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VIA ELECTRONIC DELIVERY

January 2, 2024

Office of Regulations and Interpretations, Room N5655
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

RE: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210–AC02), Proposed Amendment to Prohibited Transaction Exemption 2020–02 (ZRIN 1210–ZA32), Proposed Amendment to Prohibited Transaction Exemption 84–24 (ZRIN 1210–ZA33)

To Whom It May Concern:

The U.S. Chamber of Commerce (Chamber) submits these comments on the Department of Labor's (DOL) Retirement Security Rule: Definition of an Investment Advice Fiduciary (Proposed Regulation), Proposed Amendment to Prohibited Transaction Exemption 2020–02 (Proposed Amendments to PTE 2020-02), and Proposed Amendment to Prohibited Transaction Exemption 84–24 (Proposed Amendments to 84-24).[1] As a fundamental matter, the Chamber believes an entity or person giving investment advice for a fee should do so under a heightened standard of care. However, the regulation of investment advice must be with the appropriate regulator overseeing such advice and each regulator applying the law as directed by Congress. We believe some aspects of the Proposed Regulation and the Amended PTEs are not within DOL's powers.

As discussed in more detail below, the Chamber requests DOL reconsider its approach to the Proposed Regulation and the Amended PTEs for the following reasons:

General

- The Proposed Regulation and Amended PTEs are overly broad and outside of DOL's statutory authority by imposing Title I obligations on entities only subject to Title II.
- The Proposed Regulation and Amended PTEs are integral to each other and not severable.
- DOL's interpretation that there is no difference between sales and advice is contrary to

[1] As part of this project, DOL also amended the following prohibited transaction exemptions (PTE or PTEs): 86-128, 77-4, 75-1, 80-83, 83-1 as well as PTEs 84-24 and 2020-02 (collectively Amended PTEs). Although our comments focus on the changes to PTEs 2020-02 and 84-24, we are concerned DOL is attempting to force all entities that provide investment advice into one class PTE rather than allowing for PTEs that are narrowly tailored to an entity's business, as they have traditionally been developed in the past. We are particularly concerned that DOL has ignored the cost and disruption this will cause, especially given that many of these PTEs are 30 to 40 years old and entities have built their business models in reliance on the appropriate PTE.

what the Fifth Circuit has said and to the longstanding interpretation of the Employee Retirement Income Security Act (ERISA).

Proposed Amendment

- The standard in paragraph (c)(1)(i) of the Proposed Regulation is overly broad by including assets that are not covered by either ERISA or the Internal Revenue Code (Code).
- The standard in paragraph (c)(1)(ii) of the Proposed Regulation fails to meet the Fifth Circuit's "relationship of trust and confidence" standard.
- The term "recommendation" is the basis for determining fiduciary status, but it is not defined.
- A 60-day effective date is unreasonable.
- DOL grossly underestimates the costs of the Proposed Regulation and Amended PTEs.

Proposed Amendments to PTE 2020-02

- PTE 2020-02 should not have been amended only 15 months after its final enforceability date.
- DOL has not shown that the Proposed Amendments to PTEs 2020-02 and 84-24 meet the requirements of ERISA 408(a) or Code section 4975(c)(2).
- The Proposed Amendments to PTE 2020-02 create a private right of action against Title II Financial Institutions and Investment Professionals which the Fifth Circuit explicitly stated DOL does not have the authority to do.
- The requirement in the Proposed Amendments to PTE 2020-02 that Financial Institutions and Investment Professionals provide a blanket statement, without exception, that they are acting in a fiduciary capacity contradicts ERISA's functional fiduciary test.
- The requirement to provide costs, fees and compensation relating to conflicts is of little utility to a retirement investor and likely is not possible outside of a fee for service transactions.
- The standard articulated in Section II(b)(3) of the Proposed Amendments to PTE 2020-02 is contrary to ERISA's disclosure standards.
- DOL should not require Financial Institutions to maintain additional web disclosures.
- DOL's limitation on compensation is at direct odds with Reg BI and provides an unworkable model for the brokerage industry.
- DOL's mandated inclusion of filing the Form 5330 as part of the retrospective review is beyond its regulatory authority and eliminates the self-correct program.
- Section III(a)(1) and (2) of the Proposed Amendments to PTE 2020-02 should be deleted and DOL should keep the current standard.
- Access to compliance records should be limited only to DOL and Treasury.

Proposed Amendments to PTE 84-24

- Any changes to PTE 84-24 should have been a separate rule making.
- The Proposed Amendments to PTE 84-24 inappropriately regulate insurance.
- The disclosures required under the Proposed Amendments to PTE 84-24 impermissibly create a private right of action against independent producers.
- Disclosure of every insurance product available for recommendation would be

burdensome, provide little value to the retirement investor, and be subject to frequent change.

- Any statement provided before the final recommendation of an annuity regarding the amount of the insurance commission to be paid in connection with the recommendation will be misleading.
- It is unclear how an independent producer is to compare fees and expenses of employer plans without an annuity option with a recommended annuity.
- The policies and procedures in the Proposed Amendments to 84-24 are fundamentally unworkable and are contrary to most state laws.
- An entity that is not a disqualified person who does not take part in a prohibited transaction is not liable for the excise tax.
- DOL should not incorporate into PTE 84-24 the Proposed Amendments to PTE 2020-02 relating to ineligibility based on a litany of crimes.
- Access to compliance records should be limited only to DOL and Treasury.
- ERISA civil penalties and excise taxes cannot be imposed on insurers.

Process

On November 3, 2023, DOL published the Proposed Regulation and the Proposed Amendments to PTEs 2020-02 and 84-24, which both included significant changes. In addition, it published proposed amendments to five other longstanding PTEs, which eliminated the ability to use these PTEs to provide investment advice for a fee. DOL provided a 60-day comment period for the Proposed Regulations and the Amended PTEs, with comments due on January 2, 2024. Because of the publication timing and federally recognized holidays, the number of actual business days to comment was shortened to 39. In addition, DOL scheduled a hearing on December 12th and 13th, several weeks before the comment period ended. Holding a hearing before comments are due, posted and publicly available was unprecedented. It also effectively shortened the comment period because commenters were required to prepare for and attend the hearing during the comment period, which did not allow them to focus on their comments during that time. Finally, it diminished the purpose of the hearing because many commenters had not finished their comments by the time of their testimony.

A number of trade associations, including the Chamber, requested DOL extend the comment period.[2] In a letter dated November 14, 2023, DOL rejected that request because:

> EBSA believes that its current proposal reflects significant input it has received from public engagement with this project since 2010, and looks forward to another robust comment period, public hearing, vigorous public debate, and stakeholder meetings. In addition, since the beginning of this Administration, EBSA has engaged informally with numerous stakeholders representing multiple viewpoints on issues related to the proposed rulemaking package. Therefore, at this point, EBSA does not intend to extend the comment period or delay the hearing.
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> EBSA remains committed to receiving public comments and looks forward to the

[2]Available at U.S. Chamber Signs Request for Comment Period Extension for DOL's Proposed Retirement Security Rule | U.S. Chamber of Commerce (uschamber.com).

hearing, which will be held virtually, beginning on December 12. Additionally, one benefit of holding the public hearing before the comment period closes is that the testimony will inform the comments EBSA receives.[3]

Such a short comment period, with an unprecedented hearing before comments were due and posted, is insufficient for thorough and thoughtful comments. Adding to this is the fact that the transcript of the hearing was not made available until late afternoon of December 22, 2023, just four business days before the comment period ended. When the 2010 Fiduciary Rule was released, DOL initially had a 90-day comment period, followed by a 14-day extension. DOL then held a public meeting, followed by a 15-day comment period for response. For the 2016 Final Regulation and Related Exemptions, DOL allowed a 75-day comment period and granted a 15-day extension. After a public hearing, there was then another 15-day comment period. The fact that DOL has, as described below, significantly revised the definition of fiduciary, amended PTE 2020-02 (which has only been fully implemented on a voluntary basis for 15 months), completely revised PTE 84-24 (which has been operational for nearly 40 years) and amended five other longstanding PTEs, but only given a 60-day comment period for all of these changes is contrary to one of strictures and the intents of the Administrative Procedure Act (APA), which is to "provide for public participation in the rulemaking process." Given that DOL routinely provides a 60-day comment period for just one proposed class or individual exemption or amendments, it hardly seems reasonable to expect public comments on an integrated package that contains significant changes to a regulation and amendments to seven PTEs, many of which have been in operation for over 40 years, in a truncated period.

Background

ERISA was enacted in 1974 to regulate employer-provided plans. As enacted, ERISA contains four titles. Title I contains the labor provisions that regulate employer plans, and DOL has jurisdiction over this title. Title II contains the tax provisions which amended the Code, and Treasury has jurisdiction over this title. Title III contains administrative provisions, and Title IV includes plan termination and multiemployer plan provisions, both of which are not germane to this comment letter.

Both ERISA and the Code have a definition of fiduciary and a list of prohibited transactions that plans, fiduciaries, parties in interest (ERISA) and disqualified persons (Code) may not enter into without either a statutory, class or individual exemption.[4] Title I contains the fiduciary standards applicable to employer plans, but Title II does not contain parallel provisions.[5] Specifically, Title I contains the loyalty and prudence fiduciary standards which require, among other things, that:

> A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and:
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> - For the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan;

[3] EBSA extension denial letter dated November 14, 2023 available at [EBSA Denies Request to Extend Retirement Security Rule Comment Period | U.S. Chamber of Commerce (uschamber.com)].

[4] See ERISA §§3(21); 406 and 408; 29 USC §§1002(21); 1106; and 1108. 26 USC § 4975.

[5] See ERISA §404; 29 USC §1104.

and

- With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.[6]

Individual Retirement Accounts (IRAs) were included in Title II and not in Title I because they are not employer plans, and Congress did not intend for DOL to have jurisdiction over IRAs.[7] The duties of loyalty and prudence do not apply under Title II, and they only apply under Title I[8] because the purpose of IRAs is to provide a tax favored retirement vehicle to individuals who do not have access to an employer sponsored plan. As a result, there was no need to provide fiduciary conduct rules because the individual, rather than the employer, had control over the money in the IRA.[9] However, Congress did not leave IRAs unregulated, and the prohibited transaction rules and excise taxes apply to IRAs.

Because some of the provisions in Title I and Title II were the same, Executive Order: Reorganization Plan No. 4 of 1978 (Reorganization Plan 4) spelled out which agency, DOL or Treasury, would issue regulations, but it did not change which agency had jurisdiction over enforcement.

Section 102 of Reorganization Plan 4 provides that "except as otherwise provided in Section 105 of this Plan, all authority of the Secretary of the Treasury to issue the following described documents pursuant to the statutes hereinafter specified is hereby transferred to the Secretary of Labor: regulations, rulings, opinions, and exemptions under section 4975 of

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[6] See ERISA § 404(a); 29 USC § 1104(a).

[7] In a 2008 GAO Report entitled "Individual Retirement Accounts: Government Actions Could Encourage More Employers to Offer IRAs to Employees", GAO stated that:

> IRS is responsible for tax rules on establishing and maintaining IRAs, while Labor is responsible for oversight of fiduciary standards for employer-sponsored IRAs and provides certain guidance on payroll-deduction IRAs, although Labor does not have jurisdiction.
>
> In written comments on the draft, Labor stated that it does not have jurisdiction over payroll-deduction IRAs. Although Labor is responsible for oversight of fiduciary standards for employer-sponsored IRAs, Labor stated in its comment on our draft report that payroll-deduction IRAs are not under Labor's jurisdiction because they are exempt from the requirements imposed on plans by Title I of ERISA.

GAO Report available at https://www.gao.gov/products/gao-08-590. Given DOL does not have jurisdiction over payroll-deduction IRA, it certainly does not have jurisdiction over IRAs established by individuals. Furthermore, the Fifth Circuit specifically found that "[t]reating IRA financial services providers in tandem with ERISA employer-sponsored plan fiduciaries" conflates the distinctions outlined by Congress. Chamber of Commerce of the United States of America v. U.S. Dept. of Labor, 885 F.3d 360, 381 (2018).

[8] The Fifth Circuit noted in US Chamber of Commerce with respect to the Best Interest Contract Exemption that was issued as part of the 2016 fiduciary rulemaking package that to "qualify for a BIC Exemption, providers of financial and insurance services must enter into contracts with clients that, *inter alia,* affirm their fiduciary status; incorporate 'Impartial Conduct Standards' that include the duties of loyalty and prudence; 'avoid[] misleading statements;' and charge no more than 'reasonable compensation.' As noted above, Title II service providers to IRA clients are not statutorily required to abide by the duties of loyalty and prudence." Chamber of Commerce of the United States of America v. U.S. Dep't of Labor, 885 F.3d at 367.

[9] Federation of Americans for Consumer Choice v. U.S. Dept. of Labor, Case No. 3:22-cv-00243-K-BT 2023 WL 5682411,*22 (N.D. Tex. June 30, 2023).

the Code."[10] However, it excepted 4975 (a) and (b) which are the enforcement provisions of excise taxes on disqualified persons. Finally, nothing in Reorganization Plan 4 gave DOL the authority to apply Title I standards to Title II only plans.

ERISA section 3(21)(A)(ii) and Code section 4975(e)(3) define a fiduciary (in relevant part), as a person with respect to a plan to the extent that the person "renders 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."

In 1975, DOL issued a regulation interpreting when a person is a fiduciary with respect to rendering investment advice for a fee. Under that regulation, a person is considered to provide investment advice if he or she meets all the following requirements (known as the five-part test):

- Renders any investment 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 property;
- On a regular basis to the plan;
- Pursuant to a mutual agreement, arrangement or understanding;
- The advice is a primary basis for investment decisions with respect to plan assets; and
- The person renders individualized investment advice to the plan based on the needs of the plan.[11]

In 2005, DOL issued Advisory Opinion 2005-23A, also known as the Deseret Letter, in which it stated in its answer to Question 2 that "[i]t is the view of the Department that merely advising a plan participant to take an otherwise permissible plan distribution, even when that advice is combined with a recommendation as to how the distribution should be invested, does not constitute 'investment advice' within the meaning of the regulation (29 CFR § 2510-3.21(c))." In its answer to Question 3, DOL stated "an advisor who is not otherwise a plan fiduciary and who recommends that a participant withdraw funds from the plan and invest the funds in an Individual Retirement Account (IRA) is not a fiduciary because such a recommendation is not investment advice and such a recommendation, in and of itself, is not an exercise of authority or control over plan assets that would make a person a fiduciary within the meaning of ERISA section 3(21)(A)." Therefore, because such an advisor is not otherwise a fiduciary, DOL explained in Question 3 that the advisor does not "engage in an act of self-dealing if he or she advises the participant to roll over his account balance from the plan to an IRA that will pay management or other investment fees to such person."

In 2010, DOL published a notice of proposed rulemaking to revise the 1975 regulation's

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[10] Executive Order: Reorganization Plan No. 4 of 1978 available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/executive-orders/4#section3 .

[11] 40 Fed. Reg. 50842 (Oct. 31, 1975; codified at 29 CFR § 2510.3-21(c)). On that same date, Treasury issued a final regulation defining fiduciary for purposes of Title II, which mirrored the DOL regulation. 40 Fed. Reg. 50840 (Oct. 31, 1975; codified at 26 CFR § 54.4975-9). The Treasury definition remains as a valid regulation in the Code of Federal Regulations, and it does not appear to have been rescinded. Therefore, it is unclear that if that regulation is not rescinded by Treasury whether DOL's Proposed Regulation is effective for purposes of Code Section 4975 or whether the DOL's Proposed Regulation would override the Treasury regulation because of Reorganization Plan 4.

five-part test for determining when a person "renders investment advice."[12] The proposal eliminated the regular basis and primary basis prongs of the test. The 2010 proposed rule was withdrawn because it was unworkable and highly criticized. In addressing the impracticality of the proposal, DOL reported that a:

> number of commenters urged consideration of other means to attain the objectives of the 2010 Proposal and of additional analysis of the proposal's expected costs and benefits. In light of these comments and because of the significance of this rule, the Department decided to issue a new proposed regulation. On September 19, 2011 the Department announced that it would withdraw the 2010 Proposal and propose a new rule defining the term ''fiduciary'' for purposes of section 3(21)(A)(ii) of ERISA.[13]

On April 20, 2015, DOL issued a new proposal, which modified both the 1975 regulation and the relevant PTEs.[14] DOL finalized the proposed rule in 2016, making significant revision to the 1975 definition of an investment advice fiduciary to plans, participants, beneficiaries, and IRA owners.[15] The 2016 Final Regulation had an effective date of June 7, 2016 and an applicability date of April 10, 2017. The 2016 Final Regulation provided:

> A person is deemed to be rendering investment advice with respect to moneys or other property of a plan or IRA … if the person provides to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner the following types of advice for a fee or other compensation, direct or indirect:
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> - A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after being rolled over, transferred, or distributed from the plan or IRA;
> - A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage versus advisory); or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made.[16]

In addition, the investment advice recommendation must be made either directly or indirectly (e.g., through or together with any affiliate) by a person who:

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[12] 75 Fed. Reg. 65263 (Oct. 22, 2010). The proposal also received wide bipartisan opposition from Congress, and it was criticized for being unworkable and unjustifiably burdensome for financial institutions with no correlating investor benefit. See "Bipartisan Group of Members Issue Letter to Labor Secretary Perez on Proposed Fiduciary Rule", July 29, 2015 (discussing the bipartisan disapproval of the 2010 proposal) available at https://wagner.house.gov/media-center/press-releases/bipartisan-group-members-issue-letter-labor-secretary-perez-proposed.

[13] 80 Fed. Reg. 21928, 21932 (Apr. 20, 2015).

[14] 80 Fed. Reg. 21928 (Apr. 2015).

[15] 81 Fed. Reg. 20946 (Apr. 8, 2016) (2016 Final Regulation).

[16] 81 Fed. Reg. 20946, 20997 (Apr. 8, 2016).

- Represents or acknowledges that it is acting as a fiduciary;
- Renders the advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is based on the investment needs of the advice recipient; or
- Directs the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.[17]

In the preamble to the 2016 Final Regulation, DOL explained that it changed the definition of fiduciary not because of the text of ERISA but rather because of changes in society and economics, which DOL suggested created a gap in the regulation. Specifically, DOL explained:

> The 1975 regulation was adopted prior to the existence of participant-directed 401(k) plans, the widespread use of IRAs, and the now commonplace rollover of plan assets from ERISA-protected plans to IRAs. Today, as a result of the five-part test, many investment professionals, consultants, and advisers have no obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules, despite the critical role they play in guiding plan and IRA investments.[18]

Because the 2016 Final Regulation's expanded fiduciary definition swept in individuals and institutions that were not considered fiduciaries under the 1975 regulation, DOL revised several existing PTEs and issued new ones as part of the 2016 Final Regulation regulatory package. One of these exemptions was the "Best Interest Contract Exemption" (BIC or BICE Exemption). As the Fifth Circuit noted, "[t]he BICE and related exemptions were promulgated pursuant to DOL's authority to approve prohibited transaction exemptions for certain classes of fiduciaries or transactions. The BICE was intended to afford such relief because, as DOL candidly acknowledged, the new standard could 'sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships.'"[19]

The BIC Exemption[20] required that:

- Financial institutions acknowledge their and their advisers' fiduciary status in writing;
- The financial institution and advisers adhere to the Impartial Conduct Standards;
- Compensation is not in excess of what is considered reasonable;
- Financial institutions adopt policies and procedures to ensure that advisers adhere to the Impartial Conduct Standards;
- Financial institutions disclose fees, compensation, and Material Conflicts of Interest;
- Financial institutions retain records demonstrating compliance with the exemption;

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[17] Id.

[18] 81 Fed. Reg. 20946 (Apr. 8, 2016). This is the same argument that DOL uses in the 2023 Proposed Regulation where it states that "[h]owever, as a result of the five-part test in the 1975 rule, many investment professionals, consultants, and financial advisers have no obligation to adhere to the fiduciary standards in Title I of ERISA or to the prohibited transaction rules, despite the critical role they play in guiding plan and IRA investments." 88 Fed. Reg. 75890, 75892 (Nov. 3, 2023). However, in neither case does DOL cite to any change in the law that would give it jurisdiction over Title II plans, including IRAs.

[19] Chamber of Commerce of the United States of America v. U.S. Dep't of Labor, 885 F.3d at 367.

[20] The BIC Exemption was published in 81 Fed. Reg. 21002 (Apr. 8, 2016).

and
- In the case of IRAs and non-ERISA plans, the standards are set forth in an enforceable contract with the retirement investor.

The Impartial Conduct Standards required that:

- Investment advice must be in the "Best Interest" of the retirement investor;
- The recommended transaction will not cause the financial institution, adviser or affiliates to receive compensation that is in excess of reasonable compensation; and
- The financial institution and its advisers' statements are not materially misleading.

On June 1, 2016, the U.S. Chamber of Commerce, along with other organizations, filed a complaint in the United States District Court for the Northern District of Texas asserting claims under the APA and the First Amendment of the Constitution of the United States that the rule and PTEs "overstep the Department's authority, create unwarranted burdens and liabilities, undermine the interests of retirement savers, and are contrary to law."[21]

In a memorandum to the Secretary of Labor, dated February 3, 2017, President Donald Trump directed DOL to "examine the Fiduciary Duty Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice."[22] It also required DOL to prepare an updated economic and legal analysis concerning the likely impact of the rule.

On February 8, 2017, the United States District Court for the Northern District of Texas denied plaintiffs' motion for summary judgment on all counts, and plaintiff appealed that decision.

On March 2, 2017, DOL proposed a 60-day delay of the applicability date. DOL invited comments on the proposed delay, on questions raised in the President's memorandum, and generally on questions of law and policy concerning the 2016 Final Regulation and PTEs.[23]

On April 7, 2017, DOL extended the applicability date for the fiduciary rule and BIC Exemption for 60 days and provided that compliance with other requirements such as the disclosures would not be required until January 1, 2018.[24] DOL also announced it would not pursue claims through January 1, 2018 against fiduciaries who were working in good faith toward complying with the 2016 Final Regulation and PTEs.[25]

On March 15, 2018, the Fifth Circuit Court of Appeals issued a decision vacating the District Court's decision. In its decision, the Fifth Circuit stated that "[f]iduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and the client."[26] And, "[n]otably, DOL does not dispute that a relationship of trust and confidence is

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[21] Chamber of Commerce of the United States of America v. U.S. Dep't of Labor, Compl. para. 1 available at https://www.chamberlitigation.com/sites/default/files/cases/files/16161616/DOL%20Fiduciary%20Rule%20Complaint.pdf.
[22] "Presidential Memorandum on Fiduciary Duty Rule" dated Feb. 3, 2017, available at https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-fiduciary-duty-rule/.
[23] 82 Fed. Reg. 12319 (Mar. 2, 2017).
[24] 82 Fed. Reg. 16902, 16905 (Apr. 7, 2017).
[25] FAB 2017-02 (May 22, 2017), p. 2 available at https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02.pdf.
[26] Chamber of Commerce of the United States v. U.S. Dept. of Labor, 885 F.3d at 391.

the sine qua non of fiduciary status."[27] The court found that the 2016 Final Regulation's interpretation of investment advice fiduciary "fatally conflicts with the statutory text and contemporary understandings"[28] because "had Congress intended to abrogate both the cornerstone of fiduciary status – the relationship of trust and confidence – and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so."[29]

The Court went on to reject the BIC Exemption and the 2016 Final Regulation stating:

> Together, the Fiduciary Rule and the BIC Exemption circumvent Congress' withholding from DOL of regulatory authority over IRA plans. The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transaction penalties is unreasonable and arbitrary and capricious.[30]

The United States declined to appeal the Fifth Circuit's decision, and on May 7, 2018, DOL issued Field Assistance Bulletin 2018-02 in which it announced that from June 9, 2017 until after guidance is issued, DOL would not pursue prohibited transaction claims against investment advice fiduciaries who are working in good faith to comply with the Impartial Conduct Standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption.

Because of the Securities and Exchange Commission's (SEC) expertise, the 2010 Dodd-Frank Act section 913 directed the SEC, not DOL, to study regulatory standards around investment advice and recommendations to retail investors. As a result, on June 5, 2019, the SEC adopted Regulation Best Interest (Reg BI) to enhance the standards of conduct for financial professionals and protect retail investors. The SEC also adopted the Form CRS which requires broker-dealers and investment advisers to provide retail investors with a brief relationship summary.[31]

Reg BI was the culmination of the Congressional directive, studies, and the SEC's regulatory expertise. In addition, the Reg BI framework sets a consistent national standard that prohibits broker-dealers from placing their own interests ahead of their clients' interests. Reg BI requires a consideration of costs and emphasizes the deliberation by a broker-dealer of reasonably available alternatives. Further, the SEC stated that the Best Interest standard applies to account type recommendations, which includes "recommendations to roll over or transfer assets from one type of account to another (e.g., a workplace retirement plan account to an IRA)."[32]

Reg BI also requires transparency focused on ensuring investors are informed of the services, fees and conflicts. The new Form CRS requires the following information that is presented in a way to help investors compare information about different firms:

- Firm registration information (including whether the firm is registered as a broker-

[27] Id. at 371.
[28] Id. at 376.
[29] Id.
[30] Id. at 384.
[31] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019).
[32] SEC's Adopting Release No. 34-86031, 84 FR 33318 (June 5, 2019).

dealer, investment advisor, or both);

- A description of all services offered by the firm;
- Information regarding fees and costs (including principal fees and costs, custodian fees, account maintenance fees, and others);
- Information regarding conflicts of interest (including policies and procedures to mitigate conflicts, prevent material limitations on offerings, and eliminate sales contests, sales quotas, bonuses, and non-cash compensation based on the sale of specific securities);
- A summary of the firm and advisor's disciplinary history; and
- "Conversation starters" for customers to ask their advisor or point of contact.[33]

As the SEC noted in its adopting release, the final Form CRS rule was informed by extensive feedback from retail investors, financial institutions, consumer advocacy groups, and the SEC's Investor Advisory Committee.[34] And, overall, both Reg BI and Form CRS were supported by industry and were not challenged in court.

Reg BI went into effect on June 30, 2020. The Financial Industry Regulatory Authority (FINRA) and Municipal Securities Rulemaking Board (MSRB) also implemented changes to their rules to align their organizations' standards with Reg BI and to bring greater clarity to investment professionals and investors.[35]

On July 7, 2020, DOL published guidance related to the Fifth Circuit's decision. It also reinstated the 1975 five-part test and removed PTE 2016-01 and 02 and reinstated PTEs 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128. It also reinstated Interpretive Bulletin 96-1.[36]

On that same day in 2020, DOL also issued a notice of a proposed voluntary exemption that would:

> [A]llow investment advice fiduciaries under both ERISA and the Code to receive compensation, including as a result of advice to roll over assets from a Plan to an IRA, and to engage in principal transactions, that would otherwise violate the prohibited transaction provisions of ERISA and the Code. The exemption would apply to registered investment advisers, broker dealers, banks, insurance companies, and their employees, agents, and representatives that are investment advice fiduciaries.[37]

In the preamble to the proposed PTE, DOL stated that in determining whether someone were a fiduciary with respect to investment advice to roll over money from an ERISA plan, it did not intend to apply the analysis in Advisory Opinion 2005–23A (the Deseret Letter). DOL stated that after 15 years it "believes that the analysis in the Deseret Letter was incorrect and

[33] Instructions for Form CRS available at https://www.sec.gov/files/formcrs.pdf.
[34] 84 Fed. Reg. 33318 (July 12, 2019).
[35] Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change to Align Certain MSRB Rules to Securities Exchange Act Rule 15l-1, Regulation Best Interest, Release No. 34-89154; File No. SR-MSRB-2020-02 (June 25, 2020) and Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to FINRA's Suitability, Non-Cash Compensation and Capital Acquisition Broker (CAB) Rules in Response to Regulation Best Interest, Release No. 34-89091; File No. SR-FINRA-2020-007 (June 18, 2020).
[36] 85 Fed. Reg. 40589 (July 7, 2020).
[37] 85 Fed. Reg. 40834 (July 7, 2020).

that advice to take a distribution of assets from an ERISA-covered Plan is actually advice to sell, withdraw, or transfer investment assets currently held in the Plan."[38] DOL acknowledged that all prongs of the now restored five-part test must be met, including the regular basis test, and "advice to take a distribution from a Plan and roll over the assets may be an isolated and independent transaction that would fail to meet the regular basis prong."[39]

Contrary to the analysis in the Deseret Letter, in the 2020 proposal DOL would have applied a facts and circumstances test in determining fiduciary status. DOL stated:

> [A]dvice to roll over Plan assets can occur as part of an ongoing relationship or an anticipated ongoing relationship that an individual enjoys with his or her advice provider. For example, in circumstances in which the advice provider has been giving financial advice to the individual about investing in, purchasing, or selling securities or other financial instruments, the advice to roll assets out of a Plan is part of an ongoing advice relationship that satisfies the 'regular basis' requirement. Similarly, advice to roll assets out of the Plan into an IRA where the advice provider will be regularly giving financial advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the 'regular basis' requirement. In these scenarios, there is advice to the Plan—meaning the Plan participant or beneficiary—on a regular basis.[40]

The Department also reissued the 1975 regulation related to the definition of investment advice fiduciary on the same day as the exemption, but with no discussion of its new interpretation. However, with respect to the proposed exemption:

> In light of potential conflicts of interest related to rollovers from Plans to IRAs, ERISA and the Code prohibit an investment advice fiduciary from receiving fees resulting from investment advice to Plan participants to roll over assets from a Plan to an IRA, unless an exemption applies. The proposed exemption would provide relief, as needed, for this prohibited transaction, if the Financial Institution and Investment Professional provide investment advice that satisfies the Impartial Conduct Standards and they comply with the other applicable conditions....[41]

The Impartial Conduct Standards in the proposed exemption, which are nearly the same as the requirements in the BIC Exemption that the Fifth Circuit invalidated, would require that the fiduciary act in the "best interest" of the retirement investor, charge only reasonable compensation, not make any materially misleading statements about the investment transaction and other relevant matters, and obtain the best execution of the investment transaction reasonably available under the circumstances, as required by the federal securities laws.[42]

On December 18, 2020, DOL published the final exemption (PTE 2020-02), which was

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[38] Id. at 40839.
[39] Id.
[40] Id.
[41] Id.
[42] Id. at 40862-63.

substantially similar to the proposed exemption.[43] Like the proposed exemption, the preamble to PTE 2020-02 contained DOL's new interpretation of fiduciary status vis-a-vis rollovers. The exemption also requires compliance with the Impartial Conduct Standards; disclosures, including a written acknowledgment of fiduciary status and why a rollover is in the retirement investor's best interest; policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and that mitigate conflicts of interest; and a retrospective compliance review. In the preamble to PTE 2020-02, DOL extended the temporary enforcement policy in FAB 2018–02 until it expired on December 20, 2021.[44] The temporary enforcement policy was later extended by FAB 2021-02 until January 31, 2022 for all of the PTE's conditions except the "specific reasons" requirement, which was extended to June 30, 2022. As such, PTE 2020-02 did not become fully enforceable until July 1, 2022.

On April 13, 2021, DOL issued a series of FAQs relating to PTE 2020-02.[45] In FAQ 7, DOL reiterated its view of when advice to rollover assets would be considered on a "regular basis." DOL stated a "single, discrete instance of advice to roll over assets from an employee benefit plan to an IRA would not meet the regular basis prong of the 1975 test." However, DOL explained that the single instance could either be part of an ongoing relationship or the start of a future relationship with the investment advice provider. DOL elaborated on this stating:

> When the investment advice provider has been giving advice to the individual about investing in, purchasing, or selling securities or other financial instruments through tax-advantaged retirement vehicles subject to ERISA or the Code, the advice to roll assets out of the employee benefit plan is part of an ongoing advice relationship that satisfies the regular basis prong. Similarly, when the investment advice provider has not previously provided advice but expects to regularly make investment recommendations regarding the IRA as part of an ongoing relationship, the advice to roll assets out of an employee benefit plan into an IRA would be the start of an advice relationship that satisfies the regular basis requirement. The 1975 test extends to the entire advice relationship and does not exclude the first instance of advice, such as a recommendation to roll plan assets to an IRA, in an ongoing advice relationship.

Two lawsuits were filed challenging DOL's new interpretation of an investment advice fiduciary. On February 2, 2022, the Federation of Americans for Consumer Choice (FACC) filed a lawsuit against DOL in the U.S. District Court for the Northern District of Texas claiming DOL's new interpretation of an investment advice fiduciary was contrary to law. Namely:

> In adopting the New Interpretation, along with its withdrawal of the Deseret Letter, the DOL seeks to disregard Congress' intent and assert the right to regulate actors and transactions beyond its statutory authority by redefining the term "fiduciary" in an impermissibly broad manner. This effort to assert new regulatory jurisdiction in the IRA market disregards Congress' distinction between the DOL's authority to interpret technical and accounting terms for

[43] 85 Fed. Reg. 82798 (Dec. 18, 2020).
[44] 85 Fed. Reg. 82798, 82799 (Dec. 18, 2020).
[45] See New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.

purposes of Title II and its far broader regulatory authority over Title I employer benefit plans.[46]

> The interpretation of fiduciary provided in the New Interpretation is fundamentally inconsistent with Congress' intent as expressed in the text of ERISA and the Code, as well as the historical and common law understanding of the term. Likewise, the sudden reversal of the longstanding position expressed in the Deseret Letter concerning advice relating to proceeds from employer plan distributions defies Congressional intent. The Fifth Circuit flatly rejected the DOL's attempt to rewrite the meaning of fiduciary and usurpation of regulatory authority when it attempted to do so directly in adopting the Fiduciary Rule in 2016. The DOL may not now do indirectly what it was prevented from doing directly in Chamber of Commerce.[47]

The district court referred DOL's motion to dismiss to the assigned magistrate judge. On June 30, 2023, the magistrate judge filed her recommendation, which, in part, provided:

> ERISA's text defines Title I and Title II 'plans' distinctly. (citation omitted). By utilizing these separate definitions, Congress indicated how each Title's plans should be treated differently due to the nature of the relationship between financial professionals and retirement investors in Title I and Title II plans. As the New Interpretation purports to consider recommendations as to Title II plans when determining Title I fiduciary status, it conflicts with ERISA. Therefore, it is an arbitrary and capricious agency action in violation of the APA.[48]

The magistrate judge concluded that this distinction was supported by the statute's text and structure, and:

> This is significant because allowing Title II advice to be considered for determining Title I relationships would dilute these provisions and encompass financial professionals who may only have fiduciary status for one ERISA-protected plan, but not a separate one. Congress carefully distinguished between the penalties fiduciaries faced for engaging in prohibited transactions for Title I and Title II plans. Allowing the New Interpretation to stand as a whole would give the DOL an ability to impose Title I fiduciary status on unsuspecting financial professionals who do not cultivate relationships of trust and confidence with that same Title I plan.[49]

The magistrate judge addressed the "regular basis" prong of the 1975 regulation, which the DOL new interpretation appeared to disregard. The magistrate judge noted:

> The five-part test requires that—as aligned with the essence of a fiduciary relationship of trust and confidence—the financial professional must have a

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[46] Federation of Americans for Consumer Choice v. U.S. Dep't of Labor, Case 3:22-cv-00243-K, (M.D. Fla) Compl. at paragraph 44.
[47] Id. at paragraph 48.
[48] Federation of Americans for Consumer Choice v. U.S. Dept. of Labor, Case No. 3:22-cv-00243-K-BT 2023 WL 5682411,*18 (N.D. Tex. June 30, 2023).
[49] Id.

> substantial, ongoing relationship regarding the specific plan. As reflected in Title I, the additional duties imposed on fiduciaries reflect Congressional intent to protect against conflicted transactions regarding employer-provided benefit plans, see ERISA § 404(a), 29 U.S.C. § 1104(a), as compared to the different circumstances of relationships between financial professionals and investors in Title II plans.[50]

Given the impermissible conflation of Title I and Title II, the magistrate judge recommended that the district court "vacate only those portions of the preamble of PTE 2020-02 and PTE 2020-02 that expand the view of a Title I fiduciary's status based on Title II plan relationships for the purposes of determining whether a financial professional is an investment advice fiduciary."[51] Both parties objected to the magistrate judge's report and recommendation, and those objections remain pending as of the date this comment letter was submitted.

One week after the FACC case was filed, on February 9, 2022, the American Securities Association (ASA) filed an APA lawsuit in the U.S. District Court for the Middle District of Florida challenging the policies underlying FAQs 7 and 15 as arbitrary and capricious and therefore in violation of the APA. The district court largely agreed with ASA, and it declared unlawful and vacated the policy referenced in FAQ 7. The district court stated that under the 1975 regulation, "the scope of the regular basis inquiry is limited to the provision of advice pertaining to a particular plan."[52] "Because the policy referenced in FAQ 7 abandons this plan-specific focus in the context of rollovers, it sweeps conduct into its purview that would not otherwise trigger fiduciary obligations."[53] "The policy referenced in FAQ 7 departs from this standard by sweeping advice that is not made to an ERISA plan into its ambit. Because the policy referenced in FAQ 7 allows fiduciary obligations to be premised on conduct that does not fall within the 'regular basis to a plan' analysis, the Department has 'fail[ed] to comply with its own regulations.'"[54] Furthermore, the court stated that "while the Department may disagree with segmenting the fiduciary inquiry based on which plan advice was made to as a matter of policy, the fact that conduct might trigger fiduciary duties under the Code but not Title [I] is not, by itself, absurd."[55] As such, the court held that because "the policy referenced in FAQ 7 conflicts with the Department's existing regulations, it is an arbitrary and capricious interpretation of the 1975 Regulation."[56] For that reason, the court vacated the DOL's interpretation of an investment advice fiduciary articulated in FAQ 7.

DOL initially filed a notice of appeal. However, on May 15, 2023, DOL dropped its appeal of the ASA case.

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[50] Id. at *22.
[51] Id. at *29.
[52] American Securities Ass'n, v. U.S. Dept. of Labor, Case No. 8:22-cv-330-VMC-CPT, 2023 WL 1967573, *16 (M.D. Fla. Feb. 13, 2023).
[53] Id. at *17.
[54] Id. (citation omitted).
[55] Id. at *19.
[56] Id.

Proposed Amendments

Proposed Regulation

Under the Proposed Regulation, a person will be a fiduciary if the person renders "investment advice" with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property to the plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary (retirement investor),[57] and the person meets one of the following:

(i) The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;

(ii) The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or

(iii) The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.[58]

The Proposed Regulation does not define the term "recommendations," but instead defines "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property" as recommendations:

(i) As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;

(ii) As to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

(iii) As to rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.[59]

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[57] It is unclear why DOL chose not to define the term "retirement investor" in the definition section of the Proposed Regulation, which is not a term used or defined in ERISA or the Code. However, the term is defined in PTE 2020-02, but it is defined differently than in the parenthetical in the Proposed Regulation.

[58] Proposed Regulation § 2510.3–21(c)(1).

[59] Proposed Regulation § 2510.3–21(f)(10).

Under the Proposed Regulation, a person may not disclaim fiduciary status under ERISA or the Code or disclaim any statement that the recommendations are based on the particular needs or individual circumstances of the retirement investor or that they may be relied on by the investor as the basis for an investment decision to the extent they are inconsistent with the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.[60]

The Proposed Regulation provides that "for a fee or other compensation, direct or indirect," means "if the person (or any affiliate) receives any explicit fee or compensation, from any source, for the advice or the person (or any affiliate) receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase, sale, or holding of a security or other investment property or the provision of investment advice, including, though not limited to, commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation."[61]

A fee or compensation is paid "in connection with or as a result of" such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or the provision of advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of advice.[62]

The Proposed Regulation and Amended PTEs would be effective 60 days after final rules are published in the Federal Register.[63]

Proposed Amendments to PTE 2020-02

PTE 2020-02 has only been fully enforceable for 15 months, and DOL has not requested any information from industry on its workability.[64] Instead, DOL is proposing to significantly change the PTE in ways that increase costs and risks associated with offering investment advice, expose Financial Institutions and Investment Professionals to state law claims, and make it more difficult to rely on the class exemption. Specifically, the proposed amendments would change PTE 2020-02 by:

- Stating in Section II(a) of the Impartial Standards that "[f]or example, in choosing between two investments offered and available to the retirement investor from the Financial Institution, it is not permissible for the Investment Professional to advise investing in the one that is worse for the retirement investor but better or more

[60] Proposed Regulation § 2510.3–21(c)(1)(iv).
[61] Proposed Regulation § 2510.3–21(e).
[62] Proposed Rule § 2510.3–21(e).
[63] 88 Fed. Reg. 75890, 75912 (Nov. 3, 2023).
[64] There is concern that the PTE would not apply where the investment advice is being provided by employees of the employer sponsoring the plan in the context of Financial Institutions whose employees may be Investment Professionals. In many cases, employees of a Financial Institution would want to be able to work with such Investment Professionals, and an exception should be made.

profitable for the Investment Professional or the Financial Institution."[65]

- Changing the written disclosures to require written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the retirement investor and are fiduciaries under Title I, the Code, or both when making an investment recommendation;[66]
- Requiring a written statement of the Best Interest standard of care owed by the Investment Professional and Financial Institution to the retirement investor be furnished before providing investment advice;[67]
- Requiring the disclosures to include a statement on whether the retirement investor will pay for such services, directly or indirectly, including through third-party payments. If, for example, the retirement investor will pay through commissions or transaction-based payments, the written statement must clearly disclose that fact. This statement must be written in plain English, taking into consideration a retirement investor's level of financial experience;[68]
- Including a written statement that the retirement investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present full and fair disclosure that is materially accurate in scope, magnitude, and nature, with sufficient detail to permit the retirement investor to make an informed judgment about the costs of the transaction and about the significance and severity of the conflicts of interest and that describes how the retirement investor can get the information, free of charge;[69]
- Including the extensive rollover disclosures that are substantially similar to what was in the preamble of the final PTE 2020-02 because DOL fundamentally changed its interpretation of when rollover advice is investment advice for a fee. With respect to disclosures:

> The Financial Institution and Investment Professional must consider and document the basis for their conclusions as to whether a rollover is in the retirement investor's Best Interest, and must provide that documentation to the retirement investor. Relevant factors to consider must include but are not limited to:
> (1) the alternatives to a rollover, including leaving the money in the Plan or account type, as applicable;
> (2) the fees and expenses associated with the Plan and the recommended investment or account;
> (3) whether an employer or other party pays for some or all of the Plan's administrative expenses; and
> (4) the different levels of services and investments available under the Plan

[65] 88 Fed. Reg 75979, 76000 (Nov. 3, 2023).
[66] Id. Both the Proposed Regulation and these new disclosure requirements create First Amendment concerns because they directly regulate speech by Investment Professionals, independent agents and others. As discussed further, there also is a question of whether certain commercial sales speech is now banned because such speech may now only be in the context of acting as a fiduciary.
[67] Id.
[68] Id.
[69] Id.

and the recommended investment or account.[70]

- Requiring that the policies and procedures must provide that "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 are not in retirement investors' Best Interest."[71]
- Requiring that as part of the retrospective review, the senior executive officer must certify that the "Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975."[72]
- Changing the domestic criminal conviction of the Financial Institution, affiliate or Investment Profession exclusion from "[a] conviction of any crime described in ERISA section 411 arising out of such person's provision of investment advice to retirement investors" to a conviction "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."[73]
- Including a conviction of the Financial Institution, affiliate or Investment Professional by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, which is substantially equivalent to the domestic offenses exclusions. [74]
- Stating eligibility will be lost for "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)."[75]
- Including a new definition of third-party payments to include sales charges when not paid directly to the Financial Institution by the plan, from a participant or beneficiary's account, or from an IRA; gross dealer concessions; revenue sharing payments; 12b-1

[70] Id. at 76000-76001. It appears DOL may require the same documentation for a recommendation to move from one IRA to another or from an advisory to a brokerage account. However, obtaining this documentation could be difficult and does not make sense in the context of moving from brokerage to advisory because the services, and therefore the fees, will be an apples-to-oranges comparison.

[71] Id. at 76001.

[72] Id.

[73] Id. This is the exact same definition used in the proposed changes to PTE 84-14 relating to Qualified Professional Asset Managers (QPAM), which serves entirely different purposes and a different population, but DOL now feels that it should also apply in this context. See 87 Fed. Reg. 45204, 45231-2 (July 27, 2022).

[74] Id. This also is the exact same exclusion used in the proposed QPAM amendments, which received substantial criticism in the context of QPAMs, especially the foreign affiliates inclusion.

[75] Id.

fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration, or financial benefit provided to the Financial Institution or an affiliate or related entity by a third-party as a result of a transaction involving a plan, participant or beneficiary account, or IRA.[76]

Proposed Amendments to PTE 84-24

For nearly forty years, insurance companies, their employees, and agents have relied on PTE 84-24 with respect to selling annuity products. However, the Proposed Amendments to 84-24 would limit the use of PTE 84-24 only to independent producers who recommend annuities from an unaffiliated financial institution to retirement investors on a commission or fee basis. All other annuity sales would be required to be conducted under PTE 2020-02. The Proposed Amendments to 84-24 mostly lift the requirements directly from PTE 2020-02 and the Proposed Amendments to PTE 2020-02 into 84-24. DOL attempts to replace the Financial Institution and its roles with the insurer and the Investment Professional with the independent producer, creating burdensome and expensive disclosure and other requirements on the independent producer.

With respect to disclosures, similar to PTE 2020-02 and the Proposed Amendments to PTE 2020-02, the independent producer would be required to provide acknowledgement of fiduciary status and a description of the Impartial Conduct Standard and a lengthy description of services, products and costs before the receipt of any sales commission. Specifically, the independent producer must provide:

(1) A written acknowledgment that the independent producer is a fiduciary under Title I and the Code, as applicable, with respect to any investment recommendation provided by the independent producer to the retirement investor;
(2) A written statement of the best interest standard of care owed by the independent producer to the retirement investor;
(3) A written description of the services to be provided and the independent producer's material conflicts of interest that is accurate and not misleading in any material respects. The description will include the products the independent producer is licensed and authorized to sell. The description must inform the retirement investor in writing of any limits on the range of insurance products recommended. The independent producer must identify the specific insurers and specific insurance products available for recommendation;
(4) A written statement of the amount of the insurance commission that will be paid to the independent producer in connection with the purchase by a retirement investor of the recommended annuity. The statement must disclose the amount of expected insurance sales commission, expressed both in dollars and as a percentage of gross annual premium payments, if applicable, for the first year and for each of the succeeding years; and
(5) A written statement that the retirement investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially

[76] Id. at 76003.

accurate disclosure of their scope, magnitude, nature with sufficient detail to permit the retirement investor to make an informed judgment about the costs of the transaction and about the significance and severity of the conflicts of interest, and describe how the retirement investor can get the information, free of charge.[77]

The Proposed Amendments to PTE 84-24 would mandate new requirements for both the sale of an annuity and rollovers. Before the sale of a recommended annuity, the independent producer would be required to document "its conclusions as to whether the recommended annuity is in the Best Interest of the retirement investor" and provide the documentation to the retirement investor and the insurer.[78] With respect to rollovers, before "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 consider and document its conclusions as to whether a rollover is in the retirement investor's Best Interest and provide that documentation to both the retirement investor and to insurer."[79] The relevant factors in the Proposed Amendments to PTE 84-24 are the similar to those in the Proposed Amendments to 2020-02, including:

(1) the alternatives to a rollover, including leaving the money in the plan, if applicable;
(2) the comparative fees and expenses;
(3) whether an employer or other party pays for some or all administrative expenses; and
(4) the different levels of fiduciary protection, services, and investments available. [80]

The Proposed Amendments to PTE 84-24 also would impose new obligations on insurers who are not fiduciaries. Insurers would be required to have policies and procedures in place to ensure compliance by the independent producers, and DOL spells out what must be in them. The policies and procedures also must "identify and eliminate 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 are not in the retirement investor's Best Interest, or that subordinate the interests of the retirement investor to the independent producer's own interest."[81]

The policies and procedures would be expected to include a prudent process for taking action to protect retirement investors from independent producers who might fail to adhere to the Impartial Conduct Standards or who lack the necessary education, training, or skills.[82] DOL explains that this requirement is consistent with, but more protective than, the National Association of Insurance Commissioners (NAIC) model regulation, which requires an insurer to verify that the producer has completed the required annuity training course. The insurer also must document the basis for its initial determination that it can rely on the independent producer to adhere to the Impartial Conduct Standards, and the insurer must review that

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[77] 88 Fed. Reg. at 76027-28 (Nov. 3. 2023).
[78] 88 Fed. Reg. at 76027, 76028. (Nov. 3, 2023).
[79] Id.
[80] This is unique to the Proposed Amendments to PTE 84-24 and is not required under the Proposed Amendments to 2020-02.
[81] Id. at 76028.
[82] Id.

determination at least annually as part of the retrospective review.[83]

The retrospective review is similar to that of PTE 2020-02 and the Proposed Amendments to PTE 2020-02, including that the senior executive at the insurer must certify that the insurer has filed the Form 5330 for any violations.[84]

Similar to the Proposed Amendments to PTE 2020-02, the Proposed Amendments to PTE 84-24 would disqualify the independent producer, insurer, or affiliate from relying on the class exemption if either the independent producer, insurer, or affiliate has been convicted of any of a broad swath of domestic and criminal acts.[85]

The Proposed Amendments to PTE 84-24 also contain strict recordkeeping requirements on the insurance agent or broker (or the insurance company whose contract is being described if designated by the agent or broker), the pension consultant or investment company principal underwriter, the independent producer or the insurer. These require that each entity maintain the records necessary to enable the following person to determine if the conditions of the exemption have been met:

> (1) Any authorized employee of DOL or the Internal Revenue Service or another state or federal regulator;
> (2) Any Plan fiduciary that engaged in a transaction pursuant to this exemption;
> (3) Any contributing employer and any employee organization whose members are covered by a plan that engaged in a transaction pursuant to this exemption; or
> (4) Any participant or beneficiary of a plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.[86]

The Proposed Amendments to 84-24 also provides that no party, other than the party responsible for complying with recordkeeping requirements, will be subject to the civil penalty under ERISA section 502(i) or the excise tax imposed by Code section 4975(a) and (b) if the records are not maintained or available for examination.[87]

Discussion

The Proposed Regulation and Amended PTEs are overly broad and outside of DOL's statutory authority by imposing Title I obligations on entities only subject to Title II.

Just as it attempted to do in 2010 and did do in 2016, through the Proposed Regulation and Amended PTEs, DOL seeks to fill a gap that can only be filled by Congress. Once again, DOL has decided that the proliferation and popularity of IRA products, which are governed by Title II, is a problem DOL needs to solve by imposing Title I fiduciary obligations on IRA providers. In DOL's view, this solution will help ensure that every retirement investor, regardless of the retirement plan vehicle, receives the same protection. However, this solution ignores that DOL does not have authority to do so. "Expanding the scope of DOL regulation in vast and novel ways is valid only if it is authorized by ERISA Titles I and II. A regulator's

[83] Id.
[84] Id. at 76029.
[85] Id. at 76029-30.
[86] Id. at 76030-31.
[87] Id.

authority is constrained by the authority that Congress delegated it by statute." [88] The fact that an agency may have policy concerns does not give it authority to require entities only governed by Title II of ERISA to abide by Title I's standards. As the Fifth Circuit noted:

> DOL's principal policy concern about the lack of fiduciary safeguards in Title II was present when the statute was enacted, but Congress chose not to require advisers to individual retirement plans to bear the duties of loyalty and prudence required of Title I ERISA plan fiduciaries. That times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority. A perceived 'need' does not empower DOL to craft de facto statutory amendments or to act beyond its expressly defined authority.[89]

DOL has expanded the definition of a fiduciary for purposes of both Title I and Title II of ERISA such that, practically speaking, the only way an entity may receive compensation is to abide by PTE 2020-02. In defining who is a fiduciary for purposes of subparagraph (c)(1)(ii), the Proposed Regulation provides that an investment recommendation "may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest."[90] Yet, nowhere in the text of the Proposed Regulation is the term "best interest" defined (even though it is required to be the basis for such decision and that it is referenced 266 times in the preamble to the Proposed Regulation).

Despite not defining "best interest" in the Proposed Regulation, DOL requires it and defines it in the Proposed Amendments to PTEs 2020-02 and 84-24 which all entities generally will be required to use if they intend to provide investment advice for a fee. These PTEs provide that Financial Institutions, independent producers and insurers must comply with the Impartial Conduct Standards, which require, among other things, that investment advice is in the retirement investor's best interest.[91] Investment advice will be in the retirement investor's best interest if the advice:

> (A) 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; and
> (B) does not place the financial or other interests of the Investment Professional, Financial Institution or any affiliate, Related Entity, or other party ahead of the interests of the retirement investor, or subordinate the retirement investor's interests to their own.

The best interest requirement of the Impartial Conduct Standard requirement in the Proposed Amendments to PTEs 2020-02 and 84-24 is the fiduciary standard under Title I of ERISA that Congress explicitly declined to include in Title II in 1974. Specifically, ERISA

[88] Chamber of Commerce of the United States v. U.S. Dept. of Labor, 885 F.3d at 369.
[89] Id. at 379.
[90] 88 Fed. Reg. at 75977.
[91] Proposed Amendments to PTE 2020-02 Section II(a) and 84-24 Section VII(a).

section 404(a), as discussed above, requires that:

> A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and:
>
> - For the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan; and
> - With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.[92]

By now requiring any entity that only provides advice to Title II plans to either forgo their business or abide by the Title I standards through the Proposed Amendments to PTEs 2020-02 and 84-24, DOL:

> ignores that ERISA Titles I and II distinguish between DOL's authority over ERISA employer-sponsored plans and individual IRA accounts. By statute, ERISA plan fiduciaries must adhere to the traditional common law duties of loyalty and prudence in fulfilling their functions, and it is up to DOL to craft regulations enforcing that provision. IRA plan 'fiduciaries,' though defined statutorily in the same way as ERISA plan fiduciaries, are not saddled with these duties, and DOL is given no direct statutory authority to regulate them. ... It follows that these ERISA provisions must have different ranges; they cannot mean that DOL may comparably regulate fiduciaries to ERISA plans and IRAs. (citation omitted). Despite the differences between ERISA Title I and II, DOL is treating IRA financial services providers in tandem with ERISA employer-sponsored plan fiduciaries. The Fiduciary Rule impermissibly conflates the basic division drawn by ERISA.[93]

As such, similar to the BIC Exemption, both Proposed Amendments to PTEs 2020-02 and 84-24 "extend[...] far beyond creating 'conditional' exemptions; to ERISA's prohibited transactions provisions. Rather than ameliorate overbreadth, [they]... deliberately extend[...] ERISA Title I statutory duties of prudence and loyalty to brokers and insurance representatives who sell to IRA plans, although Title II has no such requirements."[94] That is exactly what DOL again attempts to do. By requiring all entities to now abide by the Best Interest Standard, which is the same as the ERISA Section 404(a) in the Proposed Amendments to PTEs 2020-02 and PTE 84-24, DOL is now requiring Title II fiduciaries to abide by ERISA.[95] If DOL were not doing so, there would be no need for the Best Interest Standard because Title I fiduciaries are required to abide by the loyalty and prudence

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[92] See ERISA § 404(a); 29 USC § 1104(a). See also 29 C.F.R. § § 2550.404a–1(a), (b).
[93] Chamber of Commerce of the United States of America v. U.S. Dept. of Labor, 885 F.3d at 381.
[94] Id. at 383-84. In fact, the model notice that DOL provides in the Proposed Amendments to PTE 2020-02 specifically states that the advice will be prudent and loyal, the very cornerstones of ERISA section 404(a). See 88 Fed. Reg. 75979, 75985 (Nov. 3, 2023).
[95] Nowhere in this letter do we contest that such entities are Title II fiduciaries. However, we contest DOL's authority to require such entities to abide by Title I through the Proposed Amendments to PTEs 2020-02 and PTE 84-24.

standards in Title I whereas Title II fiduciaries are not.

The Proposed Regulation and Amended PTEs are integral to each other and not severable.

DOL states in the preamble to the Proposed Regulation, that it "considered proposing a definition of an investment advice fiduciary that would be broader in scope, similar to the 2016 Final Rule. In promulgating the 2016 Final Rule, the Department expanded the definition of a fiduciary beyond the five-part test included in the 1975 regulation."[96] After assessment of the text of both the Proposed Regulation and the 2016 Final Regulation, it is unclear how, in fact, DOL narrowed the Proposed Regulation compared to the 2016 Final Regulation.[97] As discussed below, DOL has removed three of the five prongs of the 1975 rule, namely the regular basis, the primary basis and the mutual agreement, arrangement or understanding tests, resulting in many more entities being considered a fiduciary.[98]

DOL has used the exact same words in the definition of fiduciary that it used in the 2016 Final Regulation, but instead moved them to different parts of the regulation. In doing so, DOL has actually expanded the definition of fiduciary in the Proposed Regulation by moving the language that is currently in (c)(1)(i) and (iii) into separate clauses. This means that because DOL has now cast the net so wide in defining fiduciary for purposes of providing investment advice for a fee, entities seeking to provide investment advice for a fee must now rely on an exemption to be able to conduct business. This is especially true for brokerage services. DOL has yet again created precisely the "vice" that the Fifth Circuit pointed to in striking down the 2016 Final Regulation as fatally overly broad:

> This is the vice in BICE, which exploits DOL's narrow exemptive power in order to 'cure' the Rule's overbroad interpretation of the 'investment advice fiduciary' provision. DOL admitted that without the BIC Exemptions, the Rule's overbreadth could have 'serious adverse unintended consequences.' 81 Fed. Reg. at 21062. The BIC Exemption is integral to retaining the Rule. Because it is independently indefensible, this alone dooms the entire Rule.[99]

DOL has once again created the same severability issue. The Proposed Regulation does not contain a severability clause. However, in the preamble to the Proposed Regulation, DOL states that it "intends discrete aspects of this regulatory package to be severable. For example, in the event that this regulatory package is finalized with both an updated regulatory definition of a fiduciary and amendments to the PTEs, the Department intends that the updated regulatory definition of a fiduciary would survive even if a court vacated any of the amendments to the PTEs leaving in place the previously granted versions of those PTEs."[100]

However, this position is simply unworkable. Because the Proposed Regulation broadly

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[96] 88 Fed. Reg 75890, 75961 (Nov. 3, 2023).
[97] The Proposed Regulation also does not include a number of carve outs, such as the sophisticated investor exception, which were in the 2016 Final Regulation, which further expands who is a fiduciary beyond the 2016 Final Regulation.
[98] See Chamber of Commerce of the United States of America v. U.S. Dept. of Labor, 885 F.3d at 361 ("Critically, the new definition dispenses with the 'regular basis' and 'primary basis' criteria used in the regulation for the past forty years. Consequently, it encompasses virtually all financial and insurance professionals who do business with ERISA plans and IRA holders.").
[99] Chamber of Commerce of the United States of America v. U.S. Dept. of Labor, 885 F.3d at 383.
[100] 88 Fed. Reg. 75890, 75912 (Nov. 3, 2023).

creates fiduciary status for a whole category of providers that were not previously deemed fiduciaries and because fiduciaries are generally not permitted to receive compensation at all without an exemption permitting them to do so, entities who have become fiduciaries by virtue of the Proposed Regulation cannot conduct business without using the Proposed Amendments to PTEs 2020-02 or PTE 84-24 under the Proposed Regulation. If they are deemed fiduciaries but no exemption is available to them, then they are necessarily violating ERISA (and likely the Code) every day that they operate.

By their plain text, both the Proposed Regulation and the Amended PTEs are inextricably intertwined. For example, the Proposed Regulation and the preamble use the term "best interest" 267 times, but the Proposed Regulation does not define the term. Instead, the definition of "best interest" is in the Proposed Amendments to PTEs 2020-02 and 84-24, which all entities are now required to use if they intend to receive compensation in return for their services. In short, there is absolutely no way to conclude that the Proposed Regulation is severable from the Amended PTEs, and DOL provides no analysis to the contrary.

DOL's interpretation that there is no difference between sales and advice is contrary to what the Fifth Circuit has said and to the longstanding interpretation of ERISA.

In the preamble to the 2016 Final Regulation, DOL stated "[i]n addition, and perhaps more fundamentally, the Department rejects the purported dichotomy between a mere 'sales' recommendation, on the one hand, and advice, on the other in the context of the retail market for investment products."[101] However, the Fifth Circuit called this into question when it stated that "[o]nly in DOL's semantically created world do salespeople and insurance brokers have 'authority' or 'responsibility' to 'render investment advice.'"[102] In rejecting DOL's theory, the Fifth Circuit noted that:

> Substantial case law has followed and adopted DOL's original dichotomy between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does. In the Fifth Circuit, this court held that '[s]imply urging the purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products.' *Am. Fed'n of Unions v. Equitable Life Assurance Soc'y,* 841 F.2d 658, 664 (5th Cir. 1988*).* Applying the DOL's 1975 regulation of an 'investment advice fiduciary,' the Seventh Circuit refused to hold a brokerage firm liable for the failure of investments it sold to an ERISA plan, but the court emphasized that there was nothing in the record to indicate that Jones or its employees had agreed to render individualized investment advice to the Plan. . . . The only 'agreement' between the parties was that the trustees would listen to Jones' sales pitch and if the trustees liked the pitch, the Plan would purchase from among the suggested investments, *the very cornerstone of a typical broker-client relationship. Farm King Supply, Inc. v. Edward D. Jones & Co.,* 884 F.2d 288, 293 (7th Cir.1989) (emphasis added). The Eleventh Circuit, relying upon 'numerous cases,' dismissed a claim that an insurance company's selling of life policies to an ERISA plan, without more, sufficed to give rise to fiduciary duties

[101] 81 Fed. Reg. 20946, 20981 (Apr. 8, 2016).

[102] Chamber of Commerce of the United States of America v. U.S. Dept. of Labor, 885 F.3d at 373.

to the plan. *Cotton v. Mass. Mut. Life Ins. Co.,* 402 F.3d 1267, 1278-79 (11th Cir. 2005).[103]

Despite the admonitions from the Fifth Circuit, in the Preamble to the Proposed Regulation, DOL states nearly verbatim the same position it had in 2016 relating to sales. Specifically, in the preamble to the Proposed Regulation, DOL states that "[m]ore fundamentally, the Department rejects the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products."[104]

DOL tried to salvage this distinction in the preamble to PTE 2020-02 by stating that "the Department does not believe that there should be significant concerns about introductory 'hire me' conversations. This is because all prongs of the five-part test must be satisfied for a financial services provider to be considered a fiduciary."[105] However, given that DOL has, in substance, done away with the principal components of the five-part test in the Proposed Regulation, it is unclear when a sales pitch, especially where a particular fund or product is mentioned as part of that pitch, would now be considered investment advice if the fiduciary ultimately purchases the item.

This is of particular importance to the small employer market. Because employees at small employers often lack employer-provided plans, Congress and private industry have developed a number of innovative solutions for the small plan market, including multiple employer plans (MEPs) and, more recently, pooled employer plans (PEPs). The economics of small plans are very different than larger plans, and small employers often cannot afford an independent adviser, which is why many small plan solutions often involve a plan with simple design options and a pre-selected platform of investments, often overseen by a separate fiduciary that acts as an ERISA 3(38) fiduciary.

The plan provider, whether a MEP or PEP sponsor, payroll company, financial services firm, or professional employer organization, engages in marketing and conversations to help small businesses understand how the plans work. However, these sales and education conversations could, unfortunately, be captured by DOL's new fiduciary test because they will often involve a "recommendation" to adopt the plan, which naturally entails adopting the pre-selected investment plan menu and indirectly hiring the independent fiduciary that oversees the menu as an ERISA 3(38) fiduciary.

Because the proposal triggers fiduciary status after even a single conversation, and it does not include any specific carveouts for offering a platform of investments or for sales conversations with employers (of any size), these conversations could create unintended liability risk even where the provider clearly intends, and the employer clearly understands, that the provider is not giving impartial investment advice. The Proposed Amendments to PTEs 2020-02 and 84-24 are not tailored to small plan sales conversations, and ensuring those conversations can continue is critical to encouraging small employers to offer a plan.

Similarly, in the context of a PEP, there often is only one investment lineup available to

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[103] Id, at 374.
[104] 88 Fed Reg, 75890, 75907 (Nov. 3, 2023).
[105] 85 Fed. Reg. 82798, 82809 (Dec. 18, 2020).

make these plans more administratively efficient and less burdensome for employers, especially small employers.[106] This single investment lineup is not individualized to any particular participating employer. In DOL's view, when a sales pitch provides a "selective list of securities to a particular retirement investor as appropriate for the investor,"[107] such a pitch turns into investment advice. This would mean that when a salesperson recommends any product, such as a PEP, that only has one investment lineup, that sales recommendation per se becomes advice. This interpretation is clearly at odds with settled case law holding that product design decisions are non-fiduciary in nature. Treating PEP marketing efforts as fiduciary investment advice would likely have a negative effect on PEP adoption, particularly by small employers who otherwise would not sponsor a plan. This is contrary to Congress's intent to encourage increased plan adoption by smaller employers by authorizing PEPs in the SECURE Act (and extending them to the 403(b) marketplace in SECURE 2.0).

There is also significant concern with how DOL's interpretation will impact a plan's ability to purchase annuities in the context of a pension risk transfer (PRT). During the bid process for a PRT, the bid itself must be individually tailored to the plan to be able to provide an accurate cost. Were the plan to select the bid, inevitably that bid will become fiduciary advice under this broad interpretation. Making it more difficult to provide bids in the PRT context will increase the cost of providing annuities for a PRT, and could force plans to seek alternative routes, such as offering lump sums, which may not be the most effective option for many participants.

The standard in paragraph (c)(1)(i) of the Proposed Regulation is overly broad by including assets that are not covered by either ERISA or the Code.

Paragraph (c)(1)(i) provides that a person who "either directly or indirectly has discretionary authority or control with respect to purchasing or selling securities or other investment property for the retirement investor" will be a fiduciary for purposes of providing investment advice for a fee. This section is overly broad because under ERISA a person is a fiduciary if the person has discretionary authority over assets of a plan, not any assets of the retirement investor. Under the proposed rule, (c)(1)(i) would apply when the advisor has discretionary authority over non-plan assets of the retirement investor (e.g., a taxable brokerage account of an IRA owner). Moreover, this prong may be satisfied even if the authority or control is not given pursuant to an agreement, arrangement, or understanding between the provider and the retirement investor. For example, a person who gives one-time asset allocation advice with respect to the investor's IRA account would likely satisfy the professional relationship prong if the person has discretion over a taxable account of the IRA owner.

This is equally troublesome in the institutional setting. For example, it would not be uncommon for an affiliate of an asset manager to provide investment advice to a plan sponsor for non-ERISA assets. Under the broad definition, this would then make an asset manager an ERISA fiduciary were they to provide a sales pitch to the plan sponsor for a specific investment in the defined benefit plan or the retirement consultant who provides model asset

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[106] This would also be a problem for many Health Savings Accounts (HSA). As HSAs have evolved, platform providers have offered more investment options, rather than a mere interest-bearing account. However, often there is either only one lineup or one option, such as a brokerage account.
[107] 88 Fed. Reg. 75,890, 75908 (Nov. 3, 2023).

allocation. Even more troubling is that the definition of affiliate is so broad under (f)(1) that it also would include any relative (defined as a brother or sister or spouse of a brother or sister), and it would be impossible to track whether such relationships exist.

The standard in paragraph (c)(1)(ii) of the Proposed Regulation fails to meet the Fifth Circuit's "relationship of trust and confidence" standard.

The "relationship of trust and confidence" requirement was a critical component of the Fifth Circuit's understanding of an ERISA fiduciary. The 1975 five-part test embodied this by requiring an ongoing relationship between the investment advice provider and the ERISA governed plan with respect to giving investment advice on a regular basis. DOL's new interpretation bears no resemblance to the relationship of trust and confidence articulated by the Fifth Circuit.

Proposed paragraph (c)(1)(ii) provides that a person making a recommendation to a retirement investor becomes a fiduciary when the "person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest."[108]

"Regular Basis" Requirement. The Proposed Regulation purports to keep the regular basis test by requiring that the person making the recommendation does so on a regular basis as part of their business. But this interpretation completely distorts what the "regular basis" test actually required. First, the interpretation ignores that the regular basis test has never been predicated on holding yourself out to the public to be in the business of giving investment advice on a regular basis to the general public. To do so would ignore the requirement of a relationship of trust and confidence between the individual giving the advice and the individual receiving it. Furthermore, this completely ignores what type of advice is being provided. Specifically, under this broad reading, anyone who gives any investment advice as part of their business, regardless of whether it is for retirement assets in either a Title I or Title II plan per se meets this prong. Second, the 1975 regulation examined whether advice was given "on a regular basis to the plan," which requires that there be an actual relationship between the provider of advice and the plan. DOL's new interpretation makes the relationship completely irrelevant, and the provider does not need to have a relationship with the retirement investor at all to be considered an investment advice fiduciary.

"Mutual Agreement" Requirement: The mutual agreement prong of the 1975 test served to

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[108] Although this seems to impose a standard that the recommendation be in the retirement investor's "best interest," the term is nowhere defined in the Proposed Regulation. Instead, it is only defined in the Proposed Amendments to PTE 2020-02, indicating further that the two are not severable. Furthermore, ERISA has never required that any actions be in the participant's or beneficiary's best interest, rather the standard is that an action is in the sole interest, meaning that it is in the interest of the plan, participant, or beneficiary not the person taking the action. Use of the term "best" interest, implies an impossible standard that does not exist in ERISA because, especially in the investment context, there will always be a better investment. ERISA only requires a prudent selection process and that the selection is made solely in the interest of the plan, participant, or beneficiary not that it is the best.

create the "relationship of trust and confidence." Removing the mutual agreement prong creates a subjective test in which one party may believe a recommendation is being provided, but the other party may not (for example, in the context of a sale). As such, the Proposed Regulation casts a wide net that anyone giving recommendations to investors, regardless of whether it is to Title I or Title II plans, automatically will be a fiduciary under this standard. This problem is exacerbated by the requirements in the Proposed Amendments to PTEs 2020-02 and 84-24 that providers would be required to affirmatively concede their fiduciary status to be eligible for the exemption which creates a superficial relationship of trust and confidence that the actual transaction may not itself create.

This broad interpretation also brings into question how retirement plan call service centers will be able to effectively communicate with participants and beneficiaries when DOL has blurred the line between education and advice. Call centers generally are outsourced and are not within the plan sponsor's HR department, which means that the DOL's discussion of exempting HR employees as fiduciaries would not apply. For example, what would happen if a call center employee helps an individual decide between a loan and a hardship distribution? Also, if a call center employee advises a participant about an obviously inappropriate investment, such as investing in a number of target date funds, would this be advice or education? These are just a few instances where call centers may need to limit how they communicate with participants and may need to refuse to provide information that participants and beneficiaries affirmatively seek to avoid being deemed a fiduciary. The result would be to undermine a participant's access to education, which would leave the participant worse off.

"Primary basis" requirement: The primary basis prong in the 1975 regulation ensured that providers would not become fiduciaries based on the incidental provision of investment advice or information. The test was met when both the ERISA-governed plan and the provider understood that the provider was being retained to provide advice and the advice would be the primary basis upon which the plan would make its investment decisions. DOL's new interpretation dramatically changes the requirement, and it merely requires that the provider's recommendations "may" be relied upon as "a basis" rather than "is the primary basis" for a retirement investor's investment decision. That change, in substance, destroys the relationship of "trust and confidence" to one of neither trust nor confidence. This new interpretation would allow for fiduciary liability even if someone may not have actually relied upon a recommendation or it may have been a small part of the decision-making process. Again, this would limit what and how call centers communicate because a participant could easily use a general educational conversation with a call center employee about the pros and cons of rollovers as "a basis" for rolling money out of the plan, even though they may have also received a recommendation from someone else.

In the preamble, DOL claims that "[t]he determination of whether a recommendation has been made would be an objective rather than a subjective inquiry."[109] However, under proposed paragraph (c)(1)(ii), it is now up to the retirement investor to determine whether the recommendation is the basis for the decision and whether it is in the retirement investor's "best interest." Given that DOL has now blurred the line between education and advice and turned an objective test into a subjective test based on a retirement investor's perceptions, it

[109] 88 Fed. Reg. 75890, 75904 (Nov. 3, 2023).

is completely unclear when advice will be fiduciary in nature. What may be advice for some, may not be for others. In the absence of a specific agreement, whether an understanding between two parties exists is inherently subjective.

The term "recommendation" is the basis for determining fiduciary status, but it is not defined.

"Whether a person has made a 'recommendation' is a threshold element in establishing the existence of fiduciary investment advice."[110] Despite the importance of this issue, DOL chose not to include a definition of the term recommendation in the Proposed Regulation. Instead, the Proposed Regulation uses the term circularly by defining the phrase ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property." As noted above, there are a litany of scenarios that would be recommendations, many of which are so broad that they blur the line between advice and education. For example, with respect to clause (i), would explaining different investment strategies, such as active versus passive, to a participant or how liability-driven investing works for defined benefit plans, be considered education or advice when the individual is being paid for this? Although DOL officials stated during the December 13th hearing that a recommendation is a call to action and merely discussing the attributes of an investment is not advice, this verbiage is not in the Proposed Regulation itself, and the breadth of the scenarios presented in the Proposed Regulation leave what is an actual recommendation open to interpretation.

The list of activities in clause (ii) also is so broad as to blur the line between education, often through consulting, with advice. For example, management of securities or other investment property would now include "recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, [and] selection of investment account arrangements (e.g., account types such as brokerage versus advisory)…." In pension consulting, it is common for consultants to draft required investment policy statements. It is unclear if this would be considered a recommendation. Furthermore, if a consultant assists with a vendor selection for an asset manager and makes an assessment of the responses to an RFP for a plan fiduciary to review and make a final determination, is this considered a recommendation? What about the context in which a fund responds to an RFP for a specific type of investment? By turning the RFP sales pitch into fiduciary advice, is DOL requiring the fund to guarantee the success of the investment and/or risk being sued as a fiduciary? There is also concern whether the line would be crossed when providing model portfolio compositions or educating people on the difference between different types of accounts, such as brokerage or advisory, and when one is more suitable than the other. Finally, it is unclear whether an asset manager's input on the creation of investment guidelines for a separately managed account during the initial contracting process would be investment advice.

By not actually defining what a recommendation is and instead listing a litany of topics that could include a recommendation or could include education, the Proposed Regulation blurs the line between the two. In doing so, DOL creates a significant risk that those providing education could erroneously be deemed fiduciaries, which ultimately could limit what, if any,

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[110] 88 Fed. Reg. 75890, 75904 (Nov. 3, 2023).

education is provided.[111]

A 60-day effective date is unreasonable.

The Proposed Regulation and Amended PTEs would be effective just 60 days after the date published in the Federal Register, although the Proposed Regulation is as broad (if not broader) in scope as the 2016 Final Regulation. In addition, contrary to DOL's assumptions in the preamble to the Proposed Regulation and Proposed Amendments to PTE 2020-02, not all Financial Institutions have implemented PTE 2020-02 because it is a completely voluntary PTE. However, because the Proposed Regulation would sweep in more entities on the retail, institutional and consulting side, many entities would need to implement and rely on PTE 2020-02. One member firm shared that implementation of PTE 2020-02 required the work of hundreds of people and took thousands of hours. Those firms that have not yet implemented PTE 2020-02 are likely to face similar implementation burdens across their service lines. For those firms that have implemented the current PTE 2020-02, they also will need to make extensive updates were the Proposed Amendments to PTE 2020-02 to be finalized. Finally, the Proposed Amendments to 84-24, on which the insurance industry has relied for 40 years, completely upend this industry, and a 60-day compliance period is impossible.

Given that the 2016 Final Regulation had a one-year applicability date, and numerous extensions, and PTE 2020-02 took nearly two years to be fully effective and/or enforceable, it is completely unreasonable to expect compliance with an equally, if not more, disruptive Proposed Regulation and Amended PTEs within 60 days. As such, although we strongly disagree with the scope of these changes, as currently proposed, any effective date would need to be at least 18 if not 24 months after publication in the Federal Register.

DOL grossly underestimates the costs of the Proposed Regulation and Amended PTEs.

Given the broad changes in the Proposed Regulation and the Amended PTEs, it is exceedingly difficult to do a full assessment of the economic impact within 39 business days. At the very least, it could take 6 to 12 months to compile a more thorough analysis. With over 180 substantive and economic impact questions and queries in the preambles to the Proposed Regulation and the Amended PTEs, it is clear that DOL has underestimated the cost impact of this package. Given this, DOL should have first issued a request for information before advancing to proposed rulemaking.

DOL admits that the "available data do not allow the Department to quantify the gains to investors or the components social welfare 'benefits' and 'transfers.'"[112] DOL further admits that "the magnitude of gains to retirement investors, through benefits or transfers, is uncertain."[113] Furthermore, there is nothing in DOL's analysis that shows how the Proposed Regulation and Amended PTEs will change the market for providing investment advice or the impact on retirement savings or decumulation. For example, there is no new analysis of how increasing costs, blurring the lines between investment advice and education, and forcing some firms out of providing advisory services compares to the benefits to retirement

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[111] DOL could have instead put out a request for information on Interpretive Bulletin 96-1 regarding investment advice versus education, especially given the need for more clarity in lifetime income education and financial wellness.
[112] 88 Fed. Reg. 75890, 75937 (Nov. 3, 2023).
[113] Id. at 75938.

investors. Instead, DOL relies on the same analysis from the 2016 Final Regulation. The 2016 analysis fails to account for the change in the regulatory baseline, namely Reg BI and the adoption of the NAIC model by most states, which would lessen any benefit compared to what it may have been in 2016.

Given that DOL stated in its letter denying an extension that "the current proposal reflects significant input it has received from public engagement," we are surprised at the number of assumptions in the economic impact that have no basis, such as:

- A legal professional would only charge $159.34 per hour.
- Assuming all Financial Institutions have fully implemented PTE 2020-02 for all aspects of their business, even though it is voluntary.
- Assuming that the current disclosures required under PTE 2020-02 satisfy the requirement for most Financial Institutions and that only 10 percent would need to update their current disclosures, and such updates would only take 10 minutes to make, which also wrongly assumes that all Financial Institutions elected to use PTE 2020-02 for any or all lines of business and that the significant changes in the Proposed Amendments to PTE 2020-02 would need to be included in the disclosures.
- Assuming it would only take one hour to draft the acknowledgement in PTE 2020-02.
- Assuming it would only take 30 minutes to update the existing written description of the services and whether the retirement investor would pay for such services.
- Assuming that documenting each rollover recommendation will require 30 minutes for a financial advisor whose firm currently does not require rollover documentation and five minutes for a financial adviser whose firm already requires them to do so. For example, merely trying to obtain comparative data alone can take much more than 5 minutes.
- Assuming that entities will incur minimal costs associated with retrospective review because they must do it for FINRA, the SEC, and state law. However, there are different standards and different reviews for each of the different laws.
- Assuming that it will only take a legal professional five hours for a small entity and 10 hours for a large entity to initially establish, maintain and enforce written policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards.

PTE 2020-02 should not have been amended only 15 months after its final enforceability date.

PTE 2020-02 has only been fully enforceable for 15 months. However, DOL is proposing not just to amend it with respect to rollovers, but rather include other changes that will require substantial work to implement, even for those firms that voluntarily have elected to rely on PTE 2020-02. DOL has provided no data or evidence showing a need for these changes or even that it has investigated any entity regarding its use of PTE 2020-02. As such, it is premature to make changes at this time without first reaching out to stakeholders to determine what changes, if any, may be needed.[114]

DOL has not shown that the Proposed Amendments to PTEs 2020-02 and 84-24 meet the

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[114] Although the Chamber believes DOL should not have proposed amendments to PTE 2020-02 so soon after its enforcement date, the Chamber supports allowing robo advice to be covered under PTE 2020-02.

requirements of ERISA 408(a) or Code section 4975(c)(2).

To grant an exemption, ERISA 408(a) and Code section 4975(c)(2) require that the Secretary determine that a PTE is:

- Administratively feasible,[115]
- In the interests of the plan and of its participants and beneficiaries, and
- Protective of the rights of participants and beneficiaries of such plan.

DOL has failed to show how the first two prongs are met with respect to the Proposed Amendments to PTEs 2020-02 and 84-24. The Proposed Amendments to PTE 2020-02 (which were also included in the Proposed Amendments to 84-24) create new eligibility provisions that could potentially preclude many Financial Institutions and Investment Professionals from relying on either exemption for acts completely unrelated to providing investment advice by individuals or entities that have nothing to do with Title I or Title II assets, including far removed foreign affiliates. It also appears to condition eligibility on a strict compliance standard, which likely would disqualify most entities. Finally, it conditions compliance on certification that Form 5330 has been filed with Treasury, which is an area outside of DOL's enforcement authority.

Because new eligibility requirements likely will preclude many entities from using the Proposed Amendments to PTEs 2020-02 and 84-24, the only way in which they would be able to continue providing investment advice for a fee would be to apply for an individual exemption. However, in recent years, DOL has granted fewer and fewer individual exemptions, and, in fact, DOL is even proposing to make it more difficult to obtain an exemption under its proposed amendments to the prohibited transaction exemption procedures.[116] Therefore, it is difficult to understand how DOL will now be able to administer the Proposed Amendments to PTEs 2020-02 and 84-24 and the resulting applications for individual exemptions.[117]

The Proposed Amendments to PTEs 2020-02 and 84-24 also add a number of new substantive requirements, such as enhanced disclosures[118] and retrospective review. It is difficult to fathom that administratively DOL will be able to enforce the Proposed Amendments to PTEs 2020-02 and 84-24 and the extensive new requirements on independent producers and insurers, especially given its lack of resources to enforce what currently is under EBSA's jurisdiction, let alone adding hundreds of thousands of financial

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[115] Although this section details how the Proposed Amendments to PTEs 2020-02 and 84-24 are not administratively feasible for DOL, the Proposed Amendments to PTEs 2020-02 and 84-24 also are not administratively feasible for the regulated community.

[116] See "The New Year May Bring New Restrictions on Department of Labor Prohibited Transaction Exemptions" January 13, 2023 (noting that there has been a 97 percent decline in the number of individual exemptions DOL has granted in the last 10 years, and, if finalized, the proposed amendments to the prohibited transaction exemption procedures will make it more difficult to obtain an individual exemption) available at https://www.morganlewis.com/blogs/mlbenebits/2023/01/the-new-year-may-bring-new-restrictions-on-department-of-labor-prohibited-transaction-exemptions.

[117] Under Section II(b)(1), an entity will become ineligible six months after an ineligibility event has occurred. Although this is an improvement over the current immediate ineligibility, six months is not enough time to procure an individual exemption which realistically could take 18 to 24 months.

[118] The Proposed Amendments to PTE 2020-02 add significantly more disclosures even though in the preamble DOL acknowledged that "[d]ue to the complexity of some disclosures as well as investors' propensity to ignore lengthy disclosures, disclosures often fail to accomplish their goals." 88 Fed. Reg. 759890,75962 (Nov. 3, 2023).

advisers, insurance agents, financial institutions and insurers.[119]

It is also unclear how the Proposed Amendments to PTEs 2020-02 and 84-24's eligibility provisions are in the interest of plans and participants. For example, one new provision is that an entity cannot rely on either PTE for 10 years if a foreign affiliate is convicted of any one of a litany of crimes unrelated to Title I or Title II assets. For example, if a Financial Institution's affiliate in Taiwan is convicted of theft, a Financial Professional in the United States who works for the Financial Institution can no longer rely on PTE 2020-02 when providing investment advice to a participant in Nebraska. It is unclear how eligibility for PTE 2020-02 based on a theft in Taiwan by an affiliate of the Financial Institution is related to a Financial Professional providing advice to a participant or beneficiary in Nebraska. We further question how this limitation is in the interest of the participant who will no longer be able to receive advice from the Financial Professional.

This change to domestic crimes also includes limiting eligibility if a domestic affiliate is convicted of one of many crimes. Affiliate is defined very broadly not only to include an actual entity, but also to include "[a]ny officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the Investment Professional or Financial Institution."[120] This means that an Investment Professional of a Financial Institution could lose the ability to rely on PTE 2020-02 if the spouse of a grandchild of an employee is convicted of any litany of crimes unrelated to providing investment advice. Such ineligibility provisions are a bridge too far and can in no way be in the interest of participants and beneficiaries.

The Proposed Amendments to PTE 2020-02 create a private right of action against Title II Financial Institutions and Investment Professionals which the Fifth Circuit explicitly stated DOL does not have the authority to do.

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[119] GAO report "Employee Benefits Security Administration: Systematic Process Needed to Better Manage Priorities and Increased Responsibilities" GAO-24-105667, Published: Oct 24, 2023. Publicly Released: Nov 16, 2023 available at https://www.gao.gov/products/gao-24-105667. Finding that:

> Although EBSA officials said they use several strategies to manage declining resources, the agency does not have a clear or systematic decision-making process for doing so. Officials cited attempts to estimate resources for certain priorities, but these resource estimates were not acknowledged or included in planning documentation.
>
> Federal internal control standards state that agencies should use quality information and that significant changes to the agencies' oversight, programs, and other resources should be communicated across the agency through established reporting lines to appropriate personnel. Without a systematic and well-documented decision-making process, EBSA officials may not have adequate information for making informed decisions about how to manage resource allocations to meet its increased responsibilities.

See also "Semiannual Report to Congress" Volume 90, April 1, 2023–September 30, 2023 Office of Inspector General for the U.S. Department of Labor available at https://www.oig.dol.gov/public/semiannuals/90.pdf (stating "[t]he OIG remains concerned about the Employee Benefits Security Administration's (EBSA) ability to protect the integrity of pension, health, and other benefit plans of about 153 million workers, retirees, and their families under the Employee Retirement Income Security Act of 1974 (ERISA). In particular, the OIG is concerned about the statutory limitations on EBSA's oversight authority and inadequate resources to conduct compliance and enforcement.")

[120] Proposed Amendments to PTE 2020-02, Section V(a). ERISA section 3(15) defines relative to include a spouse, ancestor, lineal descendant, or spouse of a lineal descendant. Lineal descendants are a person's direct descendants, such as a child or grandchild.

According to the Fifth Circuit:

> Only Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates. In ERISA, Congress authorized private rights of action for participants and beneficiaries of employer sponsored plans, 29 U.S.C. § 1132(a), but it did not so privilege IRA owners under Title II. DOL may not create vehicles for private lawsuits indirectly through BICE contract provisions where it could not do so directly.[121]

In the preamble to the Amendment to PTE 2020-02, DOL states that the "exemption does not create any new causes of action, nor does it require firms to make enforceable contractual commitments or give enforceable warranties to retirement investors, as was true of the 2016 fiduciary rulemaking which the Fifth Circuit set aside in its Chamber opinion."[122] This statement likely is because DOL acknowledges that "[i]n the Fifth Circuit's view, the Department had effectively exceeded its authority by giving IRA investors the ability to bring a private cause of action that Congress had not authorized."[123]

However, DOL's statements and analysis fail to recognize the fundamentals of contract law. In the Proposed Amendments to PTE 2020-02, before "engaging in a transaction pursuant to" PTE 2020-02, the Financial Institution must provide a written document with:

- Acknowledgement that the Financial Institution and its Investment Professionals are fiduciaries under Title I and the Code, as applicable, with respect to any fiduciary investment advice provided;
- A written statement of the Best Interest standard of care owed by the Investment Professional and Financial Institution to the retirement investor;
- A description of the services to be provided and the Financial Institution's and Investment Professional's material conflicts of interest, including whether the retirement investor will pay for such service directly or indirectly; and
- A statement the retirement investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present full and fair disclosure that is materially accurate in scope, magnitude, and nature, with sufficient detail to permit the retirement investor to make an informed judgment about the costs of the transaction and about the significance and severity of the conflicts of interest, and that describes how the retirement investor can get the information, free of charge.

After receiving this statement, the retirement investor will pay the Financial Institution or Investment Professional for the investment advice and make investment decisions in reliance[124] on the statements in the written disclosure, namely that the person giving the advice was a fiduciary, the advice met the Best Interest standard of care, and they sufficiently understood the conflicts of interest. However, if the retirement investor later questions the

[121] Chamber of Commerce of the United States of America v. U.S. Dept. of Labor, 885 F.3d at 384.
[122] 88 Fed. Reg. 82798, 82828 (Nov. 3, 2023).
[123] 88 Fed. Reg. 75890,75945 (Nov. 3, 2023).
[124] In fact, the very definition of fiduciary in the Proposed Regulation contemplates reliance on the recommendations and that the recommendations will be "in the retirement investor's best interest" as required by the written statement. Proposed Regulation § 2510-21(c)(1)(ii).

investment advice or the investment, the retirement investor presumably would claim breach of contract based on the written document required to be provided before any investment advice is given and the retirement investor's reliance on the statements in it. In such a case, the retirement investor could seek a number of remedies under state law, such as compensatory damages, which are not contemplated under the Code. And "ERISA Title II only punishes violations of the 'prohibited transactions' provision by means of IRS audits and excise taxes. And unlike § 1132 of ERISA Title I, Title II contains no private lawsuit provision."[125]

Merely because DOL now characterizes these as written statements rather than a contract does not mean that they would not be considered as contracts under state law and, thus, DOL is again essentially "authoriz[ing] new claims under the fifty states' different laws."[126] And "they are no more than an end run around Congress's refusal to authorize private rights of action enforcing Title II fiduciary duties."[127] As such, DOL's assumption of non-existent authority to create private rights of action [is] … unreasonable and arbitrary and capricious."[128]

The requirement in the Proposed Amendments to PTE 2020-02 that Financial Institutions and Investment Professionals provide a blanket statement, without exception, that they are acting in a fiduciary capacity contradicts ERISA's functional fiduciary test.

The Proposed Amendments to PTE 2020-20 require a written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the retirement investor and are fiduciaries under Title I, the Code, or both when making an investment recommendation. Clause (c)(1)(iv) of the Proposed Regulation provides that a "person may not disclaim fiduciary status under ERISA or the Code." As DOL noted in the preamble, this will require both Financial Institutions and Investment Professionals to decide up front whether they are always acting in a fiduciary capacity. However, this is contrary to ERISA's functional fiduciary status and also would force Investment Professionals and Financial Institutions to make statements that are fundamentally untrue because not all interactions between a Financial Institution or an Investment Professional are fiduciary in nature. Even the model language provided in the preamble to the Proposed Amendments to PTE 2020-02 insinuates that every recommendation regarding a retirement plan or account is fiduciary in nature, which simply is not true.[129]

The requirement to provide costs, fees and compensation relating to conflicts is of little utility to a retirement investor and likely is not possible outside of a fee for service transaction.

The Proposed Amendments to PTE 2020-02 would require a statement that the retirement investor has the right to obtain:

> specific information regarding costs, fees, and compensation, described in dollar

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[125] Chamber of Commerce of the United States of America v. United States, 885 F.3d at 384.
[126] Id.
[127] Id.
[128] Id.
[129] The first sentence of the model language provides that "[w]hen we make investment recommendations to you regarding your retirement plan account or individual retirement account, we are 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." See 88 Fed. Reg. 75979,75985 (Nov. 3, 2023). This broad language insinuates that any investment recommendation brings with it fiduciary status even though the Proposed Regulation does not define what a recommendation is. We suggest DOL keep the model language in the current PTE 2020-02.

> amounts, percentages, formulas, or other means reasonably designed to present full and fair disclosure that is materially accurate in scope, magnitude, and nature, with sufficient detail to permit the retirement investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest, and that describes how the retirement investor can get the information, free of charge.[130]

It is unclear what the purpose of this disclosure is: is it to inform the retirement investor how much they will pay or is it to explain that a payment may create a conflict? If it is the latter, would the Financial Institution or Investment Professional only be required to report compensation that relates to a conflict? Also, does this need to be individualized to each person? It would seem odd that you would need to provide a second statement on payment when, in fact, any contract with an individual would explain exactly what the retirement investor is paying.[131] We suggest DOL delete this requirement because a contract with the retirement investor should already spell out what the retirement investor is paying and for what services. Finally, certain fee arrangements may not be possible to provide as a dollar amount because they are based on a percentage of assets under management.

The standard articulated in Section II(b)(3) of the Proposed Amendments to PTE 2020-02 is contrary to ERISA's disclosure standards.

The written description of the services to be provided and the Financial Institution's and Investment Professional's material conflicts of interest "must be written in plain English, taking into consideration a retirement investor's level of financial experience." However, nothing in ERISA or any current regulation requires that disclosures be individually tailored to each recipient's individual level of understanding. Current regulations require that disclosures be written "calculated to be understood by the average plan participant."[132] Nowhere in the current regulatory scheme are disclosures require to take into consideration the reading or comprehension level of each participant. Not only is this contrary to the current regulatory standard, but it is an impossible standard to meet because it is impossible to know the exact level of financial experience of an individual, a small plan sponsor, a large plan sponsor or another financial institution. Furthermore, as a practical matter, it is not feasible to customize each disclosure.[133]

DOL should not require Financial Institutions to maintain additional web disclosures.

DOL acknowledges "investors' propensity to ignore lengthy disclosures [and] disclosures often fail to accomplish their goals,"[134] but DOL requests input on whether Financial Institutions should be required to have a website with additional information not only for retirement investors but for the "investing public." Specifically, in the preamble to the

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[130] Proposed Amendments to PTE 2020-02 Section II(b)(4).
[131] It also is unclear how this would interact with Reg BI that requires disclosure of the "material fees and costs that apply to the retail customer's transactions, holding and accounts." 17 CFR §240.15l-1(a)(2)(i).
[132] 29 CFR § 2520.102-3 (providing the standard for contents in a summary plan description).
[133] Even DOL recognizes in its cost analysis that the written disclosures will be form letters not tailored to each individual when it states that update to the current disclosures would only take 10 minutes. See Estimate of the cost of the Proposed Regulation and Amended PTEs infra.
[134] 88 Fed. Reg. 75890,75962 (Nov. 3, 2023).

Proposed Amendments to PTE 2020-02, DOL asks:

> In particular, the Department is interested in receiving comments regarding whether it should require Financial Institutions to maintain a public website containing the pre-transaction disclosure, a description of the Financial Institution's business model, associated Conflicts of Interest (including arrangements that provide Third-Party Payments), and a schedule of typical fees.[135]

This requirement is nearly identical to what was required in the BIC Exemption in 2016,[136] which the Fifth Circuit rejected. As such, DOL should not require additional web disclosures, which ultimately would only add additional costs to retirement investors.

DOL's limitation on compensation is at direct odds with Reg BI and provides an unworkable model for the brokerage industry.

In the Proposed Amendments to PTE 2020-02, DOL states that a Financial Institution's policies and procedures must 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 a Financial Institution or Investment Professional to place their interests ahead of the interests of the Retirement Investor."[137] DOL then states that "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 are not in Retirement Investor's Best Interest."[138]

By calling out specific payment practices, DOL insinuates that these types of practices per se will result in a recommendation that is not in the retirement investor's best interest, and, therefore, are precluded. The limitations on pay also would seem to preclude firms from rewarding a Financial Professional based on performance or provide promotions based on several types of job performance measures. Most importantly, because it is uncertain what DOL may or may not determine is a conflicted compensation structure, firms will not be able to operate because it will be unclear when DOL might enforce a particular compensation structure as conflicting or not, which effectively eliminates any of the types of compensation structures listed in the Proposed Amendments to PTE 2020-02.

This overly broad list of payment practices also is at direct odds with Reg BI, which only prohibits "sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time."[139] As noted in the SEC FAQs, there are no specific sales practices beyond those listed in Reg BI that should be eliminated, rather they must be disclosed and mitigated.[140] Furthermore, these are only limited to sales of a specific product and not overall quotas, which DOL did not consider in the Proposed Amendments to PTE 2020-02.

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[135] 88 Fed. Reg. 75979 (Nov. 3, 2023).
[136] See 81 Fed. Reg. 21,002 21079 (Apr. 8, 2016).
[137] Proposed Amendments to PTE 2020-02, Section II(c)(2).
[138] Id.
[139] 17 C.F.R. § 240.15l (a)(2)(D).
[140] Frequently Asked Questions on Regulation Best Interest, Conflict of Interest Obligation available at https://www.sec.gov/tm/faq-regulation-best-interest#conflict-of-interest.

DOL's mandated inclusion of filing the Form 5330 as part of the retrospective review is beyond its regulatory authority and eliminates the self-correct program.

Under the Proposed Amendments to PTE 2020-02, Section II(d)(3)(B) would require that a senior executive officer of the Financial Institution certifies annually that the Financial Institution has filed (or will file) the Form 5330 to report any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975.

As noted in the Background discussion, Reorganization Plan 4 excepted Code sections 4975 (a) and (b) from DOL's authority. These are the enforcement provisions for excise taxes on disqualified persons, which remain in Treasury's domain. However, by requiring this as part of the retrospective review and certification to DOL, DOL is attempting to regulate the excise tax on PTEs.

It also is unclear how requiring filing the Form 5330, which requires paying the tax and correcting the transaction, would interact with the current self-correction program. In essence, once the excise tax is paid, and the prohibited transaction is corrected, the prohibited transaction is resolved, which would result in no need for a self-correction program.

However, a bigger issue exists in the interpretation of whether a prohibited transaction actually occurred. If a disqualified person does not believe that a prohibited transaction occurred, there is no need to file the Form 5330. In many circumstances, whether there was compliance with the current PTE 2020-02 or the Proposed Amendments to PTE 2020-02 is subjective, or at the very least not clear based on subjective standards. For example, if a Financial Institution reasonably determines that its pay structure does not result in a recommendation not being in the retirement investor's best interest, but DOL determines it does, does that result in loss of the exemption? What if DOL determines that a rollover was not in the retirement investor's best interest based on risk and return, but the retirement investor had rolled the money over because the retirement investor's preference was to consolidate assets? What if an Investment Professional recommends an annuity because the retirement investor wants lifetime income, but DOL later determines the fees were higher for the annuity than in the employer plan without a lifetime income option, and, in DOL's opinion, were, therefore, not in the retirement investor's best interest? These few examples show how subjective it can be to determine whether the current PTE 2020-02 or the Proposed Amendments to PTE 2020-02 were followed and whether a prohibited transaction occurred. As such, the final PTE 2020-02 should not include a requirement to file the Form 5330. Instead, it should allow self-correction without reporting to DOL, and it should provide a good faith compliance standard.

It is equally troubling that the Proposed Amendments to PTE 2020-02 provide in Section III(c)(2)(C) that DOL may revoke eligibility if it finds that a Financial Institution is "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)." First, as noted above, it is subjective whether a

prohibited transaction may have occurred. Second, this provision effectively allows DOL to enforce the excise tax provisions by allowing it to determine which failures should have been reported on Form 5330 and that such failures are a reason to revoke the exemption.

Section III(a)(1) and (2) of the Proposed Amendments to PTE 2020-02 should be deleted and DOL should keep the current standard.

Under the current PTE 2020-02 Section III(a)(1), a Financial Institution or Investment Professional may not rely on the class exemption for 10 years for a "conviction of any crime described in ERISA section 411 arising out of such person's provision of investment advice to retirement investors" unless the Financial Institution is granted an individual exemption. The Proposed Amendments to PTE 2020-02 would provide for a loss of eligibility based on a litany of crimes unrelated to providing investment advice, including any equivalent foreign crimes, not only by the Investment Professional and the Financial Institution, but also by an affiliate of the Financial Institution.

PTE 2020-02 relates to providing investment advice so it is unclear why DOL believes that any crime, domestic and foreign, has any nexus to the provision of investment advice and therefore should limit the ability to rely on the exemption. It is especially troubling DOL proposed to include an affiliate and any foreign crime of the affiliate in this analysis. The Proposed Amendments to PTE 2020-02 would apply the ineligibility provisions even if the bad actor is involved in activity unrelated to retirement advice and outside the United States. It is not clear why the conviction of an employee of a foreign affiliate that is completely disconnected from the Financial Institution and Investment Professional is relevant to providing investment advice in the United States. As such, DOL should keep the current ineligibility provisions relating to criminal convictions in any final PTE 2020-02.

Access to compliance records should be limited only to DOL and Treasury.

In the preamble to the Proposed Amendments to PTE 2020-02, DOL notes that it "originally proposed that records should be available for review by additional parties but limited that access in the final exemption in response to comments. Commenters expressed concern that parties might 'overwhelm' Financial Institutions with requests for use in litigation."[141] DOL further opined that the Department is of the view both that Financial Institutions could easily share their documentation of compliance and that retirement investors would benefit from access to that information." DOL did not, however, explain how participants, who they believe have a propensity to not even read required disclosures, would benefit from having access to the volumes of documents required to show compliance with PTE 2020-02. Nor did DOL opine on how a labor organization that is not otherwise a plan sponsor would have a need to know if an entity is complying with PTE 2020-02. Finally, if a plan sponsor, including trustees of multiemployer plans, is concerned with an entity's compliance with PTE 2020-02, compliance documentation could be a subject of a request for proposal or contractual provision.

Any changes to PTE 84-24 should have been a separate rule making.

PTE 84-24 is unique to the insurance industry, and it has been in place for nearly 40 years.

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[141] 88 Fed. Reg. 75979, 75990 (Nov. 3, 2023).

However, in an attempt to level the playing field, DOL has essentially applied the same requirements on insurers, their employees and independent agents, as it has on Financial Institutions and Investment Professionals, without recognizing the distinctions in structures and investment options and products.

Furthermore, because the PTE has been in place for nearly 40 years, the extensive nature of the overhaul of PTE 84-24 will severely disrupt this market, which is why many trade associations requested additional time to comment on the Proposed Amendments to 84-24. Given DOL's denial of an extended comment period, it is likely that as the proposed amendments are reviewed in-depth, other issues are bound to arise. This is why these changes should have, at the least, been provided an extended comment period, and, at best, been a separate subject of rulemaking.

The Proposed Amendments to PTE 84-24 inappropriately regulate insurance.

Over the past few years, states have recognized a need to regulate the insurance industry regarding the sales of annuities in the retirement context. This is why nearly all states have adopted some form of the NAIC Suitability in Annuity Transactions Model Regulation 275 which incorporates "a 'best interest' standard of care that requires producers to put the consumer's interest ahead of their own. The revisions align with the SEC's Regulation Best Interest."[142] It makes sense for the states to take on this task because in 1945 Congress explicitly gave states the authority to regulate insurance transactions, including the sales of annuities, under the McCarran-Ferguson Act.

The Proposed Amendments to PTE 84-24 would limit its use only to independent producers, which is defined as a person or entity "that sells to retirement investors products of multiple unaffiliated insurance companies but is not an employee of an insurance company (including a statutory employee under Code section 3121)."[143] This means that insurers that sell annuity products through statutory employees or common law employees would need to use PTE 2020-02. Many insurers classify agents as statutory employees for purposes of providing employee benefits, such as health care and retirement benefits, but also allow these individuals to sell other products so long as a certain percentage of sales are from the insurer providing these benefits. Were an insurer to want to use the Proposed Amendments to PTE 84-24, it would need to reclassify such individuals and stop providing health and retirement coverage, which hardly seems the outcome DOL's mission supports.

The Proposed Amendments to PTE 84-24 would impose substantive regulatory requirements on insurers, such as disclosure regimes, compensation structures, reporting and disclosure requirements, recordkeeping requirements, and retrospective review requirements, among other items. It is unclear how these requirements do not constitute the regulation of insurance and do not infringe on the states' rights to regulate insurance.[144]

The Proposed Amendments to PTE 84-24 effectively incorporate the requirements of PTE

[142] See "The NAIC Annuity Suitability "Best Interest" Model Regulation" March 2023 available at https://content.naic.org/sites/default/files/government-affairs-brief-annuity-suitability-best-interest-model.pdf.
[143] Proposed Amendments to 84-24, Section X(d).
[144] Even assuming DOL has authority to regulate insurance in this manner, nothing in the preamble to the Proposed Amendments to PTE 2020-02 or PTE 84-24 addresses the difficulties of treating an insurance company the same as a financial institution.

2020-02 and the Proposed Amendments to PTE 2020-02.[145] Although DOL states that the insurer would not be considered an ERISA fiduciary, the Proposed Amendments to PTE 84-24 would require insurers to comply with the recordkeeping requirements, supervisory requirements, and retrospective review requirements, including reporting prohibited transactions to the IRS on Form 5330 and reporting violations of the PTE to DOL. It is unclear, especially given that DOL states that for purposes of the Proposed Amendments to 84-24 the insurer is not a fiduciary, how the requirements in the Proposed Amendments to PTE 84-24 would not infringe on the states' rights to regulate insurance.

The disclosures required under the Proposed Amendments to PTE 84-24 impermissibly create a private right of action against independent producers.

Similar to the Proposed Amendments to PTE 2020-02, the Proposed Amendments to 84-24 would require that before receiving a sales commission as a result of investment advice regarding the purchase of a non-security annuity contract or other insurance product not regulated by the SEC, the independent producer must provide a written acknowledgment that the independent producer is a fiduciary under Title I and/or the Code, as applicable, with respect to any investment recommendation provided by the independent producer to the retirement investor. In addition, the independent producer must provide a statement of the best interest standard of care, which is the same as under PTE 2020-02, a description of the services to be provided, the amount of the insurance commissions to be paid to the independent producer, and the right to obtain specific information on the amount to be paid.

These requirements suffer the same flaws as the similar requirements in the Proposed Amendments to PTE 2020-02 in that they would create an enforceable contract under state law. And, for the reasons discussed above, would be beyond DOL's statutory authority.

Disclosure of every insurance product available for recommendation would be burdensome, provide little value to the retirement investor, and be subject to frequent change.

Section VII(b)(3) of the Proposed Amendments to 84-24 would require the independent producer to specify in writing before the receipt of any sales commission[146] each insurance company and each product an independent producer is authorized to recommend. For many independent producers, this list could be extensive, and many products may not relate to the needs of the retirement investor. Furthermore, such a list would be subject to frequent change, requiring either expensive updates or resulting in the disclosure being out of date.

Any statement provided before the final recommendation of an annuity regarding the amount of the insurance commission to be paid in connection with the recommendation will be misleading.

Section VII(b)(4) of the Proposed Amendments to 84-24 would require the independent

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[145] It is unclear how insurance companies would satisfy PTE 2020-02 for independent producer sales of SEC-registered products.

[146] It is unclear exactly when the independent producer is required to provide the new disclosures because the independent producer will not receive a sales commission until after the contract is signed and delivered. This means that an independent producer could provide all of the disclosures after a product is sold, but before receiving the commission. However, as explained in the text, even were the information provided before the contract is sold, most of the required disclosures would, at best, be of little value to a retirement investor, and in fact, actually be misleading or factually inaccurate.

producer to specify in writing before the receipt of any sales commission "the amount of the Insurance Commission that will be paid to the independent producer in connection with the purchase by a retirement investor of the recommended annuity. The statement must disclose the amount of expected Insurance Sales Commission, expressed both in dollars and as a percentage of gross annual premium payments, if applicable, for the first year and for each of the succeeding years."

Providing this information before the retirement investor has signed or otherwise committed to purchase the product would not only be problematic, but likely would be misleading because the product could change before being finalized and, depending on the type of product, could change if future premium payments are not made, all of which would make the disclosure inaccurate at best.

It is unclear how an independent producer is to compare fees and expenses of employer plans without an annuity option with a recommended annuity.

The Proposed Amendments to 84-24 would require an independent producer to compare the fees and expenses of the ERISA plan to those of the recommended annuity. However, given that most plans do not include an in-plan annuity option, it is unclear how an independent producer could do this. Furthermore, a comparison on investment options that are not annuities is an apples-to-oranges comparison that would likely confuse a participant more than help.

The policies and procedures in the Proposed Amendments to 84-24 are fundamentally unworkable and are contrary to most state laws.

The Proposed Amendments to 84-24 would require the insurer to directly supervise each independent agent, which is contrary to state law and would constitute the inappropriate regulation of insurance. More specifically, the Proposed Amendments to 84-24 would require the insurer to determine that every recommendation of the insurer's product is in the best interest of the retirement investor. The Proposed Amendments to 84-24 also provide that the insurer is not required to supervise an independent producer's recommendations to retirement investors of products other than annuities offered by the insurer. However, if an insurer is not required to supervise the recommendation of other products, how can it determine whether the recommendation is in the best interest as compared to other products the independent producer is authorized to sell? Yet, 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. The result is that it is not possible to make the determination of whether the recommendation is in the retirement investor's best interest as only the independent producer has the information necessary to do this.

The Proposed Amendments to 84-24 are aimed at independent producers who sell products from more than one insurer. The Proposed Amendments to 84-24 also would require each insurer to have policies and procedures that the independent producer must follow. However, from a practical perspective, it would be impossible for an independent producer to set up a system where they follow different policies and procedures from different insurers. This would inevitably lead to their not meeting the requirements of the Proposed Amendments to PTE 84-24, resulting in a prohibited transaction, which would require the insurer to obtain

an individual exemption.

Under Section VII(c)(2) of the Proposed Amendments to 84-24, the insurer's policies and procedures must "identify and eliminate 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 are not in the retirement investor's Best Interest, or that subordinate the interests of the retirement investor to the independent producer's own interest."[147]

The preamble effectively reflects a judgment call by DOL on what conflicts created by certain compensation practices cannot be mitigated and must be eliminated, including "differential compensation." Furthermore, in the preamble, DOL is particularly concerned with offering certain non-cash compensation based on sales volumes or quotas, even including educational conferences.[148] However, it would seem odd for an insurer to pay for educational training for an independent producer who did not sell any of the insurer's product for some time. All of these bans and limitations appear contrary to the states that have adopted the NAIC model, which only requires disclosure of compensation, but does not ban any particular type.[149]

The policies and procedures would be expected to include a prudent process for taking action to protect retirement investors from independent producers who might fail to adhere to the Impartial Conduct Standards, or who lack necessary education, training, or skill. DOL explains that this requirement is consistent with, but more protective than, the NAIC model regulation, which requires an insurer to verify that the producer has completed the required annuity training course. However, it is unclear how DOL has the authority to require insurers, who are otherwise not fiduciaries under ERISA, to adhere to higher standards than state law. The insurer also 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. It also is unclear how an insurer can document that it can rely on an independent producer to comply with the Impartial Conduct Standards.

An entity that is not a disqualified person who does not take part in a prohibited transaction is not liable for the excise tax.

As part of the retrospective review under the Proposed Amendments to PTE 84-24 Section VIII(d)(4)(B) the senior executive must certify that the insurer has filed the Form 5330 for any violations of the PTE. However, an insurer is not a disqualified person, so it is unclear how the insurer would be required to file and pay the excise tax. Furthermore, this same section would

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[147] This requirement also is at odds with most state laws that do not require mitigation and elimination of all of these types of practices and compensation. For example, the NAIC model regulation requires "reasonable procedures to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time." NAIC Suitability in Annuity Transaction Model Regulations, Section 6(C)(2)(h)(vi) available at https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf. However, NAIC notes that this does not preclude "these practices on sales of a company's products with no emphasis on any particular product."
[148] 88 Fed. Reg. 760004, 76011 (Nov. 3, 2023).
[149] NAIC Suitability in Annuity Transaction Model Regulations, Section 6(A)(2)(a)(vi) available at https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.

require the insurer to report any such violations to DOL. Again, it is unclear how DOL has authority to require an insurer who is not a fiduciary to report prohibited transactions to which it is not a party.

DOL should not incorporate into PTE 84-24 the Proposed Amendments to PTE 2020-02 relating to ineligibility based on a litany of crimes.

Similar to the Proposed Amendments to PTE 2020-02, DOL proposes an insurer, an affiliate, or independent producer would lose eligibility to rely on the Proposed Amendments to 84-24 based on a litany of crimes unrelated to the provision of investment advice, including any equivalent foreign crimes. Inclusion of these provisions in the Proposed Amendments to 84-24 suffers the same flaws as described above as does the inclusion in PTE 2020-02. In addition, given DOL admits the insurer is not an ERISA fiduciary (nor would the affiliate be), it is inconceivable how the actions of a non-ERISA fiduciary should impact whether an independent producer may use the exemption. Finally, DOL notes that if eligibility is lost under the class exemption, the insurer may apply for an individual exemption, which would seem to force the insurer to concede to fiduciary status where none exists under the statute and DOL's authority.

Access to compliance records should be limited only to DOL and Treasury.

Section IX (a)(2)(C) and (D) of the Proposed Amendments to PTE 84-24 would require that the records showing compliance must be made available to any contributing employer and employee organization whose members are in the plan and any participant or beneficiary of the plan or beneficial owner of an IRA acting on behalf of the IRA. As discussed above regarding the proposal to put this same requirement in PTE 2020-02, DOL has shown no reason why any of these entities would need access to these records and how it would help a retirement investor determine whether to purchase an annuity.

ERISA civil penalties and excise taxes cannot be imposed on insurers.

Section IX of the Proposed Amendments to PTE 84-24 provides that "[n]o party, other than the party responsible for complying with this section IX, will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the excise tax imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or available for examination." If an insurer is not a fiduciary and not otherwise subject to ERISA or the Code, it is unclear how DOL can subject them to either ERISA penalties or excise taxes.

Conclusion

For the reasons discussed in this letter, the Chamber requests that DOL reconsider the scope of the Proposed Regulation and the Proposed Amendments to PTE 2020-02 and its approach to the Proposed Amendments to 84-24, as well as the other Amended PTEs.

Sincerely,

Chantel Sheaks

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