate for the number of Independent Producers was too low. While commenters provided estimates that were substantially higher, the commenters did not provide any documentation or basis for their suggestions. In response, the Department analyzed employment data from the March 2023 Current Population Survey to identify the number of self-employed workers in the “Finance and Insurance” industry whose occupation was listed as “Insurance Sales Agents.” This identified 86,410 self-employed insurance sales agents in the Finance and Insurance

industry.<sup>75</sup> While the Department assumes that not all of these independent producers will sell annuities, it utilizes this number while recognizing that it likely reflects an over-estimate.

Insurance companies are primarily regulated by states and no single regulator maintains a nationwide count of insurance companies. Although state regulators track insurance companies, the total number of insurance companies cannot be calculated by aggregating individual state totals, because individual insurance companies often operate in multiple states. As mentioned above, the Department has updated its estimate of the number of insurance companies writing annuities for the 398 presented in the 2016 Regulatory Impact Analysis, to 442 in this rulemaking.

Some of these insurance companies may not sell any annuity contracts to IRAs or plans. Because of these data limitations, the Department includes all 442 insurance companies in its cost estimate, though this likely represents an upper bound.

Insurance companies sell insurance products through (1) captive insurance agents that work for an insurance company as employees or as independent contractors who exclusively sell the insurance company's products and (2) independent agents who sell multiple insurance companies' products. Independent agents may contract directly with an insurance company or through an intermediary. In recent years, the market has seen a shift away from captive distribution toward independent distribution.<sup>76</sup>

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<sup>75</sup> EBSA Tabulations based off the March 2023 Current Population Survey

<sup>76</sup> Ramnath Balasubramanian, Rajiv Dattani, Asheet Mehta, & Andrew Reich, *Unbundling Value: How Leading Insurers Identify Competitive Advantage*, McKinsey & Company, (June 2022), <https://www.mckinsey.com/industries/financial-services/our-insights/unbundling-value-how-leading-insurers-identify-competitive-advantage>; Sheryl Moore, *The Annuity Model Is Broken*, Wink Intel, (June 2022), <https://www.winkintel.com/2022/06/the-annuity-model-is-broken-reprint/>.

The Department does not have strong data on the number of insurance companies using captive agents or Independent Producers. In the Proposed Amendment, the Department assumed that the number of companies selling annuities through captive or independent distribution channels would be proportionate to the sales completed by each respective channel. The Department requested comments on this assumption but did not receive any directly addressing it. In the Proposed Amendment, the Department based its estimate on the percent of sales completed by independent agents and career agents in the individual annuities distribution channel. This resulted in an estimate that approximately 46 percent of sales are done through captive distribution channels and 54 percent of sales are done through independent distribution channels.

One source stated that 81 percent of individual annuities sales are conducted by non-captive, or independent, agents.<sup>77</sup> The Department assumes that the percent of companies selling annuities through an independent distribution channel is proportionate to the percent of sales conducted through an independent distribution channel. The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel.

Also, the Department recognizes that some insurance companies use multiple distribution channels, though the Department did not receive any comment on how common the use of multiple distribution channels is. Looking at the 10 insurance companies with highest annuity sales in 2022, one relied on captive distribution channels,

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<sup>77</sup> This study considers sales by independent agents, independent broker-dealers, national broker-dealers, and banks to be sales in the independent distribution channel, while sales by career agents and direct means are considered to be in the captive distribution channel. (See Ramnath Balasubramanian, Christian Boldan, Matt Leo, David Schiff, & Yves Vontobel, *Redefining the Future of Life Insurance and Annuities Distribution*, McKinsey & Company (January 2024), <https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution>.)



seven relied on independent distribution channels, and two relied on both.<sup>78</sup> Accordingly, most insurance companies appear to primarily use either captive distribution or independent distribution. However, any entity using a captive insurance channel, or using both captive and independent channels, likely has already incurred most of the costs of this rulemaking under PTE 2020-02. Costs are estimated by assuming that entities using a third-party distribution system, even if they also use captive agents, will incur costs for the first time under amended PTE 84-24. This assumption leads to an overestimation of the cost incurred by insurance companies.

Following from this assumption, the Department estimates that 84 insurance companies distribute annuities through captive channels and will rely on PTE 2020-02 for transactions involving investment advice. Further, the Department estimates that 358 insurance companies distribute annuities through independent channels and will rely on PTE 84-24 for transactions involving investment advice.<sup>79</sup>

The Department estimates that 70 of the 442 insurance companies are large entities.<sup>80</sup> In the Proposed Amendment, the Department requested data on how distribution channels differed by size of insurance company but did not receive any comments. In the absence of data relating to the distribution channel differences by firm size, the Department uses the aggregate rate in its estimates. That is, the Department assumes that 19 percent of large insurance companies (13 insurance companies) sell

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<sup>78</sup> Annuity sales are based on LIMRA, *U.S. Individual Fixed Annuity Sales Breakouts, 2022*, <https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2022/q4/2022-ye--fixed-breakout-results.pdf>. Information on distribution channels is based on review of insurance company websites, SEC filings of publicly held firms, and other publicly available sources.

<sup>79</sup> The number of insurance companies using captive distribution channels is estimated as  $442 \times 81\% \approx 358$  insurance companies. The number of insurance companies using independent distribution channels is estimated as  $442 - 358 \approx 84$  insurance companies.

<sup>80</sup> LIMRA estimates that, in 2016, 70 insurers had more than \$38.5 million in sales. See LIMRA Secure Retirement Institute, *U.S. Individual Annuity Yearbook: 2016 Data*, (2017).

annuities through captive distribution channels, while the remaining 71 of the 84 insurance companies distributing annuities through captive channels are assumed to be small.<sup>81</sup> Additionally, 81 percent of large insurance companies (57 insurance companies) sell annuities through independent distribution channels, while the remaining 301 of the 358 insurance companies selling annuities through independent distribution channels are assumed to be small.<sup>82</sup>

### **1.3.1 Disclosures**

As discussed above, the Department assumes that 86,410 Independent Producers service the retirement market, selling the products of 358 insurance companies. For more generalized disclosures, the Department assumes that insurance companies will prepare and provide disclosures to Independent Producers selling their products. However, some of the disclosures are tailored specifically to the Independent Producer and-or the transaction. The Department assumes that these disclosures will need to be prepared by the Independent Producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures; however, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services. The costs for the intermediary to prepare the disclosure may result in an increase in commission. The

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<sup>81</sup> The number of large insurance companies using a captive distribution channel is estimate as: 70 large insurance companies x 19%  $\approx$  13 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 84 insurance companies – 13 large insurance companies  $\approx$  71 small insurance companies.

<sup>82</sup> The number of large insurance companies using an independent distribution channel is estimate as: 70 large insurance companies x 81%  $\approx$  57 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 358 insurance companies – 57 large insurance companies  $\approx$  301 small insurance companies.

Department expects that this increase in commission will not exceed the cost of preparing the disclosure in house.

### **1.3.1.1 Written Acknowledgement that the Independent Producer is a Fiduciary by the Independent Producer**

The Department is including a model statement in the preamble to PTE 84-24 that details what should be included in a fiduciary acknowledgment for Independent Producers.<sup>83</sup> The Department assumes that the time associated with preparing the disclosures will be minimal. Further, these disclosures are expected to be uniform in nature. Accordingly, the Department estimates that these disclosures will not take a significant amount of time to prepare.

Due to the nature of Independent Producers, the Department assumes that most Insurers will make draft disclosures available to Independent Producers pertaining to their fiduciary status. However, the Department expects that a small percentage of Independent Producers may draft their own disclosures. The Department assumes that a legal professional for all 358 Insurers and an insurance sales agent for 5 percent of Independent Producers, or 4,320 Independent Producers, will spend 30 minutes to produce a written acknowledgement in the first year. This results in an estimated burden of approximately 2,339 hours with an equivalent cost of \$386,657 in the first year.<sup>84</sup>

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<sup>83</sup> 85 FR 82798, 82827 (Dec. 18, 2020). The model statement was also included in Frequently Asked Questions in April 2021, New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions, Q13, (April 2021), <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf>.

<sup>84</sup> The burden is estimated as: [(358 Insurers + 4,320 Independent Producers) x (30 minutes ÷ 60 minutes)] ≈ 2,339 hours. A labor rate of approximately \$165.71 is used for a legal professional and \$165.29 is used for an independent producer. The labor rates are applied in the following calculation: [(358 Insurers x (30 minutes ÷ 60 minutes)) x \$165.71] + [(4,320 Independent Producers x (30 minutes ÷ 60 minutes)) x \$165.71] ≈ \$386,657.

<b>Table 4: Hour Burden and Equivalent Cost Associated with the Fiduciary Acknowledgement</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	179	\$29,630	0	\$0
Insurance Sales Agent	2,160	\$357,026	0	\$0
<b>Total</b>	<b>2,339</b>	<b>\$386,657</b>	<b>0</b>	<b>\$0</b>

### 1.3.1.2 Written Statement of the Care Obligation and Loyalty Obligation

As discussed above, the Department assumes that 86,410 Independent Producers service the retirement market, selling the products of 358 Insurers. Due to the nature of Independent Producers, the Department assumes that most Insurers will make draft disclosures available to Independent Producers, pertaining to the annuities they offer. The Department assumes that an in-house attorney for all 358 Insurers and an insurance sales agent for 5 percent of Independent Producers, or 4,320 Independent Producers, will spend 60 minutes to prepare the statement in the first year. This results in a burden of 4,678 hours with an equivalent cost of \$773,313 in the first year.<sup>85</sup>

<b>Table 5: Hour Burden and Equivalent Cost Associated with the Written Statement of the Best Interest Standard of Care Owed</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	358	\$59,260	0	\$0
Insurance Sales Agent	4,320	\$714,053	0	\$0
<b>Total</b>	<b>4,678</b>	<b>\$773,313</b>	<b>0</b>	<b>\$0</b>

### 1.3.1.3. Written Description of All Material Facts

<sup>85</sup> The burden is estimated as: (358 Insurers + 4,320 Independent Producers) x 1 hour ≈ 4,678 hours. A labor rate of approximately \$165.71 is used for a legal professional and \$165.29 for an independent producer. The labor rates are applied in the following calculation: [(358 Insurers x 1 hour x \$165.71) + (4,320 Independent Producers x 1 hour x \$165.29)] = \$773,313.

As discussed above, the Department assumes that 86,410 Independent Producers service the retirement market, selling the products of 358 insurance companies. For disclosures tailored more specifically to an individual Independent Producer, the Department assumes that the disclosure will need to be prepared by the Independent Producer. The Department recognizes that many Independent Producers may not have the internal resources to prepare such disclosure. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation will be covered by commission retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost back to the Independent Producer.

Accordingly, the Department assumes that all 86,410 Independent Producers in this analysis would need to prepare the disclosure. The Department assumes that, for each of these Independent Producers, an attorney will spend three hours and five hours of legal staff time drafting the written description for small and large entities, respectively. This results in an hour burden of 260,967 hours with an equivalent cost of \$43,244,858 in the first year.<sup>86</sup>

<b>Table 6: Hour Burden and Equivalent Cost Associated with the All Material Facts</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	260,967	\$43,244,858	0	\$0
<b>Total</b>	<b>260,967</b>	<b>\$43,244,858</b>	<b>0</b>	<b>\$0</b>

<sup>86</sup> The burden is estimated as: [(85,451 small independent producers x 3 hours) + (869 large independent producers x 5 hours)] ≈ 260,967 burden hours. Applying the labor rate of \$165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(85,451 small independent producers x 3 hours) + (869 large independent producers x 5 hours)] x \$165.71 = \$43,244,858.

**1.3.1.4 Before Recommending an Annuity, Engaging in a Rollover, or Making a Recommendation to a Plan Participant as to the Post-Rollover Investment of Assets Currently Held in a Plan, the Independent Producer Must Document Its Conclusions as to Whether the recommendation Is in the Investor's Best Interest**

The amendment requires an Independent Producer to provide a disclosure to investors that documents their consideration as to whether a recommended annuity or rollover is in the Retirement Investor's best interest. Due to the nature of this disclosure, the Department assumes that the content of the disclosure will need to be prepared by the Independent Producer for each transaction. The Department recognizes that some may rely on intermediaries in the distribution channel, and some may seek external legal support to assist with drafting the disclosures. However, the Department expects that most Independent Producers will prepare the disclosure themselves.

For the purposes of this analysis, and as developed in a preceding section, the Department estimates that 500,000 Retirement Investors will receive documentation on whether the recommended annuity is in their best interest each year.

The Department assumes that, for each of these Retirement Investors, an Independent Producer will spend 30 minutes of their time drafting the documentation. This results in an estimated hour burden of 250,000 hours with an equivalent cost of \$41.3 million annually.<sup>87</sup>

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<sup>87</sup> The burden is estimated as: 500,000 rollovers x (30 minutes ÷ 60 minutes) = 250,000 hours. A labor rate of approximately \$165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [500,000 rollovers x (30 minutes ÷ 60 minutes)] x \$165.29 = \$41,322,500.

<b>Table 7: Hour Burden and Equivalent Cost Associated with the Rollover Documentation</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Insurance Sales Agent	250,000	\$41,322,500	250,000	\$41,322,500
<b>Total</b>	<b>250,000</b>	<b>\$41,322,500</b>	<b>250,000</b>	<b>\$41,322,500</b>

### **1.3.1.5 Mailing Cost for Disclosures Sent from Independent Producers to Retirement Investors**

As discussed at the beginning of the cost section, the Department assumes that 28.2 percent of disclosures would be mailed. Accordingly, of the estimated 500,000 affected Retirement Investors, 141,000 Retirement Investors are estimated to receive paper disclosures.<sup>88</sup> The Department further estimates that 10% of these Retirement Investors, or 14,100, will request a second, more comprehensive disclosure related to the Independent Producer's compensation. For paper copies, the Independent Producer is assumed to require two minutes to prepare and mail the primary disclosure packet to the Retirement Investors, and 10 minutes to prepare and mail the second compensation disclosure, upon request. This requirement results in an estimated hour burden of 13,503 hours with an equivalent cost of \$2,231,966.<sup>89</sup>

<b>Table 8: Hour Burden and Equivalent Cost Associated with Preparing the Disclosures</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Insurance Sales Agent	13,503	\$2,231,966	13,503	\$2,231,966
<b>Total</b>	<b>13,503</b>	<b>\$2,231,966</b>	<b>13,503</b>	<b>\$2,231,966</b>

<sup>88</sup> This is estimated as: (500,000 Retirement Investors x 28.2%) = 141,000 paper disclosures.

<sup>89</sup> This is estimated as: [141,000 paper disclosures x (2 minutes ÷ 60 minutes)] + [14,100 paper disclosures x (10 minutes) ÷ 60 minutes] = 13,503 hours. A labor rate of \$165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [141,000 paper disclosures x (2 minutes ÷ 60 minutes)] + [14,100 paper disclosures x (10 minutes ÷ 60 minutes)] x \$165.29 = \$2,231,966.

The Department assumes that this information will include seven pages, and that a second, optional compensation disclosure will be two pages, resulting in an annual cost burden for material and paper costs of \$156,228.<sup>90</sup>

<b>Table 9: Material Cost Associated with the General Disclosures</b>				
<b>Activity</b>	<b>Year 1</b>		<b>Subsequent Years</b>	
	<b>Pages</b>	<b>Equivalent Burden Cost</b>	<b>Pages</b>	<b>Equivalent Burden Cost</b>
General Disclosures	7	\$145,230	7	\$145,230
Compensation Disclosure	2	\$10,998	2	\$10,998
<b>Total</b>	<b>9</b>	<b>\$156,228</b>	<b>9</b>	<b>\$156,228</b>

Additionally, Independent Producers will be required to send the documentation to the Insurer. The Department expects that such documentation will be sent electronically and result in a de minimis burden.

### **1.3.2 Policies and Procedures**

#### **1.3.2.1 Insurers Must Establish, Maintain, and Enforce Written Policies and Procedures for the Review of Each Recommendation Before an Annuity is Issued to a Retirement Investor, and the Insurer Review its Policies and Procedures at Least Annually.**

As discussed above, the Department estimates that 358 Insurers will need to meet this requirement, of which 301 are estimated to be small and 57 are estimated to be large.<sup>91</sup> The Department assumes that, for each large insurance company, an in-house

<sup>90</sup> This is estimated as: {141,000 rollovers resulting in a paper disclosure x [\$0.68 postage + (\$0.05 per page x 7 pages)]} + {14,100 secondary disclosures x [\$0.68 postage + (\$0.05 per page x 2 pages)]} = \$156,228.

<sup>91</sup> The number of large insurance companies using an independent distribution channel is estimated as: (70 large insurance companies x 81%) ≈ 57 insurance companies. The number of small insurance companies using an independent distribution channel is estimated as: (358 insurance companies – 57 large insurance companies) ≈ 301 small insurance companies.



attorney will spend 40 hours of legal staff time drafting the written description, and for each small insurance company, an in-house attorney will spend 20 hours of legal staff time. This results in an hour burden of 8,286 hours with an equivalent cost of \$1,373,123 in the first year.<sup>92</sup>

In the following years, the Department assumes for each insurance company, an in-house attorney will spend five hours of legal staff time reviewing the policies and procedures. This results in an hour burden of 1,788 hours with an equivalent cost of \$296,302 in subsequent years.<sup>93</sup>

The Final Amendment also requires Insurers to provide their complete policies and procedures to the Department upon request. Based upon prior experience, the Department estimates that it will request three policies and procedures in the first year and one in subsequent years for entities relying on PTE 84-24.<sup>94</sup> The resulting cost is estimated at \$49 in the first year, and \$17 in subsequent years for a clerical worker to prepare and fulfil the request.<sup>95</sup>

Insurers will also be required to review each of the Independent Producer's recommendations before an annuity is issued to a Retirement Investor to ensure

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<sup>92</sup> This is estimated as:  $[(301 \text{ small insurance companies} \times 20 \text{ hours}) + (57 \text{ large insurance companies} \times 40 \text{ hours})] \approx 8,286 \text{ hours}$ . A labor rate of \$165.71 is used for a legal professional. The labor rate is applied in the following calculation:  $[(301 \text{ small insurance companies} \times 20 \text{ hours}) + (57 \text{ large insurance companies} \times 40 \text{ hours})] \times \$165.71 \approx \$1,373,123$ .

<sup>93</sup> This is estimated as:  $358 \text{ insurance companies} \times 5 \text{ hours} \approx 1,788 \text{ hours}$ . A labor rate of \$165.71 is used for a legal professional. The labor rate is applied in the following calculation:  $(358 \text{ insurance companies} \times 5 \text{ hours}) \times \$165.71 \approx \$296,302$ .

<sup>94</sup> The number of requests in the first year is estimated as:  $358 \text{ Insurers} \times (165 \text{ requests in PTE 2020-02} \div 18,632 \text{ Financial Institutions in PTE 2020-02}) \approx 3 \text{ requests}$ . The number of requests in subsequent years is estimated as:  $358 \text{ insurance companies} \times (50 \text{ requests in PTE 2020-02} \div 18,632 \text{ Financial Institutions in PTE 2020-02}) \approx 1 \text{ request}$ .

<sup>95</sup> The burden in the first year is estimated as:  $3 \text{ requests} \times (15 \text{ minutes} \div 60 \text{ minutes}) = 0.75 \text{ hours}$ . A labor rate of \$65.99 is used for a clerical worker. The labor rate is applied in the following calculation:  $3 \text{ requests} \times (15 \text{ minutes} \div 60 \text{ minutes}) \times \$65.99 = \$49.49$ . The burden in subsequent years is estimated as:  $1 \text{ request} \times (15 \text{ minutes} \div 60 \text{ minutes}) = 0.25 \text{ hours}$ . A labor rate of \$65.99 is used for a clerical worker. The labor rate is applied in the following calculation:  $1 \text{ request} \times (15 \text{ minutes} \div 60 \text{ minutes}) \times \$65.99 = \$16.50$ .

compliance with the Impartial Conduct Standards and other conditions of this exemption. This requirement is consistent with the language in NAIC’s 2010 model regulation 275, Suitability in Annuity Transactions,<sup>96</sup> and the 2020 revisions to NAIC Model Regulation 275, which expanded the suitability standard to a best interest standard.<sup>97</sup> Most states have adopted some form of the NAIC Model Regulation 275.<sup>98</sup> Accordingly, the Department expects that Insurers will be prepared to undergo this review and approval process. The Department assumes that it will take a financial manager, with a labor rate of \$198.25, an average of 30 minutes to review and provide a decision to the Independent Producer on rollover recommendations. Therefore, the Department estimates that this will have an equivalent cost of \$49.6 million annually.<sup>99</sup> The combined estimated burden associated with policies and procedures is presented below in Table 10.

Activity	Year 1		Subsequent Years	
	Burden Hours	Equivalent Burden Cost	Burden Hours	Equivalent Burden Cost
Legal	8,286	\$1,373,123	1,788	\$296,302
Clerical	0.75	\$49	0.25	\$17
Financial Manager	250,000	\$49,562,500	250,000	\$49,562,500
<b>Total</b>	<b>258,287</b>	<b>\$50,935,672</b>	<b>251,788</b>	<b>\$49,858,818</b>

<sup>96</sup> NAIC Model Suitability Regulations, § 6(F)(1)(d) (2010), <https://naic.soutrnglobal.net/Portal/Public/en-GB/RecordView/Index/25201>.

<sup>97</sup> NAIC Model Suitability Regulations, § 6(C)(1)(d) (2020), <https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf>.

<sup>98</sup> As of October of 2021, only three states had not adopted some form of NAIC Model Regulation 275. (See A.D. Banker & Company, *Annuity Best Interest State Map and FAQs*, (October 2021), <https://blog.adbanker.com/annuity-best-interest-state-map-and-faqs>).

<sup>99</sup> The burden is calculated as: 500,000 transactions x (30 minutes ÷ 60 minutes) ≈ 250,000 hours. A labor rate of \$198.25 is used for a financial manager. The labor rate is applied in the following calculation: [500,000 transactions x (30 minutes ÷ 60 minutes)] x \$198.25 ≈ \$49,562,500.

### **1.3.3 Retrospective Review**

The Final Amendment requires Insurers to conduct a retrospective review at least annually. The review will be required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review will be required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. Insurers will also be required to provide the Independent Producer with the underlying methodology and results of the retrospective review. For the Final Amendment, the Department has stated that Insurers may use sampling in their review of an Independent Producer's transactions so long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

#### **1.3.3.1 The Insurance Company Must Conduct a Retrospective Review, at Least Annually, for Each Independent Producer that Sells the Insurance Company's Annuity Contracts**

The Department estimates that 358 Insurers will need to meet this requirement. For this requirement the information collection is documenting the findings of the retrospective review. The Department lacks data on, for a given insurance company, how many Independent Producers, on average, sell their annuities. For the purposes of this analysis, the Department assumes that, on average, each Independent Producer sells the products of three Insurers. From each of these Insurers, they may sell multiple products. As such, the Department assumes that each year, insurance companies would need to

prepare a total of 259,230 retrospective reviews,<sup>100</sup> or on average, each insurance company will need to prepare approximately 725 retrospective reviews.<sup>101</sup> The Department assumes that, for each Independent Producer selling an insurance company's products, a legal professional at the insurance company would spend one hour time, on average, drafting the retrospective review. This results in an estimated hour burden of 259,230 hours with an equivalent cost of \$43.0 million.<sup>102</sup>

<b>Table 11: Hour Burden and Equivalent Cost Associated with the Retrospective Review</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	259,230	\$42,957,003	259,230	\$42,957,003
<b>Total</b>	<b>259,230</b>	<b>\$42,957,003</b>	<b>259,230</b>	<b>\$42,957,003</b>

### **1.3.3.2 Certification by the Senior Executive Officer of the Insurance Company**

The Department assumes it will take a Senior Executive Officer four hours to review and certify a report which details the retrospective review. This results in an annual hour burden of 1,430 hours with an equivalent cost of \$190,594.<sup>103</sup>

<sup>100</sup> This is estimated as: 86,410 Independent Producers x 3 insurance companies covered  $\approx$  259,230 retrospective reviews.

<sup>101</sup> This is estimated as: 259,230 retrospective reviews  $\div$  358 entities  $\approx$  725 retrospective reviews, on average.

<sup>102</sup> This is estimated as: 259,230 retrospective reviews x 1 hour  $\approx$  259,230 hours. A labor rate of \$165.71 is used for a legal professional. The labor rate is applied in the following calculation: (259,230 retrospective reviews x 1 hour) x \$165.71  $\approx$  \$42,957,003.

<sup>103</sup> This is estimated as: 358 insurance companies x 4 hours  $\approx$  1,430 hours. A labor rate of \$133.24 is used for a Senior Executive Officer. The labor rate is applied in the following calculation: (358 insurance companies x 4 hours) x \$133.24  $\approx$  \$190,594.

<b>Table 12: Hour Burden and Equivalent Cost Associated with the Certification by the Senior Executive Officer</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Senior Executive Officer	1,430	\$190,594	1,430	\$190,594
<b>Total</b>	<b>1,430</b>	<b>\$190,594</b>	<b>1,430</b>	<b>\$190,594</b>

### **1.3.3.3 The Insurance Company Provides to the Independent Producer the Methodology and Results of the Retrospective Review**

The Department assumes that the insurance company would provide the methodology and results electronically. The Department estimates that it would take clerical staff five minutes to prepare and send each of the estimated 259,230 retrospective reviews. This results in an annual hour burden of approximately 21,603 hours with an equivalent cost of \$1,425,549.<sup>104</sup> The Department expects that the results would be provided electronically and thus does not expect there to be any material costs with providing Independent Producers with the retrospective review.

<b>Table 13: Hour Burden and Equivalent Cost Associated with the Provision of the Results of the Retrospective Review</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Clerical	21,603	\$1,425,549	21,603	\$1,425,549
<b>Total</b>	<b>21,603</b>	<b>\$1,425,549</b>	<b>21,603</b>	<b>\$1,425,549</b>

<sup>104</sup>This is estimated as: 259,230 retrospective reviews x (5 minutes ÷ 60 minutes) ≈ 21,603 hours. A labor rate of \$65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [259,230 retrospective reviews x (5 minutes ÷ 60 minutes)] x \$65.99 ≈ \$1,425,549.

### 1.3.4 Self-Correction

The amendment requires an Independent Producer that chooses to use the self-correction provision of the exemption to notify the Insurer of any corrective actions taken. As discussed above, the Insurer must discuss corrective actions in the retrospective review. The Department does not have sufficient information to estimate how often violations will occur, or on how often Independent Producers will choose to use the self-correction provisions of the amendment. However, the Department expects that such violations and corrections will be rare. For illustration, the Department assumes that one percent of transactions will result in self-correction, this would result in 5,000 notifications of self-correction being sent by Independent Producers to Insurers. The Department estimates that it will take an Independent Producer 30 minutes, on average, to draft and send a notification to the Insurer, resulting in an estimated burden of 2,500 hours and an annual cost of \$413,225.<sup>105</sup>

The self-correction provisions of this rulemaking allow entities to correct violations of the exemption in certain circumstances, when either (1) the Independent Producer has refunded any charge to the Retirement Investor or (2) the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. Without the self-correction provisions, an Independent Producer would be required to report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).

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<sup>105</sup> The burden is estimated as: [500,000 transaction x 1% of transactions resulting in self-correction x (30 minutes ÷ 60 minutes)] ≈ 2,500 hours. A labor rate of \$165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [500,000 transaction x 1% of transactions resulting in self-correction x (30 minutes ÷ 60 minutes)] x \$165.29 ≈ \$413,225.

<b>Table 14: Hour Burden and Equivalent Cost Associated with Self-Correction</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Clerical	2,500	\$413,225	2,500	\$413,225
<b>Total</b>	<b>2,500</b>	<b>\$413,225</b>	<b>2,500</b>	<b>\$413,225</b>

### 1.3.5 Recordkeeping Requirement

The Final Amendment incorporates a new provision in PTE 84-24 that is similar to the recordkeeping provision in PTE 2020-02. In the Proposed Amendment, the Department proposed a broader recordkeeping requirement.

For this analysis, the Department considers the cost for Insurers and Independent Producers complying with the recordkeeping requirements. The Department estimates that the additional time needed to maintain records to be consistent with the exemption would take two hours for an Independent Producer and two hours for a legal professional at an insurer, resulting in an hour burden of 173,535 hours and an equivalent cost of \$28.7 million.<sup>106</sup>

<b>Table 14: Hour Burden and Equivalent Cost Associated with the Recordkeeping Requirement</b>				
	<b>Year 1</b>		<b>Subsequent Years</b>	
<b>Activity</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>	<b>Burden Hours</b>	<b>Equivalent Burden Cost</b>
Legal	173,535	\$28,683,939	173,535	\$28,683,939
<b>Total</b>	<b>173,535</b>	<b>\$28,683,939</b>	<b>173,535</b>	<b>\$28,683,939</b>

### 1.4 Overall Summary

These paperwork burden estimates are summarized as follows:

<sup>106</sup> This is estimated as: (86,410 Independent Producers + 358 insurance companies) x 2 hours ≈ 173,535 hours. A labor rate of \$165.29 is used for an Independent Producer and a rate of \$165.71 for an insurance company legal professional. The labor rate is applied in the following calculation: [(86,410 Independent Producers x 2 hours x \$165.29) + (358 insurance companies x 2 hours x \$165.71)] ≈ \$28,683,939.

*Type of Review:* Revision of an Existing Collection.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters.

*OMB Control Number:* 1210-0158.

*Affected Public:* Businesses or other for-profits; not for profit institutions.

*Estimated Number of Respondents:* 89,818.

*Estimated Number of Annual Responses:* 1,498,615.

*Frequency of Response:* Initially, annually, when engaging in exempted transaction.

*Estimated Total Annual Burden Hours:* 1,093,403 hours.

*Estimated Total Annual Burden Cost:* \$191,759.

### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA)<sup>107</sup> imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.<sup>108</sup> Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the *Federal Register*, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a

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<sup>107</sup> 5 U.S.C. 601 *et seq.*

<sup>108</sup> 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.



significant economic impact on a substantial number of small entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the *Federal Register*.

### **Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995<sup>109</sup> requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this amended exemption does not include any Federal mandate that will result in such expenditures.

### **Federalism Statement**

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have “substantial direct effects” on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of

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<sup>109</sup> Pub. L. 104-4, 109 Stat. 48 (Mar. 22, 1995).

Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and previously in this preamble,<sup>110</sup> there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that “ERISA leaves room for complementary or dual federal or state regulation” of insurance.<sup>111</sup> The Department designed the final Regulation and exemptions to complement State insurance laws.<sup>112</sup>

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this class exemption has federalism implications because it has no substantial direct effect on the States, on the relationship between the National government and the

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<sup>110</sup> See “The Department’s Role Related to the Sale of Insurance Products to Retirement Investors,” supra.

<sup>111</sup> See *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 98 (1993).

<sup>112</sup> See *BancOklahoma Mortg. Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc. v. Lexington Ins. Co.*, 638 F. Supp. 2d 1317 (N.D. Fla. 2009); see also *U.S. v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to “impair” a State law is to hinder its operation or “frustrate [a] goal of that law.” *Humana Inc. V. Forsyth*, 525 U.S. 299, 308 (1999).

States, or on the distribution of power and responsibilities among the various levels of government.

### **General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and/or Code section 4975(c)(2) does not relieve a fiduciary, or other Party in Interest with respect to a Plan or IRA, from certain other provisions of ERISA and the Code, including but not limited to any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge their duties respecting the Plan solely in the interests of the participants and beneficiaries of the Plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirements of Code section 401(a), including that the Plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries;

(2) In accordance with ERISA section 408(a) and Code section 4975(c)(2), and based on the entire record, the Department finds that this exemption is administratively feasible, in the interests of Plans, their participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the Plan and IRA owners;

(3) The Final Amendment is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The Final Amendment is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and

transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

The Department is granting the following amendments to the class exemption on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).<sup>113</sup>

#### **Amendment to PTE 84-24**

##### **Section I—Retroactive Application**

The restrictions of ERISA sections 406(a)(1)(A) through (D) and 406(b) and the taxes imposed by Code section 4975 do not apply to any of the transactions described in section III of this exemption in connection with purchases made before November 1, 1977, if the conditions set forth in section IV are met.

##### **Section II—Prospective Application**

(a) Except for the receipt of reasonable compensation and/or the sale of any property as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder, the restrictions of ERISA sections 406(a)(1)(A) through (D) and 406(b) and the taxes imposed by Code section 4975 do not apply to any of the transactions described in section III(a)-(f) of this exemption in connection with purchases made after October 31, 1977, if the conditions set forth in sections IV and V are met.

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<sup>113</sup> Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, Subpart B (89 FR 4662 (January 24, 2024))).

(b) Effective on the date that is [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], the restrictions of ERISA sections 406(a)(1)(A), (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(A), (D), (E) and (F) do not apply to Independent Producers that provide fiduciary investment advice and engage in the transactions described in Section III(g), in accordance with the conditions set forth in Sections VI, VII, are satisfied, and the Independent Producer and Insurer are not ineligible under Section VIII, and subject to the definitional terms and recordkeeping requirements in Sections IX and X.

### **Section III—Transactions**

(a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a sales commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract, if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(b) The receipt of a sales commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(c) The effecting by an insurance agent or broker, pension consultant or investment company Principal Underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the Plan solely by reason of the sponsorship of a Pre-approved Plan if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when such investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-approved plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2); and the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(g) An Independent Producer may engage in the following transactions, including as part of a rollover, as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder:

(1) The receipt, directly or indirectly, by an Independent Producer of reasonable compensation; and

(2) the sale of a non-security annuity contract or other insurance product that does not meet the definition of “security” under Federal securities laws.

**Section IV—Conditions With Respect to Transactions Described in Section III(a)-(f)**

The following conditions apply to a transaction described in Section III(a)-(f):

(a) The transaction is effected by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter in the ordinary course of its business as such a person.

(b) The transaction is on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be.

(c) The combined total of all fees, commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter:

(1) For the provision of services to the plan; and

(2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of “reasonable compensation” within the contemplation of section 408(b)(2) and 408(c)(2) of ERISA and section 4975(d)(2) and 4975(d)(10) of the Code. If such total is in excess of “reasonable compensation,” the “amount involved” for purposes of the civil penalties of section 502(i) of ERISA and the

excise taxes imposed by section 4975(a) and (b) of the Code is the amount of compensation in excess of “reasonable compensation.”

**Section V—Conditions for Transactions Described in Section III (a) Through (d)**

The following conditions apply to a transaction described in subsections (a), (b), (c) or (d) of section III:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter is not:

(1) a trustee of the plan (other than a Nondiscretionary Trustee who does not render investment advice with respect to any assets of the plan),

(2) a plan administrator (within the meaning of section 3(16)(A) of ERISA and section 414(g) of the Code),

(3) a fiduciary who is authorized to manage, acquire, or dispose of the plan’s assets on a discretionary basis, or

(4) for transactions described in sections III (a) through (d) entered into after December 31, 1978, an employer any of whose employees are covered by the plan.

Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is affiliated with a trustee or an investment manager (within the meaning of section VI(b)) with respect to a plan may engage in a transaction described in section III(a) through (d) of this exemption on behalf of the plan if such trustee or investment manager has no discretionary authority or control over the plan assets involved in the transaction other than as a Nondiscretionary Trustee.

(b)(1) With respect to a transaction involving the purchase with plan assets of an insurance or annuity contract or the receipt of a sales commission thereon, the insurance



agent or broker or pension consultant provides to an independent fiduciary or IRA owner with respect to the plan prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an affiliate of the insurance company, or if the ability of such agent, broker or consultant is limited by any agreement with such insurance company, the nature of such affiliation, limitation, or relationship;

(B) The sales commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the contract; and

(C) For purchases made after June 30, 1979, a description of any charges, fees, discounts, penalties or adjustments which may be imposed under the contract in connection with the purchase, holding, exchange, termination or sale of such contract.

(2) Following the receipt of the information required to be disclosed in subsection (b)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner acknowledges in writing receipt of such information and approves the transaction on behalf of the plan. Such fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction. Such fiduciary may not receive, directly or indirectly (e.g., through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(c)(1) With respect to a transaction involving the purchase with plan assets of securities issued by an investment company or the receipt of a sales commission thereon by an investment company Principal Underwriter, the investment company Principal Underwriter provides to an Independent fiduciary or IRA owner with respect to the plan, prior to the execution of the transaction, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) the nature of the relationship between the Principal Underwriter and the investment company issuing the securities and any limitation placed upon the Principal Underwriter by the investment company;

(B) The sales commission, expressed as a percentage of the dollar amount of the plan's gross payment and of the amount actually invested, that will be received by the Principal Underwriter in connection with the purchase of the securities issued by the investment company; and

(C) For purchases made after December 31, 1978, a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the securities in connection with the purchase, holding, exchange, termination or sale of such securities.

(2) Following the receipt of the information required to be disclosed in subsection (c)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner approves the transaction on behalf of the plan. Unless facts or circumstances would indicate the contrary, such approval may be presumed if the fiduciary or IRA owner permits the transaction to proceed after receipt of the written disclosure. Such fiduciary may be an employer of employees covered by the plan, but may not be a

Principal Underwriter involved in the transaction. Such fiduciary may not receive, directly or indirectly (e.g., through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(d) With respect to additional purchases of insurance or annuity contracts or securities issued by an investment company, the written disclosure required under subsections (b) and (c) of this section V need not be repeated, unless—

(1) More than three years have passed since such disclosure was made with respect to the same kind of contract or security, or

(2) The contract or security being purchased or the commission with respect thereto is materially different from that for which the approval described in subsections (b) and (c) of this section was obtained.

(e)(1) In the case of any transaction described in Section III(a), (b), or (c) of this exemption, the insurance agent or broker (or the insurance company whose contract is being described if designated by the agent or broker), pension consultant or investment company Principal Underwriter must retain or cause to be retained for a period of six years from the date of such transaction, the following:

(A) The information disclosed pursuant to paragraphs (b), (c), and (d) of this section V;

(B) Any additional information or documents provided to the fiduciary described in paragraphs (b) and (c) of this section V with respect to such transaction; and

(C) The written acknowledgement described in paragraph (b) of this section.

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the insurance agent or broker, pension consultant, or Principal Underwriter, such records are lost or destroyed prior to the end of such six-year period.

(3) Notwithstanding anything to the contrary in ERISA section 504(a)(2) and (b), such records must be made unconditionally available for examination during normal business hours by duly authorized employees or representatives of the Department of Labor, the Internal Revenue Service, plan participants and beneficiaries, any employer of plan participants and beneficiaries, and any employee organization whose members are covered by the plan.

#### **Section VI--Conditions for Transactions Described in Section III(g)**

The following conditions apply to transactions described in Section III(g):

(a) The Independent Producer is authorized to sell annuities from two or more unrelated Insurers.

(b) The Independent Producer and the Insurer satisfy the applicable conditions in Sections VII and IX and are not ineligible under Section VIII. The Insurer will not necessarily become a fiduciary under ERISA or the Code merely by complying with this exemption's conditions.

(c) Exclusions. The relief in Section III(g) is not available if:

(1) The Plan is covered by Title I of ERISA and the Independent Producer, Insurer, or any Affiliate is:

(A) the employer of employees covered by the Plan, or

(B) the Plan's named fiduciary or administrator; provided however that a named

fiduciary or administrator or their Affiliate may rely on the exemption if it is selected to provide investment advice by a fiduciary who:

(i) is not the Insurer, Independent Producer, or an Affiliate;

(ii) does not have a relationship to or an interest in the Insurer, Independent Producer, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by the exemption;

(iii) does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for their own account from the Insurer, Independent Producer, or an Affiliate in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year; or

(iv) is not the IRA owner or beneficiary; or

(2) The transaction involves the Independent Producer acting in a fiduciary capacity other than as an investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

### **Section VII--Investment Advice Arrangement**

Section VII(a) requires Independent Producers to comply with Impartial Conduct Standards, including a Care Obligation and Loyalty Obligation, when providing fiduciary investment advice to Retirement Investors. Section VII(b) requires Independent Producers to acknowledge fiduciary status under Title I of ERISA and/or the Code, and provide Retirement Investors with a written statement of the Care Obligation and Loyalty Obligation, a written description of the services they will provide and the products they are licensed and authorized to sell, and all material facts relating to Conflicts of Interest that are associated with their recommendations. In addition, before the sale of a

recommended annuity, Independent Producers must consider and document their conclusions as to whether the recommended annuity meets the Care Obligation and Loyalty Obligation. Independent Producers recommending a rollover must also provide additional disclosure as set forth in subsection (b) below. Section VII(c) requires Insurers to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Section VII(d) requires the Insurer to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the terms of this exemption. Section VII(e) allows Independent Producers to correct certain violations of the exemption conditions and continue to rely on the exemption for relief. In complying with this Section VII, the Independent Producer may reasonably rely on factual representations from the Insurer, and Insurers may rely on factual representations from the Independent Producer, as long as they do not have knowledge that such factual representations are incomplete or inaccurate.

**(a) Impartial Conduct Standards**

The Independent Producer must comply with the following “Impartial Conduct Standards”:

(1) Investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. As defined in Section X(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 X(g), to meet the Loyalty Obligation, the advice must not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the Retirement Investor's interests, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party. For example, in choosing between annuity products offered by Insurers, whose products the Independent Producer is authorized to sell on a commission basis, it is not permissible for the Independent Producer to recommend a product that is worse for the Retirement Investor, but better or more profitable for the Independent Producer or the Insurer;

(2) The compensation received, directly or indirectly, by the Independent Producer does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

(3) The Independent Producer's statements to the Retirement Investor (whether written or oral) about the recommended transaction and other relevant matters must not be materially misleading at the time statements are made. For purposes of this paragraph, the term "materially misleading" includes omitting information that is needed to prevent the statement from being misleading to the Retirement Investor under the circumstances.

**(b) Disclosure**

At or before the time a transaction described in Section III(g) occurs, the Independent Producer provides, in writing, the disclosures set forth in paragraphs (1)-(5) below to the Retirement Investor. For purposes of the disclosures required by Section VII(b)(1)-(4), the Independent Producer is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Independent

Producer becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.

(1) A written acknowledgment that the Independent Producer is providing fiduciary investment advice to the Retirement Investor and is a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation;

(2) A written statement of the Care Obligation and Loyalty Obligation, described in Section VII(a) that is owed by the Independent Producer to the Retirement Investor;

(3) All material facts relating to the scope and terms of the relationship with the Retirement Investor, including:

(A) (i) The material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts,

(ii) A notice of the Retirement Investor's right to request additional information regarding cash compensation;

(iii) Upon request of the Retirement Investor in Section VII(b)(3)(A)(ii), 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 stated as a range of amounts or percentages.

(B) The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to the Retirement Investor; this description must include the products the Independent Producer is licensed and authorized to sell, inform the Retirement Investor in writing of any limits on the



range of insurance products recommended, and identify the specific Insurers and specific insurance products available to Independent Producer for recommendation to the Retirement Investor; and

(4) All material facts relating to Conflicts of Interest that are associated with the recommendation.

(5) Before the sale of a recommended annuity, the Independent Producer considers and documents the basis for the determination to recommend the annuity to the Retirement Investor and provides that documentation to both the Retirement Investor and to the Insurer;

(6) *Rollover disclosure.* Before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I of ERISA, the Independent Producer must consider and document the bases for its recommendation to engage in the rollover, and must provide that documentation to both the Retirement Investor and to the Insurer. Relevant factors to consider must include to the extent applicable, but in any event are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan, if applicable;

(B) the fees and expenses associated with the Plan and the recommended investment;

(C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and

(D) the different levels of fiduciary protection, services, and investments available.

(7) The Independent Producer will not fail to satisfy the conditions in Section VII(b) solely because it makes an error or omission in disclosing the required information while acting in good faith and with reasonable diligence, provided that the Independent Producer discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

(8) Independent Producers and Insurers may rely in good faith on information and assurances from each other and from other entities that are not Affiliates as long as they do not know or have a reason to know that such information is incomplete or inaccurate.

(9) The Independent Producer is not required to disclose information pursuant to this Section VII(b) if such disclosure is otherwise prohibited by law.

**(c) Policies and Procedures**

(1) The Insurer establishes, maintains, and enforces written policies and procedures for the review of each recommendation, before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation, that are prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The Insurer's prudent review of the Independent Producer's specific recommendations must be made without regard to the Insurer's own interests. An Insurer is not required to supervise an Independent Producer's recommendations to Retirement Investors of products other than annuities offered by the Insurer.

(2) The Insurer's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. The Insurer 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 are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.

(3) The Insurer's policies and procedures include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity 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. A prudent process includes careful review of objective material, such as customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards, and must review that determination at least annually as part of the retrospective review set forth in subsection (d) below.

(4) Insurers must provide their complete policies and procedures to the Department upon request within 30 days of request.

**(d) Retrospective Review**

(1) The Insurer conducts a retrospective review of each Independent Producer, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of this exemption, including the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any. The retrospective review also includes a review of Independent Producers' rollover recommendations and the required rollover disclosure. As part of this review, the Insurer prudently determines whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer updates the policies and procedures as business, regulatory, and legislative changes and events dictate, to ensure that the policies and procedures remain prudently designed, effective, and compliant with Section VII(c). Insurers may rely in part on sampling of each Independent Producer's transactions to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

(2) The Insurer provides to each Independent Producer the methodology and results of the retrospective review, including a description of any non-exempt prohibited transaction the Independent Producer engaged in with respect to investment advice defined under Code section 4975(e)(3)(B), and instructs the Independent Producer to:

- (A) correct those prohibited transactions;
- (B) report the transactions to the IRS on Form 5330;
- (C) pay the resulting excise taxes imposed by Code section 4975; and,

(D) provide the Insurer with a copy of filed Form 5330 within 30 days after the form is due (including extensions);

(3) The methodology and results of the retrospective review are reduced to a written report that is provided to a Senior Executive Officer of the Insurer.

(4) The Senior Executive Officer must certify, annually, that:

(A) The Senior Executive Officer has reviewed the report of the retrospective review report;

(B) The Insurer has provided Independent Producers with the information required under (d)(2) and has received a certification that the Independent Producer has filed Form 5330 within 30 days after the form is due (including extensions);

(C) The Insurer has established written policies and procedures that meet the requirements of Section VII(c)(1); and

(D) The Insurer has a prudent process in place to modify such policies and procedures as set forth in Section II(d)(1).

(5) The review, report, and certification are completed no later than six months following the end of the period covered by the review.

(6) The Insurer retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 30 days of request, to the extent permitted by law.

**(e) Self-Correction**

A non-exempt prohibited transaction will not occur due to a violation of the exemption's conditions with respect to a transaction, provided:

(1) Either the Independent Producer has refunded any charge to the Retirement Investor or the Insurer has rescinded a mis-sold annuity, cancelled the contract and waived the surrender charges;

(2) The correction occurs no later than 90 days after the Independent Producer learned of the violation or reasonably should have learned of the violation; and

(3) The Independent Producer notifies the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under Section VII(d)(3).

### **Section VIII—Eligibility**

#### **(a) Independent Producer**

Subject to the timing and scope of ineligibility provisions set forth in subsection (c), an Independent Producer will become ineligible to rely on the relief for transactions described in Section III(g), if, on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], the Independent Producer has been:

(1) Convicted by either:

(A) a U.S. Federal or State court as a result 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

(B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce’s list of “foreign adversaries” that is codified in 15 CFR 7.4 as amended); or

(2) Found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general, to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

(A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or

(D) providing materially misleading information to the Department, the

Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of the exemption.

**(b) Insurers**

Subject to the timing and scope of ineligibility provisions set forth in subsection (c), an entity will be ineligible to serve as an Insurer if, on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], the Insurer or an entity in the same Controlled Group as the Insurer has been:

(1) Convicted by either:

(A) a U.S. 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 the 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

(B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of "foreign adversaries" that is codified in 15 CFR 7.4 as amended); or



(2) Found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general to have participated in in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

(A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or

(C) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of the exemption.

(3) Controlled Group. An entity is in the same Controlled Group as an Insurer if the entity (including any predecessor or successor to the entity) would be considered to be in the same “controlled group of corporations” as the Insurer or “under common control” with the Insurer as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder),

**(c) Timing and Scope of Ineligibility**

(1) Ineligibility shall begin upon either:

(A) the date of conviction, which shall be the date of conviction by a U.S. Federal or State trial court described in Section VIII(a)(1) or VIII(b)(1) (or the date of the conviction of any trial court in a foreign jurisdiction that is the equivalent of a U.S. Federal or State trial court) that occurs on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] regardless of whether the conviction remains under appeal; or

(B) the date of a final judgment (regardless of whether the judgment remains under appeal) or a court-approved settlement described in Section VIII(a)(2) or VIII(b)(2) that occurs on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

(2) One-Year Transition Period. An Independent Producer or Insurer that becomes ineligible under subsection VIII(a) or VIII(b) may continue to rely on this exemption or serve as an Insurer for up to 12 months after its ineligibility begins as determined under subsection (c)(1) if the Independent Producer or Insurer, as applicable, provides notice to the Department at PTE84-24@dol.gov within 30 days after ineligibility begins.

(3) An Independent Producer will become eligible to rely on this exemption and an Insurer will become eligible to serve as an Insurer again only upon the earliest of the following occurs:

(A) the date of a subsequent judgment reversing such person's conviction or other court decision described in Section VIII(a) or VIII(b);

(B) 10 years after the person became ineligible as determined under subsection (c)(1) or if later, 10 years after the person was released from imprisonment as a result of a

crime described in Section VIII(a)(1) or Section VIII(b)(1); or

(C) the effective date an individual exemption granted by the Department, (under which the Department may impose additional conditions) permitting the person to continue its reliance on this exemption.

#### **(d) Alternative Exemptions**

An Insurer or Independent Producer that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of providing retroactive relief.

#### **Section IX—Recordkeeping**

The Independent Producer and Insurer must maintain for a period of six years records demonstrating compliance with this exemption and makes such records available, to the extent permitted by law, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

#### **Section X—Definitions**

For purposes of this exemption, the terms “insurance agent or broker,” “pension consultant,” “insurance company,” “investment company,” and “Principal Underwriter” mean such persons and any Affiliates thereof. In addition, for purposes of this exemption:

(a) “**Affiliate**” means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person (For this purpose, “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the person; and

(3) Any corporation or partnership of which the person is an officer, director, or partner.

(b) Advice meets the “**Care Obligation**” if, with respect to the Retirement Investor, such advice reflects 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.

(c) A “**Conflict of Interest**” is an interest that might incline an Independent Producer—consciously or unconsciously—to make a recommendation that is not disinterested.

(d) “**Independent Producer**” means a person or entity that is licensed under the laws of a State to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies, and

(1) is not an employee of an insurance company (including a statutory employee as defined under Code section 3121(d)(3)); or

(2) is a statutory employee of an insurance company that has no financial interest in the covered transaction.

(e) “**Individual Retirement Account**” or “**IRA**” means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(f) “**Insurer**” means an insurance company qualified to do business under the laws of a State, that: (A) has obtained a Certificate of Authority from the insurance commissioner of its domiciliary State which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary State) by the State’s insurance commissioner within the preceding five years, (C) is domiciled in a State whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority; (D) is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization and the Department under Section VIII of this exemption), that retains the Independent Producer as an independent contractor, agent or registered representative.

(g) Advice meets the “**Loyalty Obligation**” if, with respect to the Retirement Investor, such advice does not place the financial or other interests of the Independent Producer, Insurer, or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor’s interests to those of the Independent Producer, Insurer, or any Affiliate, Related Entity, or other party.

(h) The term “**Nondiscretionary Trust Services**” means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1).

(i) The term “**Nondiscretionary Trustee**” of a plan means a trustee whose powers and duties with respect to the plan are limited to the provision of Nondiscretionary Trust Services. For purposes of this exemption, a person who is otherwise a Nondiscretionary Trustee will not fail to be a Nondiscretionary Trustee solely by reason of his having been delegated, by the sponsor of a Pre-Approved Plan, the power to amend such plan.

(j) “**Plan**” means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(k) The term “**Pre-Approved Plan**” means a plan which is approved by the Internal Revenue Service pursuant to the procedure described in Rev. Proc. 2017-41, 2017-29 I.R.B. 92, or its successors.

(l) A “**Principal Underwriter**” means a principal underwriter as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29)).

(m) A “**Related Entity**” means any party that is not an Affiliate, and (i) has an interest in an Independent Producer that may affect the exercise of the fiduciary’s best judgment as a fiduciary, or (ii) in which the Independent Producer has an interest that may affect the exercise of the fiduciary’s best judgment as a fiduciary.

(n) “**Retirement Investor**” means 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.

(o) A “**Senior Executive Officer**” is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Insurer.

#### **Section XI—Phase-In Period**

During the one-year period beginning [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], Independent Producers may receive compensation under Section II(b) of this exemption if the Independent Producer complies with the Impartial Conduct Standards set forth in Section VII(a) and the fiduciary acknowledgment set forth in Section VII(b)(1).

Signed at Washington, DC, this 10th day of April, 2024.

**Lisa M. Gomez,**

*Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.*