THE DOL'S RETIREMENT SECURITY RULE:

A Summary Guide for Independent Distribution

050924

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INTRODUCTION

On Tuesday, April 25, 2024, the U.S. Department of Labor (DOL) released its final rule re-defining who is an investment advice fiduciary under Title I and Title II of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code), along with final amendments to several existing prohibited transaction exemptions (PTEs) applicable to ERISA fiduciaries who provide investment advice to "retirement investors" — defined here to include both employer retirement plan participants and beneficiaries as well as IRA owners and IRA beneficiaries. The new regulations become effective Sept. 23, 2024, although some conditions and requirements of the amended PTEs go into effect Sept. 23, 2025.

Labeled the "Retirement Security Rule," the DOL upends a five-part test that has been in place for nearly 50 years to determine fiduciary status[1] and replaces it with a much broader test, the result of which will capture nearly all qualified retirement advice activity under a fiduciary standard — with all the attendant requirements, obligations and liabilities that the standard entails.

In the independent distribution channel, the broad impact of this new fiduciary rule is to expand fiduciary obligations on insurance producers when making a recommendation to roll over assets from a workplace retirement plan to an IRA, provided the elements of the fiduciary definition are otherwise satisfied. Accordingly, a rollover recommendation is investment advice triggering fiduciary status. If the recommendation results in compensation to the producer, such compensation will be considered a conflict of interest requiring the satisfaction of a PTE.

The following summarizes the components of the new fiduciary rule package that is of greatest importance to NAFA members: the base Retirement Security Rule, the final Amendment to Prohibited Transaction Exemption 84-24 and the final Amendment to Prohibited Transaction Exemption 2020-02.

[1] Adopted in 1975, the long-standing test for determining who is an investment advice fiduciary requires that a person is a fiduciary under ERISA and the Code if the person provides investment advice for a fee or other compensation with respect to any assets of a workplace retirement plan and if that person (1) **renders advice** as to the value of securities or other property or makes recommendations as to the advisability of investing in, purchasing or selling securities or other properties; (2) **on a regular basis** (3) **pursuant to a mutual understanding** with the plan, plan participant or IRA owner; and (4) that the **advice serves as a primary basis** for the investment decisions; and (5) that the **advice is individualized** based on the particular needs of the plan or IRA.

INITIAL APPLICABILITY DATE AND PHASE-IN PERIOD

The Final Rule is applicable to transactions resulting from investment advice provided on or after **Sept. 23, 2024**, at which time the new definition of fiduciary investment advice will be in effect, along with the final amendments to PTE 84-24 and PTE 2020-02.

However, there is a **one-year phase-in period — until Sept. 23, 2025** — to come into full compliance with the requirements under the amended PTEs. During this transition year, parties that meet the definition of an investment advice fiduciary will need to comply with the requirements of the Impartial Conduct Standards and will be required to provide written acknowledgment of fiduciary status in order to get exemptive relief and receive compensation.

For transactions pursuant to investment advice provided prior to Sept. 23, 2024, agents and insurance companies that currently rely on the prior version of PTE 84-24 can continue to use that exemption. In other words, no party would be held to the conditions under the amended exemption, including the Impartial Conduct Standards, the fiduciary acknowledgment and other disclosures, the insurer's supervisory and review duties and processes, eligibility provisions, and recordkeeping requirements, for transactions that occurred before the applicability date.

Moreover, if a party is receiving ongoing compensation for a recommendation that occurred prior to Sept. 23, 2024 — e.g., trailing commissions — the amended version of PTE 84-24 would not apply *unless and until* new investment advice is provided; absent that, the party could continue to use the "old" PTE 84-24.

THE NEW FIDUCIARY TEST

The Final Rule replaces the 1975 five-part test with a new test that would capture many more activities as fiduciary in nature, including rollover recommendations, one-time advice and distribution advice.

Under the Final Rule, a person is an investment advice fiduciary if they provide investment advice or make an investment recommendation[2] to a Retirement Investor[3] for which a fee or other compensation (direct or indirect) is received, and the recommendation is provided in one of the two following contexts:

1. The person, either directly or through an affiliate, makes investment recommendations to investors on a regular basis as part of their business under circumstances that would indicate to a reasonable investor that the recommendation:

[2] The DOL does not specifically define the term "recommendation" in the Final Rule. However, whether a recommendation has been made is based on a "facts and circumstances" test, but generally would be reasonably viewed as a "call to action." DOL intends to construe whether a recommendation has been made in a manner consistent with the SEC's framework in its Regulation Best Interest. The more individually tailored the communication, the greater likelihood it will be considered a recommendation. 89 Fed. Reg. 32143 – 32144 (April 25, 2024)

[3] A Retirement Investor is defined as a participant or beneficiary in workplace retirement plans, an IRA owner or beneficiary, and/or an ERISA plan or IRA fiduciary with authority or control with respect to the plan or IRA.

- Is based on review of the retirement investor's particular need or individual circumstances;
- Reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances; and
- May be relied upon by the retirement investor as intended to advance the retirement investor's best interest;

or

2. The person represents or acknowledges that they are acting as a fiduciary (under Title I of ERISA, Title II of ERISA or both) with respect to the recommendation.

The new fiduciary test in the Final Rule differs slightly from the definition included in the proposed rule; however, both are similar in that three of the five prongs of the 1975 test are eliminated: the regular basis prong, the mutual understanding prong and the primary basis prong.

Under the 1975 test, investment advice had to be given to a particular retirement investor on a *regular basis*; now, it is enough that making investment recommendations is part of an investment professional's *regular business*, untethering the "trust and confidence" foundation of a fiduciary relationship between an advice provider and client. Instead, fiduciary status as it relates to regular basis is determined based upon a person's business model or practice. Moreover, such recommendations no longer need to be pursuant to a mutual understanding with the plan participant or IRA owner, and the advice need no longer serve as a primary basis for the investment decision — the recommendation just needs to be "relied upon" by the retirement investor as intending to advance the retirement investor's best interest.

This expansive new test effectively makes any independent insurance producer who is in the business of providing rollover advice and makes even a one-time investment recommendation to a retirement investor an ERISA investment advice fiduciary, requiring compliance with a PTE in order to receive compensation for the annuity transaction.

FINAL AMENDMENT TO PTE 84-24

PTE 84-24, which has been broadly available to investment advice fiduciaries selling fixed and variable annuities and other insurance products for decades, is narrowly prescribed under the final amendment for use only by independent insurance producers[4] who receive reasonable compensation for the sale of an annuity or other insurance product that is not considered a security under federal securities laws. Other investment professionals — including captive agents, statutory employees selling products of their statutory employer insurer, and independent insurance agents who sell only one insurance company's products or investment professionals

[4] An Independent Producer is defined as someone who is licensed under the laws of a state to sell, solicit or negotiate insurance contracts and annuities and sells to Retirement Investors products of multiple unaffiliated insurance companies. The definition also includes statutory employees of an insurance company where the insurance company has no interest in the covered transaction.

who otherwise sell variable annuities and other insurance products that are securities — would now need to use the revised PTE 2020-02 in order to receive otherwise prohibited compensation.[5]

Many of the conditions of the final amended PTE 84-24 are similar to those of the final amended PTE 2020-02, including compliance with the Impartial Conduct Standards, greater written disclosures, written acknowledgment of fiduciary status, exemption disqualification for certain misconduct, and a retrospective review, among others. Furthermore, insurance companies would have heightened supervisory and reporting requirements regarding the independent insurance producers who sell their fixed and fixed indexed annuities.

Amended PTE 84-24 Conditions for Independent Insurance Producers

- **Compliance with Impartial Conduct Standards.** Requires the Independent Producer to comply with the Impartial Conduct Standards when providing fiduciary investment advice to Retirement Investors, including the satisfaction of all three of the following factors:

  1. The investment advice, at the time it is provided, must satisfy the "Care Obligation" and the "Loyalty Obligation,"[6] defined as follows:

     - 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.
     - To meet the Loyalty Obligation, the advice must not place the financial or other interests of the Independent Producer or Insurer (or affiliate or other party) ahead of the Retirement Investor.

  2. The compensation received by the Independent Producer, directly or indirectly, must not exceed "reasonable compensation"[7] within the meaning of ERISA and the Code; and

  3. The Independent Producer's statements to the Retirement Investor about the recommended transaction and other relevant matters — whether written or oral — must not be materially misleading at the time the statements are made. The term "materially misleading" includes the omission of information necessary to prevent the statement from being misleading.

[5] Individuals who hold both a securities license and an insurance license may rely on PTE 84-24 as long as they satisfy the other conditions and requirements of the exemption.

[6] As with the final amendment to PTE 2020-02, the final amendment to PTE 84-24 replaces the term "best interest" that was included in the proposed amended exemption with its two separate components of "care" and "loyalty." DOL states that the reference to the two separate obligations does not change the substance of the standard as originally proposed.

[7] This is a very significant change from the amendment to the exemption proposed in fall 2023. As originally proposed, allowable compensation under the exemption was limited to the so-called "simple insurance sales commission received by the Independent Producer as paid by or on behalf of the issuing Insurer." Under the final amendment, reasonable compensation of all types and from all sources is eligible for relief. Moreover, DOL confirms in the preamble that all compensation under PTE 84-24, including cash and non-cash compensation, may be paid to IMOs or FMOs, which may then compensate the individual Independent Producer who has provided the investment advice. 89 FR 32310.

- **Disclosures.** Requires the Independent Producer to provide a number of written disclosures to the Retirement Investor at or before the transaction occurs, including:

  1. A written acknowledgment that the Independent Producer providing fiduciary investment advice and is a fiduciary under Title I and/or Title II of ERISA;[8]

  2. A written statement of the Care Obligation and Loyalty Obligation 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:

     - The material fees and costs that apply to the Retirement Investor's transactions, holdings and account;
     - A notice of the Retirement Investor's right to request additional information regarding cash compensation;[9]
     - 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;[10] and

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

  <u>In addition, prior to the sale of a recommended annuity, the Independent Producer must consider and document the basis for the determination to recommend the annuity to the Retirement Investor and must provide that documentation to both the Retirement Investor and to the issuing Insurer.</u>

- **Additional Disclosures Required for Rollover Recommendations.** Before making a recommendation as to the rollover of investment assets currently held in a plan,[11] the Independent Producer must consider and document the basis for the recommendation to engage in the rollover and must provide that documentation to both the Retirement Investor and the issuing Insurer.

  o For ERISA plan to IRA rollover recommendations (but not for IRA to IRA rollover recommendations), relevant factors to consider must include, to the extent practicable but not limited to, the following:

    (A) Alternatives to the rollover recommendation, including leaving money in the plan;

    (B) The fees associated with the plan and the recommended investment;

    (C) Whether an employee or other party pays for some or all of the administrative expenses; and

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

[8] In the preamble to the final amendment to PTE 84-24, DOL has provided model disclosure language that Independent Producers may use to satisfy the written fiduciary acknowledgment and the written statements of the Care Obligation and Loyalty Obligation. 89 FR.

[9] Disclosures that are required if the Retirement Investor makes this request include (1) 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 (2) whether the cash compensation will be provided through a one-time payment or through multiple payment (if the latter, to include the frequency and amount of the payments, which may be stated as a range of amounts or percentages).

[10] This description must include the products the Independent Producer is licensed and authorized to sell, information regarding any limits on the range of insurance products recommended, and the identification of the specific Insurers and specific insurance products available to the Independent Producer for recommendation to the Retirement Investor.

[11] References to "plan assets" include IRA assets.

- **Errors or Omissions in Required Disclosures.** Any errors or omissions in disclosing the required information, if acting in good faith and with reasonable diligence, may be corrected by the Independent Producer by disclosing the required information as soon as practicable — but not later than 30 days after the date on which the error or omission was discovered or reasonably should have been discovered. Independent Producers and Insurers may rely in good faith on information 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.

Amended PTE 84-24 Conditions for Insurers

Although Insurers are not required to be fiduciaries under the amended PTE 84-24, they are required to adopt, maintain and enforce (and update as necessary) written policies and procedures prudently designed to ensure the Independent Producer's compliance with the Impartial Conduct Standards and other conditions of the exemption.[12] These heightened supervisory requirements include:

- **Policies and Procedures.**

  1. Prudent review of each recommendation. The Insurer must establish, maintain, and enforce written policies and procedures for the review of each recommendation before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation that are prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of the exemption. Such a review must be made without regard to the Insurer's own interests.[13]

  2. Mitigation of Conflicts of Interest. The Insurer's policies and procedures must mitigate conflicts of interest such that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create misaligned incentives for the Independent Producer. 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.

  3. Determination of who can sell the Insurer's annuities. The Insurer's policies and procedures include a prudent process for (1) determining whether to authorize an Independent Producer to sell the Insurer's annuities and (2) taking action where an Independent Producer has failed to adhere to the Impartial Conduct Standards or who lacks the necessary education, training or skill. The Insurer must document the basis for its determination that the Independent Producer will adhere to the Impartial Conduct Standards and must review that determination at least annually.

  4. Insurers must provide their complete policies and procedures to DOL within 30 days of the date of the request.[14]

[12] DOL suggests that Insurers could choose to comply with the policies and procedures requirement by creating oversight and compliance systems through contracts with IMOs, FMOs or BGAs. 89 FR32316

[13] An Insurer is not required to supervise an Independent Producer's recommendations of products other than annuities offered by the Insurer.

[14] This was increased from the proposed amendment to PTE 84-24, which required ten (10) days.

- **Retrospective Review.**

1. Insurers must conduct a retrospective review — at least annually — that is reasonably designed to detect and prevent violations of and achieve compliance with the conditions of the exemption, including the Impartial Conduct Standards. The review must consider the Insurer's policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, any exceptions or violations discovered, and corrective actions taken or recommended, if any.
    - The retrospective review must also include a review of rollover recommendations and required rollover disclosures.
    - As part of this review, the Insurer must prudently determine whether to continue to permit individual Insurance Producers to sell the Insurer's annuity contracts to Retirement Investors.
    - The Insurer must update the policies and procedures as business, regulatory and legislative changes dictate.
    - Insurers may rely in part on sampling of each Independent Producer's transactions, as long as any sampling or other method is designed to identify potential violations, problems or deficiencies.
2. The Insurer must provide the methodology and results of the retrospective review to each Independent Producer. For any prohibited transactions that did not comply with the exemptions conditions that the Insurer discovers, the Insurer must instruct the Independent Producer to correct the prohibited transaction, report the transaction to the IRS, pay the resulting excise taxes, and provide the Insurer with a copy of the filed IRS 5330 report form within 30 days.
3. The methodology and results of the retrospective review must be set forth in a written report that must then be provided to a Senior Executive Officer (SEO)[15] of the Insurer.
4. The SEO must annually certify that:
    - The SEO has reviewed the report;
    - The Insurer has provided the Independent Producer with information related to any non-exempt prohibited transaction and has received confirmation that the Independent Producer filed the appropriate IRS form;
    - The Insurer has established written policies and procedures for the review of each recommendation by an Independent Producer that are prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions.
    - The Insurer has a prudent process in place to modify such policies and procedures as business, regulatory, and legislative changes and events dictate.
5. The review, report and certification must be completed no later than six months following the end of the period covered by the review.

[15] A Senior Executive Officer is any of the following: chief compliance officer, chief executive officer, president, chief financial officer, or one of the three most senior officers of the Insurer.

6. The insurer must retain the report, certification and supporting data for a period of six years and must make the report, certification and supporting data available to the DOL within thirty (30) business days upon request.

Self-Correction in the Event of a Violation of the Exemption's Conditions

Violations of the exemption's conditions can be corrected, provided that:

1. Either the Independent Producer has refunded any charge to the Retirement Investor, or the Insurer has rescinded the annuity, cancelled the contract and waived any surrender charges;

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

3. The Independent Producer timely notifies the person(s) at the Insurer responsible for conducting the retrospective review, and the violation and corrective action is specifically set forth in the written report of the retrospective review.

Eligibility – 10-Year Prohibition on Using PTE 84-24 for Certain Misconduct

Violations of the conditions of the exemption that are not corrected, along with other circumstances that could cause ineligibility, will result in a 10-year prohibition against an Independent Producer's or Insurer's reliance on the exemption. The timing and scope of the ineligibility provisions are applicable to violations that occur on or after Sept. 23, 2024.

- **Independent Producer.** An Independent Producer will be ineligible to rely on exemptive relief under PTE 84-24 if the Independent Producer has been:

  1) Convicted by either (A) a federal or state court of certain felonies (generally offenses related to financial malfeasance) or (B) a foreign court of competent jurisdiction as a result of any crime that is substantively equivalent to the felony offenses described in subsection (A); or

  2) Found or determined in a final judgment or court-approved settlement in a federal or state criminal or civil court proceedings brought by the DOL, DOT, IRS, DOJ, or a state insurance regulator or attorney general to have engaged in conduct or practices that violates the conditions of the exemption. (The court need not specifically consider the exemption or its terms in reaching its judgment.)

- **Insurers.** The eligibility provisions for Insurers are similar to those applicable to Independent Producers (detailed above). The scope and applicability of these provisions in the Insurer category include entities that are in the same Controlled Group as an Insurer, defined as part of the controlled group of corporations or under common control with the Insurer, including any predecessor or successor to the entity.

- **Timing and Scope of Ineligibility**. Ineligibility begins upon the date of conviction or the date of a final judgment that occurs on or after Sept. 23, 2024, regardless of whether that conviction or judgment is under appeal. An Independent Producer or Insurer that becomes ineligible may continue to rely on PTE

84-24 for a period of 12 months, but notice must be given to DOL within 30 days after ineligibility begins. An Independent Producer or Insurer will become eligible to rely again upon the exemption only upon the earlier of (a) the date of a subsequent judgment reversing the conviction of court decision; (b) 10 years after the date of ineligibility; or (c) the effective date the DOL grants an individual exemption (under which the DOL may impose additional conditions).

Recordkeeping

The Independent Producer and the Insurer must maintain for a period of six years records demonstrating compliance with this exemption and make such records available to any authorized employee of DOL or the Department of Treasury, which includes the IRS.[16]

FINAL AMENDMENT TO PTE 2020-02

The DOL's final amendment to PTE 2020-02 — an exemption that was originally adopted in December 2020 and finalized in February 2021 — has been revised from the proposed amendment to expand the scope of the exemption to cover more transactions and would align many of its conditions and requirements with those included in PTE 84-24, including the Impartial Conduct Standards, the policies and procedures requirement, and the obligation to conduct an annual retrospective review. As finally amended, PTE 2020-02 is available for Financial Institutions and Investment Professionals and their Affiliates and Related Entities[17] to receive reasonable compensation for recommending a broad range of investment products, including insurance and annuity products and including as part of a rollover from an employee benefit plan to an IRA.

Although Independent Insurance Producers may use PTE 84-24, Insurers and Independent Producers may also rely on PTE 2020-02 to the same extent as other Financial Institutions and Investment Professionals. If they choose to do so, both the Insurer and the Independent Producer must satisfy the exemption's conditions, including the written fiduciary acknowledgment and other disclosures, as well as adherence to the Impartial Conduct Standards, applicable for each recommendation. Insurers must adopt policies and procedures to ensure compliance with the exemption, similar to the requirements under PTE 84-24.

As with PTE 84-24, the Insurer's oversight obligations with respect to Independent Producers is to oversee the recommendation and sale of its products by the Independent Producer not those involving other insurance companies' products. As is also the case with PTE 84-24, DOL suggests that Insurers could comply with the exemption by creating compliance and oversight systems thought contracts with insurance intermediaries, such as IMOs, FMOs and BGAs.

[16] In the Preamble, DOL notes that it intends to "regularly" request that Independent Producers provide their investor disclosures to the Department 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.

[17] DOL notes that Related Entities may include IMOs, FMOs, BGAs and others providing administrative support. Related Entities is defined to mean (a) any party that is not an affiliate and has an interest in the Investment Professional or Financial Institution or (b) is a party in which the Investment Professional or Financial Institution has an interest, in either case when that interest may affect the fiduciary's best judgment. 89 Fed. Reg. 32264 (Apr. 25, 2024)

Amended PTE 2020-02 Conditions

- **Compliance with Impartial Conduct Standards.** Requires the Investment Professional and Financial Institution to comply with the Impartial Conduct Standards when providing fiduciary investment advice to Retirement Investors, including the satisfaction of all three of the following factors:

  1. The investment advice, at the time it is provided, must satisfy the "Care Obligation" and the "Loyalty Obligation," defined as follows:

     - 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.

     - To meet the Loyalty Obligation, the advice must not place the financial or other interests of the Independent Producer or Insurer (or affiliate or other party) ahead of the Retirement Investor.[18]

  2. The compensation received, directly or indirectly by the Financial Institution, Investment Professional, their Affiliates and Related Entities for their services must not exceed "reasonable compensation" within the meaning of ERISA and the Code, and the Financial Institution and Investment Professional must seek to obtain the best execution of the investment transaction reasonably available under the circumstances; and

  3. The Financial Institution's and its Investment Professionals' statements to the Retirement Investor about the recommended transaction and other relevant matters — whether written or oral — must not be materially misleading at the time the statements are made. The term "materially misleading" includes the omission of information necessary to prevent the statement from being misleading.

- **Disclosures.** Requires the Financial Institution to provide a number of written disclosures to the Retirement Investor at or before the covered transaction occurs,[19] including:

  1. A written acknowledgment that the Financial Institution and its Investment Professional(s) are providing fiduciary investment advice and are fiduciaries under Title I and/or Title II of ERISA;[20]

  2. A written statement of the Care Obligation and Loyalty Obligation that is owed by the Investment Professional and Financial Institution to the Retirement Investor;

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

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[18] The final amendment to the exemption provides examples of situations to demonstrate satisfaction of the Loyalty Obligation and notes that a Retirement Investor's interests may sometimes be better served by the payment of a one-time commission rather than paying for ongoing advisory fees to the Investment Professional. Regulation Best Interest release, 84 FR 33318, 33319 (July 12, 2019).

[19] A covered transaction is deemed to occur on the later of (a) the date the recommendation is made; or (b) the date the Financial Institution or Investment Profession becomes entitled to compensation.

[20] In the preamble to the final amendment to PTE 2020-02, DOL has provided model disclosure language that Independent Producers may use to satisfy the written fiduciary acknowledgment and the written statements of the Care Obligation and Loyalty Obligation. 89 FR 32271

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

(B) The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to them.

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

- **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 as to the post-rollover investment of assets currently held in a plan that is covered by Title I of ERISA, the Financial Institution and Investment Professional must consider and document the bases for the recommendation to engage in the rollover and must provide that documentation to the Retirement Investor. Relevant factors to consider must include but are not limited to:

  (A) Alternatives to the rollover recommendation, including leaving money in the plan;

  (B) The fees associated with the plan and the recommended investment or account;

  (C) Whether an employee or other party pays for some or all of the administrative expenses; and

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

- **Errors or Omissions in Required Disclosures.** Any errors or omissions in disclosing the required information if acting in good faith and with reasonable diligence may be corrected by Financial Institution by disclosing the correct information as soon as practicable — but not later than 30 days after the date on which the error or omission was discovered or reasonably should have been discovered. Investment Professionals and Financial Institutions may rely in good faith on information 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.

- **Policies and Procedures.**

  1. The Insurer must establish, maintain, and enforce written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions.

  2. The Financial Institution's policies and procedures must mitigate conflicts of interest such 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 Financial Institution or Investment Professional to place their interests, or those of any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. Financial Institutions 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.

3. Financial Institutions must provide their complete policies and procedures to DOL within 30 days of the date of the request.[21]

- **Retrospective Review.**

1. Insurers must conduct a retrospective review — at least annually — that is reasonably designed to detect and prevent violations of and achieve compliance with the conditions of the exemption, including the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The Financial Institution must update 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.

2. The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer (SEO)[22] of the Financial Institution.

3. The SEO must annually certify that:

   (A) The SEO has reviewed the retrospective review report;

   (B) The Financial Institution has filed — or will timely file — Form 5530 reporting for any non-exempt prohibited transactions discovered by the Financial Institution, has corrected those transactions, and paid any resulting excise taxes owed under the Code;

   (C) The Financial Institution has written policies and procedures that meet the requirements of the exemption; and

   (D) The Financial Institution has a prudent process to modify such policies and procedure as described above.

4. The review, report and certification must be completed no later than six months after the end of the period covered by the review.

5. The Financial Institution must retain the report, certification and supporting data for a period of six years and make the report, certification and supporting data available to DOL within 30 days of request.

Self-Correction in the Event of a Violation of the Exemption's Conditions

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

1. The violation did not result in investment losses to the Retirement Investor, or the Financial Institution made the Retirement Investor whole for any resulting losses;

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[21] This was increased from the proposed amendment to PTE 2020-02, which required ten (10) days.

[22] A Senior Executive Officer is any of the following: chief compliance officer, chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution.

2. The Financial Institution corrects the violation;

3. The correction occurs no later than ninety (90) days after the Financial Institution learned of the violation or reasonably should have; and

4. The Financial Institution timely notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle, and the violation and corrective action is specifically set forth in the written report of the retrospective review.

Eligibility – 10-Year Prohibition on Using PTE 2020-02 for Certain Misconduct

Violations of the conditions of the exemption that are not corrected, along with other circumstances that could cause ineligibility, will result in a 10-year prohibition against an Investment Professional's or Financial Institution's reliance on the exemption. The timing and scope of the ineligibility provisions are applicable to violations that occur on or after Sept. 23, 2024.

- **Investment Professional and Financial Institution.** An Investment Professional or Financial Institution will become ineligible to rely on PTE 2020-02 with respect to any covered transaction if on or after Sept. 23, 2024, the Financial Institution, and entity in the same Controlled Group[23] as the Financial Institution, or an Investment Professional has been:

  1) Convicted by either (A) a federal or state court of certain felonies (generally offenses related to financial malfeasance) or (B) a foreign court of competent jurisdiction as a result of any crime that is substantively equivalent to the felony offenses described in subsection (A); or

  2) Found or determined in a final judgment or court-approved settlement in a federal or state criminal or civil court proceedings brought by the DOL, DOT, IRS, DOJ, the SEC, the Federal Reserve, the FDIC, a state insurance or securities regulator or attorney general to have engaged in conduct or practices that violates the conditions of the exemption. (The court need not specifically consider the exemption or its terms in reaching its judgment.)

- **Timing and Scope of Ineligibility.** Ineligibility begins upon the date of conviction or the date of a final judgment that occurs on or after Sept. 23, 2024, regardless of whether that conviction or judgment is under appeal. An Investment Professional or Financial Institution that becomes ineligible may continue to rely on PTE 2020-02 for a period of 12 months, but notice must be given to DOL within 30 days after ineligibility begins in order to have this "wind down" period. An Investment Professional or Financial Institution will become eligible to rely again upon the exemption only upon the earlier of (a) the date of a subsequent judgment reversing the conviction of court decision; (b) 10 years after the date of ineligibility; or (c) the effective date the DOL grants an individual exemption (under which the DOL may impose additional conditions).

[23] An entity is in the same Controlled Group as a Financial Institution if the entity, including any predecessor or successor to the entity, would be considered to be in the "controlled group of corporations" as the Financial Institution or "under common control" with the Financial Institutions as those terms are defined in the Code.

Recordkeeping

The Financial Institution must maintain for a period of six (6) years following the covered transaction records demonstrating compliance with this exemption and to make such records available to any authorized employee of DOL or the Department of Treasury, which includes the IRS.[24]

CONCLUSION

Annuity professionals — along with the retirement consumers they serve — have been in a state of flux for more than a dozen years since the Department of Labor first embarked down the fiduciary rulemaking path. Beginning with the 2010 proposal and withdrawal, to the 2015-2016 finalized rule and subsequent 2018 court vacatur, followed by three years of a temporary enforcement policy requiring adherence to Impartial Conduct Standards, to the introduction of a new PTE and the reinterpretation of who is a fiduciary in 2020, NAFA has been fighting to protect independent distribution, fixed annuities and the future of American retirement.

The DOL's "Retirement Security Rule" package is a thinly veiled attempt to impose a fiduciary-only regulatory regime that creates undue compliance burdens and liability risks on annuity professionals already working within a highly regulated environment featuring a robust set of consumer protections. This solution in search of a problem will only cause harm to the low- and middle-income savers who most want and need the products and professional advice independent distribution provides.

NAFA is pursuing all strategic avenues, both independently and in partnership with our sister trades, to ensure these unworkable regulations are overturned.

[24] DOL opted not to expand the recordkeeping requirement as contemplated in the proposed amended exemption which would have allowed other parties, such as plan participants, unions and IRA owners, to review these records. Accordingly, the final amendment to PTE 2020-02 maintains the recordkeeping provisions already in the exemption, without change.