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DOL Finalizes Amendments to Investment Advice Fiduciary Regulation, Including Revised Definition of Investment Advice Fiduciary and Amendments to PTEs

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TO: ICI Members
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Pension RE: DOL Finalizes Amendments to Investment Advice Fiduciary Regulation, Including Revised Definition of Investment Advice Fiduciary and Amendments to PTEs

On April 23, 2024, the Department of Labor (DOL) released a final version of its regulatory package on fiduciary investment advice ("Final Package").[1] The Final Package includes an amendment to the regulation defining who is a "fiduciary" under section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code ("Code") as a result of providing investment advice to a retirement investor ("Final Rule"). Like the package proposed by DOL in October (the "Proposal"),[2] the Final Package also includes amendments to prohibited transaction exemptions (PTEs) 2020-02, 84-24, 75-1, 77-4, 80-83, 83-1, and 86-128.[3] Like the Proposal, the definition of fiduciary advice in the Final Rule sweeps very

broadly, and the PTE amendments are intended to force most advice fiduciaries to rely on PTE 2020-02 to provide advice. DOL did make several changes to the package that are responsive to issues we raised in our comment letter submitted in response to the Proposal ("Comment Letter").[4]

Effective Date and Transition Period

The Final Rule and PTEs will become effective on September 23, 2024. Both amended PTE 2020-02 and amended PTE 84-24 include a one-year transition period after September 23, 2024, under which parties have to comply only with the impartial conduct standards (as described below) and provide a written acknowledgment of fiduciary status for relief under these PTEs. In the preamble, DOL also "confirms that, rather than take an enforcement-oriented approach in the initial period following applicability, its primary focus will be on promoting compliance and providing assistance to parties working in good faith to comply with the law's obligations."[5]

Key Takeaways

Even with improvements to the Final Package, the definition of fiduciary advice in the Final Rule still is considerably broader than the existing 5-part test and could be seen as covering sales conversations and other interactions where there is no true relationship of trust and confidence. The amendments to the PTE framework still eliminate the availability of PTE 77-4 (an important exemption for mutual fund companies) for providing advice in the retirement space (the same amendment was made to several other existing advice exemptions). For PTE 2020-02, now the main exemption available to investment advice fiduciaries, some changes will improve workability, but several concerns remain.

Key takeaways regarding the updated definition of investment advice fiduciary include:

- Refinements to "facts and circumstances determination" context. The Final Rule retains the Proposal's "facts and circumstances" context, but DOL revised the language in several ways in an attempt to make the test more objective.
- Improvements to "fiduciary representation or acknowledgement" context. Under the Proposal, one of the contexts that would result in a recommendation becoming "investment advice" is that the party making the recommendation represents or acknowledges that they are acting as a fiduciary of any type when making investment recommendations. In our Comment Letter we urged DOL to make this language more precise and not to equate fiduciary status under another law or regulatory framework to ERISA fiduciary status. Helpfully, the Final Rule narrows this context to cover only acknowledgements that the party is acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both, and provides that the acknowledgement is with respect to the recommendation at issue.
- Elimination of "discretionary investment authority" context. Under the Proposal, another context that would result in fiduciary status was where the party either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control with respect to purchasing or selling securities or other investment property for the retirement investor. DOL helpfully eliminated this context in the Final Rule. In our Comment Letter, we described how application of this context would lead to nonsensical and harmful results and would extend fiduciary status to situations DOL likely did not consider.
- Narrowing of the definition of "retirement investor". The definition of retirement investor still includes a plan fiduciary and an IRA fiduciary, but no longer includes a party who is serving as an investment advice fiduciary to the retirement investor

(rather, it includes those fiduciaries to plans and IRAs who have discretionary authority). While this change does not go as far as the "institutional carveout" that we requested, it is an improvement.
- Clarification that a "recommendation" is a call to action. Like the Proposal, the text of the Final Rule does not define the term "recommendation" itself. Rather, in the preamble, DOL includes several clarifying points based on existing FINRA and SEC guidance. In response to comments (including ICI's comment) that a mere "suggestion" should not be sufficient to trigger application of the rule, DOL confirms in the preamble that, it "intends that whether a recommendation has been made will be construed consistent with the SEC Regulation Best Interest[6] and the inquiry will focus on whether there is a 'call to action.'"
- Preamble discussion of specific circumstances. Several commenters including ICI emphasized the need for exclusions or carve-outs for various circumstances, including "hire me" conversations, platform provider discussions of investment options, and call center interactions. In the preamble, DOL discusses application of the rule to these circumstances but declines to add special exceptions or carve-outs in the Final Rule. Thus, concerns will remain regarding what can be said to a retirement investor in these circumstances, without triggering fiduciary status.

Key takeaways regarding amended PTE 2020-02 include:

- Expanded scope of covered transactions. The exemption now will be available for robo-advice and for recommendations of any principal transaction. The Proposal (and existing PTE) provided only limited relief for "covered principal transactions" and "riskless principal transactions." The Proposal did include coverage of robo-advice.
- Special compliance option for discretionary management RFPs. DOL provides a new streamlined compliance option for fiduciary investment advice that is provided in the context of a response to a request for proposal (RFP) for certain discretionary investment management services. In that case, if the service provider is subsequently retained, it may receive compensation as a result of the advice provided in the RFP response, provided it adheres to the exemption's impartial conduct standards (Care Obligation, Loyalty Obligation, reasonable compensation, and no materially misleading statements).
- Mixed bag of disclosure changes. Certain changes to the timing and content of required disclosures to retirement investors should improve workability of the exemption. This includes removing the Proposal's right to request a more detailed breakdown of fees. But concerns may remain around the required (and inflexible) written acknowledgement of fiduciary status, among other things.
- Treatment of differential compensation. In the preamble discussion of conflict mitigation, DOL clarifies that it did not intend to prohibit differential compensation (compensation that varies depending on the recommendation). DOL also clarifies that conflict mitigation would not prevent recommending investments such as Class A Share mutual funds, provided the Care Obligation and Loyalty Obligation are otherwise satisfied as to a retirement investor.
- Expanded ineligibility provision. The scope of circumstances or events resulting in ineligibility to rely on PTE 2020-02 is wider. As expected, DOL includes certain types of domestic and foreign criminal convictions as disqualification events (except for convictions in a country designated by the Department of Commerce as a "foreign adversary"), as well as certain other adverse court judgments involving the advice provider. Although ineligibility is immediate under the final exemption, DOL adds a one-year transition period during which an ineligible party may continue to rely on PTE

2020-02—provided the party complies with all conditions of the exemption during this period.

Background

As a reminder, following the Fifth Circuit's 2018 vacatur[7] of the Obama era fiduciary rulemaking package (the "2016 Rule"),[8] DOL reinstated the 1975 fiduciary advice regulation's 5-part test in 2020.[9] Under the 5-part test (described in 29 CFR §2510.3-21(c)(1)), a person is a fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. In conjunction with the reinstatement, DOL also proposed and then finalized PTE 2020-02.[10] In the preamble to PTE 2020-02, DOL provided commentary regarding its updated interpretations of the 5-part test. DOL provided additional guidance regarding the application of the 5-part test in the form of FAQs issued in April 2021.[11]

In February 2023, a US District Court in Florida issued a ruling vacating DOL's interpretation articulated in the FAQ guidance, regarding when in the context of a rollover recommendation, an advice provider meets the regulatory 5-part test and is therefore considered a fiduciary under ERISA.[12] In addition to this lawsuit, another challenge to DOL's 2020 interpretation of the 5-part test, as articulated in the preamble to PTE 2020-02, is currently pending in a Texas federal court.[13]

On October 31, 2023, DOL released a new Proposal on fiduciary investment advice. DOL provided a short 60-day comment period, with comments due January 2, 2024, refusing several requests for an extension.[14] In addition, DOL took the unprecedented action of holding a hearing for before the end of the comment period, on December 12 and 13, 2023.[15] On March 8, 2024, barely two months after the close of the comment period, DOL sent the Final Package to the White House's Office of Management and Budget (OMB) for review. Several stakeholders, including ICI, participated in meetings with OMB, urging OMB not to approve the Final Package.[16] After a relatively quick 33-day review of the package (a process that typically takes up to 90 days), on April 10, 2024, OMB cleared the Final Package.

Final Rule - Definition of Fiduciary

Like the 2016 Rule and the 2023 Proposal, the Final Rule would significantly broaden the definition of who would be considered an investment advice fiduciary under paragraph (c) of the regulation, by effectively eliminating the regular basis, primary basis, and mutual agreement prongs of the current 5-part test as we know them. The Final Rule is intended to cover one-time recommendations (including rollover recommendations) if the elements of the new definition are satisfied.

Functional definition

While many elements of the Final Rule's definition of investment advice are similar to the proposal, DOL did modify the operative language of the definition in paragraph (c)(1). Under the final definition, a person would be an investment advice fiduciary under Title I and Title II of ERISA if:

1. The person makes a recommendation of any securities transaction or other

investment transaction or any investment strategy involving securities or other investment property to a retirement investor (as defined) with respect to a plan or IRA[17] [paragraph (c)(1)];
2. The advice or recommendation is provided "for a fee or other compensation, direct or indirect" as stated in ERISA §3(21)(A)(ii) [paragraph (e)]; and
3. The person makes the recommendation in one of the following contexts:
    - The person either directly or indirectly (e.g., through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest [paragraph (c)(1)(i)]; or
    - The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both, with respect to the recommendation [paragraph (c)(1)(ii)].

The final rule also retains the Proposal's provisions addressing the effect of written disclaimers of fiduciary status, the meaning of the statutory phrase "for a fee or other compensation, direct or indirect,"[18] and several defined terms. The preamble provides more color on many aspects of the final rule, such as the meaning of "recommendation" and the two different contexts that result in fiduciary status for advice.

Two contexts for recommendations

The Proposal contemplated three different contexts in which recommendations would be considered fiduciary advice. The final rule narrows this to two contexts.

Context 1: facts and circumstances determination

The final rule retains the Proposal's "facts and circumstances" context, but DOL revised the language in several ways in an attempt to make the test more objective. (See the first bullet under paragraph (3) of the operative language quoted above.) DOL makes several comments in the preamble to explain the changes and how it expects to apply the test.

- DOL retains the language from the Proposal's test that incorporates activity of affiliates ("either directly or indirectly (e.g., through or together with any affiliate))." In the preamble, DOL notes that this language "is not intended to capture all actions of affiliates" but rather "is intended to describe circumstances in which an advice provider, in its interactions with the retirement investor, utilizes an affiliate to formally deliver recommendations to investors."[19]
- DOL explains that it "will apply the test based on the activities of the 'person,' which would include the firm, and its employees, agents and representatives," but also that the test will "focus on the role of the individual providing the recommendation in relation to the retirement investor."[20] Therefore, it appears that both the activities of the firm and the role of the individual will be relevant to the facts and circumstances determination.
- DOL revised the test to add the word "professional" to describe "investment recommendations." DOL explains that this change is intended to exclude "the ordinary

communications of a human resources employee" and other employees of the plan sponsor who are not investment professionals, as well as common activities of real estate agents, life coaches, probation officers and divorce counselors.[21]

- In an attempt to make the test more objective, DOL has added qualifying language regarding the circumstances surrounding the recommendation, including that those circumstances "would indicate to a reasonable investor in like circumstances" that the recommendation is based on "review of" the retirement investor's particular needs or individual circumstances, "reflects the application of professional or expert judgment" to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as "intended to advance" the investor's best interest.
- The use of the term "best interest" in the test is meant "to refer more colloquially to circumstances in which a reasonable investor would believe the advice provider is looking out for them and working to promote their interests."[22]
- DOL notes that whether the person making the recommendation has investment discretion with respect to the investor's assets could be relevant to satisfying the facts and circumstances test, because those circumstances would indicate to a reasonable investor that the recommendation may be relied upon by the investor.
- In evaluating this context, DOL explains in the preamble that it intends "that the use of titles, credentials, and marketing slogans will be a relevant consideration but will not generally be determinative."[23]

Context 2: fiduciary representation or acknowledgement

The final rule retains this context from the Proposal but makes two significant changes. (See the second bullet under paragraph (3) of the operative language quoted above.)

- Under the Proposal, this context would have resulted in a recommendation becoming "investment advice" where the person making the recommendation represents or acknowledges that they are acting as a fiduciary of any type when making investment recommendations. In our Comment Letter we urged DOL to make this language more precise and not to equate fiduciary status under another law or regulatory framework to ERISA fiduciary status. We noted the specific scenario of an asset manager who provides model portfolios for use by intermediaries and, in that context, acknowledges they are acting as a fiduciary under the Investment Advisers Act in offering model portfolios. In the final rule, DOL narrows this context to cover only acknowledgements that the person is acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both.
- Second, under the Proposal, this context applied where the person acknowledges that they act as a fiduciary "when making recommendations." As we pointed out in our Comment Letter, this seemed to mean that once a person had acknowledged fiduciary status, every interaction they had with the retirement investor would be subject to fiduciary status, regardless of the circumstances. Further, once one investment professional acknowledged fiduciary status, it seemed that the entire firm would become covered indefinitely under this context. DOL addressed this concern by narrowing the context to focus on the recommendation at issue (i.e., the person represents or acknowledges fiduciary status "with respect to the recommendation").

Elimination of "discretionary investment authority" context from Proposal

The Proposal included a third context (paragraph (c)(1)(i) in the Proposal) that would have resulted in fiduciary status where 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. This context is eliminated in the final rule. In our Comment Letter, we described how application of this context would lead to nonsensical and harmful results and would extend fiduciary status to situations DOL likely did not consider. DOL explains that it was persuaded by commenters, noting that the facts and circumstances context would likely cover, "to a more targeted extent, parties with investment discretion."[24]

Treatment of sales pitches and investment education

After laying out the basic test, DOL has added a new paragraph to the text of the rule [paragraph (c)(1)(iii)] addressing communications that are sales pitches or investment education, which can occur without ERISA fiduciary status attaching. The text essentially says that where a person makes a recommendation, but the communication does not fall into context (i) or (ii) above, that person is not providing investment advice under the definition. The text provides an example that "a salesperson's recommendation to purchase a particular investment or pursue a particular investment strategy" will not be considered investment advice if the person does not represent that they are acting as a fiduciary and the circumstances do not meet the facts and circumstances test.

In the preamble, DOL provides a more interesting and potentially helpful example of non-fiduciary sales activity, explaining that:

> "for example, absent additional facts, the following scenario described in the Chamber opinion would not be sufficient to establish ERISA fiduciary status under the final rule: 'You'll love the return on X stock in your retirement plan, let me tell you about it,' even if, as the opinion hypothesizes, the advice recipient buys the stock based solely on this communication. Certainly, the salesperson touts the stock, but the scenario falls short of suggesting that the sales pitch was individualized, the salesperson considered the investor's particular circumstances, applied professional judgment to the investor's particular needs and circumstances, or was providing a recommendation intended to advance the best interest of the investor. Under the final rule, a mere sales pitch of this sort, without more, does not amount to fiduciary investment advice for purposes of ERISA." [25]

While the new language in the text of the rule does not seem helpful as its logic is circular and it is not an actual exclusion (e.g., you're not a fiduciary if you don't meet the functional test), DOL at least acknowledges here that there are conversations that should be considered sales.[26] Further, the example in the preamble does highlight how the facts and circumstances test may be more narrowly applied that we might otherwise have assumed.

The text of this paragraph concludes by stating that "the mere provision of investment information or education, without an investment recommendation," is also excluded from the definition. For more on education, see discussion below under Preamble discussion of application of the Final Rule to specific circumstances.

Narrowing of the definition of "retirement investor"

The Proposal defined "retirement investor" to include a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary.[27] The definition generally

remains the same as in the Proposal, with one significant change. The reference to "plan fiduciary" (and IRA fiduciary) is narrowed to exclude investment advice fiduciaries.[28]

In our Comment Letter, we urged DOL to provide a broad exclusion from the fiduciary advice definition for recommendations to institutional and sophisticated investors.[29] DOL declined to provide a broad institutional carveout to address commenters' concerns.[30] Citing its concerns regarding plan fiduciaries' need for fiduciary advice, DOL explains its position that the facts and circumstances test is a more appropriate [determinative] than "an artificial carve-out from fiduciary status that does not reflect the parties' reasonable understandings."[31]

DOL did find it appropriate, however, to exclude recommendations made to other parties serving as fiduciaries to plans and IRAs if the fiduciary is merely an investment advice fiduciary, having no authority or control to regarding the investment of plan assets. DOL determined to retain within the definition of retirement investor parties serving as plan or IRA fiduciaries who have discretionary authority or control over plan assets, plan management, or plan administration.

DOL acknowledges in the preamble a concern raised by commenters that a wholesaler who is interacting with financial professionals may not know if a particular financial professional is serving as a plan or IRA fiduciary, particularly if the wholesaler is presenting in a group setting. DOL brushes aside these concerns, claiming that such communications likely would not meet the new facts and circumstances test:

> [I]t would appear that any communication in this context would not be investment advice under the final rule as it would not be based on the individual needs or particular circumstances of any plan or IRA. Such communications, to the extent they are covered recommendations that are not accompanied by an acknowledgment of ERISA Title I or Title II fiduciary status with respect to the recommendation, would not meet paragraph (c)(1)(i) of the final rule. In the scenario in which a financial professional acts as both an investment advice fiduciary and a fiduciary with control over investment decisions, the limitation in the definition of a "retirement investor" would apply only to the extent of their role as an investment advice fiduciary. In their role as a fiduciary with control, communications to them would be analyzed under the provisions of the final rule discussed in this paragraph. [32]

While this change to the definition of retirement investor does not go as far as the "institutional carveout" that we requested, the fact that "investment advice fiduciaries" are no longer included in the definition of retirement investor is an improvement.

Written disclaimers of fiduciary status

The Final Rule retains the Proposal's stipulation (in paragraph (c)(1)(iv) of the Final Rule) that written statements disclaiming fiduciary status "will not control to the extent they are inconsistent with the person's oral or written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor." (emphasis added to show addition from Proposed provision.)

Regarding the reference to disclaimers inconsistent with applicable state or federal law, language in the preamble seems to suggest that if a broker-dealer or investment adviser makes recommendations or provides advice to retail customers and is subject to

obligations under Reg BI or the Advisers Act, then the broker-dealer or adviser will be unable to effectively disclaim fiduciary status under ERISA or the Code.[33]

DOL includes somewhat helpful language in the preamble discussing how financial professionals could use disclaimers to define the parameters of the relationship. For example:

- In other contexts outside the context of Reg BI and Advisers Act duties, however, firms and financial professionals may rely on disclaimers to a greater degree but must exercise care to ensure that their actions and communications are consistent with their disclaimer of fiduciary responsibility.[34]
- To the extent a written disclaimer is otherwise permitted by Federal or State law and the firm and financial professional's communications and conduct are consistent with the disclaimer, it is relevant to determine whether [the facts and circumstances test is met].[35]
- Firms and financial professionals can best ensure that there are no misunderstandings as to fiduciary status by ensuring that they are clear and consistent in their communications with their client.[36]
- The Department believes this provision on disclaimers should also address many commenters' concerns about communications to plan and IRA fiduciaries who are retirement investors under the final rule [including for example, in the context of RFPs].[37]

Covered advice and recommendations

The Final Rule's definition of investment advice in paragraph (c)(1) requires that there be a "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property." This phrase is defined in paragraph (f)(10) and is essentially unchanged from the Proposal. Covered recommendations include recommendations as to:

1. The advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, investment strategy, or 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 [paragraph (f)(10)(i)];
2. 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 [paragraph (f)(10)(ii)]; and
3. 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 [paragraph (f)(10)(iii)].

In the preamble, DOL highlights a primary goal of the rule to cover rollovers and distributions from a plan or IRA, as these decisions "are among the most, if not the most, important financial decisions that plan participants and beneficiaries, and IRA owners and beneficiaries are called upon to make." DOL explains its broad interpretation of "advice with respect to 'any moneys or other property of the plan,'" noting:

> Even if the assets would not continue to be covered by Title I or Title II of ERISA

> after they were moved outside the plan or IRA, the recommendation to change the plan or IRA investments in this manner and to extinguish investor interests and property rights under the plan is investment advice under Title I or Title II of ERISA. [38]

As in the Proposal, the Final Rule's definition in paragraph (f)(10)(ii), adds a reference to the voting of proxies appurtenant to securities.

Definition of recommendation (clarification that a "recommendation" is a call to action)

Like the Proposal, the text of the Final Rule does not include a formal definition of "recommendation." In the preamble to the Proposal, DOL had stated that it "views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action"—which is quoted from FINRA guidance and is essentially identical to the definition from the 2016 Rule. Several commenters (including ICI)[39] suggested that a mere "suggestion" should not be sufficient to trigger application of the rule. DOL confirms in the preamble to the Final Rule that, it "intends that whether a recommendation has been made will be construed consistent with the SEC Regulation Best Interest and the inquiry will focus on whether there is a 'call to action.'"[40]

Like in the preamble to the Proposal, the preamble to the Final Rule includes several clarifying points based on existing FINRA and SEC guidance:

- Whether a recommendation has been made is an objective rather than subjective inquiry.
- The more individually tailored the communication is to a customer or targeted group of customers, the more likely the communication will be viewed as a recommendation.
- DOL reaffirms its position that "the fact that a communication is made to a group rather than an individual would not be dispositive of whether a recommendation exists" and that providing a selective list of securities to a particular advice recipient as appropriate for that investor would be a recommendation even if no recommendation is made with respect to any one security.[41]
- A series of actions that individually may not constitute a recommendation, may amount to a recommendation when considered in the aggregate.

Preamble discussion of application of the Final Rule to specific circumstances (but still no carveouts or exclusions)

The Proposed definition of fiduciary advice, while just as expansive as the 2016 Rule, did not incorporate important carveouts from the 2016 Rule.[42] Our Comment Letter stressed the need for DOL to include such carveouts, in particular exceptions for arm's length institutional transactions and for platform providers, in the final rule. We suggested that at a minimum, DOL should provide clarifying examples to illustrate its intent.

DOL has declined to add special exceptions or carveouts or to provide the clarifying examples we suggested (see discussion above regarding the modest change to the definition of "retirement investor").[43] Instead, in section E of the preamble, DOL discusses application of the rule to certain specific circumstances (confirming that the Proposal's discussion of these circumstances remains applicable and adding some additional commentary). As described below, this discussion does not appear to add much clarity or change DOL's position with respect to these circumstances (as compared to the discussion

in the Proposal).

"*Hire me*" *communications*

As in the Proposal, under the second category of covered recommendations described above (paragraph (f)(10)(ii)), the specific reference to "other" persons in the context of recommending someone to provide investment advice or investment management services, is meant by DOL to clarify that advisers can promote their own advice or management services (i.e., the "hire me" situation) without it being considered fiduciary advice. While "[t]outing the quality of one's own advisory or investment management services would not trigger fiduciary obligations," DOL cautioned that although the "hire me" recommendation itself would not be advice, anything beyond the touting of one's services, such as a description of what the professional would do if hired, could be a covered recommendation.[44]

In our Comment Letter, we raised concerns with this view, noting the heightened importance as the Proposal lacked a carveout for sophisticated investors such as the 2016 exception for transactions with independent fiduciaries with financial expertise.[45] We requested that DOL at a minimum clarify that responses to RFPs and other plan inquiries are not considered "recommendations," even if the response is tailored (or individualized) to a particular plan.

DOL declined to make the changes or clarifications we requested, and instead, in section E.1 of the preamble, reiterates its position from the Proposal. In the context of "hire me" communications, "[p]ersons can tout their own services and provide other information (including information about their affiliates' services), but to the extent 'hire me' communications include covered investment recommendations, those recommendations are evaluated separately under the provisions of the final rule."

As justification for not making requested changes, DOL opines that retaining the distinction is necessary to avoid the loopholes similar to those resulting from the "regular basis" prong of the existing 5-part test, particularly in the context of rollovers and recommendations concerning the design of a plan portfolio.[46] Noting the changes it made in the functional definition, DOL claims that those marketing their own services can provide a significant amount of information without rising to the level of a recommendation. Further, in the case of RFPs, such persons can make use of disclaimers (provided the disclaimer is consistent with oral and written communications, marketing materials, etc., as described above).[47]

Platform providers and pooled employer plans

In the preamble to the Proposal DOL noted that platform providers may provide advice in connection with their platform offerings, or they may simply provide general financial information such as historical performance of the investments available on the platform. DOL explained that the determination (turning on the threshold question of whether a recommendation has been made) "may turn on whether the provider presents the investments on the platform as having been selected for and appropriate for the investor."[48] DOL explained that it would apply a similar analysis in the case of a Pooled Employer Plan (PEP), as an off the shelf product being sold to a plan sponsor.

In our Comment Letter, we argued that in both situations, we believe that simply describing the product and marketing it to a plan sponsor should not be considered fiduciary advice but rather purely selling activity.[49] In the Final Rule, DOL declined to change its position.

For platform providers, "the Department has not changed its position from the proposal that presenting a list of investments as having been selected for and appropriate for the investor (i.e., the plan and its participants and beneficiaries) will not be carved out from ERISA fiduciary status. If the communications between a platform provider and a retirement investor amount to a covered recommendation, ERISA fiduciary status will attach if the other parts of the final rule are satisfied. If there is a covered recommendation, the fact that it is made in the context of a request for proposal or other negotiation of a future business relationship should not, in and of itself, result in the recommendation being carved out as fiduciary investment advice."[50] DOL confirms that where a platform provider merely identifies investment alternatives using objective third-party criteria without additional screening, this type of selection assistance would not constitute a recommendation.[51]

Likewise, regarding PEPs, DOL reiterates its position from the Proposal that the analysis is the same as that of a platform provider.[52]

Investment information and education (including call centers)

In the preamble to the Proposal, DOL confirmed that it does not intend to change the guidance of Interpretive Bulletin (IB) 96-1, under which providing asset allocation models and interactive investment materials is considered investment education rather than fiduciary advice.[53] In our Comment Letter, we expressed support for the this position, but noted that that conclusion is hard to square with the overly broad definition of fiduciary investment advice since these models are presented to investors, might be relied on, and are individualized.[54] We explained that while IB 96-1 is helpful, the Proposal may result in a reduction of the commonplace exchanges of information currently provided at no cost to millions of retirement savers through call centers, walk-in centers, and websites, as firms may see the need to take a conservative approach given the severe consequences of inadvertently becoming an ERISA fiduciary.

In the preamble to the Final Rule, DOL explains that the line between an investment recommendation and education will turn on whether there is a call to action.[55] DOL provides several examples of information that, absent a recommendation, will constitute investment education, including: informing an investor of the need to take RMDs, discussing the merits of a loan or hardship withdrawal, information relating to distribution options, the tax benefits associated with rollovers into IRAs, and the information in IRS's model safe harbor explanations under Code section 402(f).[56]

While DOL references IB 96-1 in the preamble to the Final Rule and confirms that it is not updating IB-96-1 at this time, it also references the "Investment Education" provision in the 2016 Rule (suggesting that this part of the 2016 Rule could be looked to for guidance).[57] While the 2016 Rule's language generally mirrors IB 96-1 and in some cases expands the education exclusion,[58] it contained concerning limitations regarding asset allocation models and the identification of specific investment alternatives within an asset class.[59] Given that the 2016 Rule was vacated, and that IB 96-1 still stands, it is unclear whether the 2016 Rule's limitations now apply, merely by virtue of DOL's reference to the 2016 Rule in the preamble. Further, DOL states that it may decide at a later date to revisit the IB.[60]

Addressing comments it received regarding call centers, DOL points to the discussion of application of IB 96-1. DOL explains that generally, call center personnel "can provide investment-related information that is not based on the particular needs or individual circumstances of the retirement investor without ERISA fiduciary status attaching, as

confirmed in paragraph (c)(1)(iii)."[61]

Swaps and security-based swaps

Noting its view of Congress' intent regarding the application of the Dodd-Frank Act to ERISA-covered plans, DOL states that:

> The disclosures required of plans' counterparties under the business conduct standards [applicable to dealers and major participants in swaps or security-based swaps] would not generally constitute a 'recommendation' under the final rule, or otherwise compel the dealers or major participants to act as fiduciaries in swap and security-based swap transactions conducted pursuant to section 4s of the Commodity Exchange Act and section 15F of the Securities Exchange Act. [62]

However, DOL cautions that a swap dealer could become an ERISA fiduciary if, in addition to the mandated disclosures, they also make specific individualized recommendations to an ERISA plan.

Valuation of securities and other investment property

DOL confirms that valuation services, appraisal services, and fairness opinions are not included as categories of covered recommendations and therefore the provision of such services would not lead to fiduciary status. As a reminder, in the preamble to the Proposal, DOL stated that valuations would be considered in a future separate rulemaking.[63]

Scope

The Final Rule includes provisions, unchanged from the Proposal and carried over from the existing regulation, regarding the scope of fiduciary duty and the execution of securities transactions. The scope provision confirms that being an investment advice fiduciary with respect to certain assets of a plan or IRA does not make the person an investment advice fiduciary for all of the assets of the plan or IRA. The securities transactions provision specifies that the execution of certain securities transactions by broker-dealers at the direction of plan clients or unrelated parties is not fiduciary advice.

Severability and other issues

In the Proposal, DOL had asked for comment on whether it should include a severability provision. While DOL did not include such a provision in the text of the Final Rule, in the preamble, it reiterated its position from the Proposal that the definition of investment advice fiduciary would survive even if the PTE amendments were vacated by a court. DOL expressed its disagreement that the components of the Final Package are "inextricably linked."[64]

We note that the preamble also addresses comments that DOL exceeded its jurisdiction and, in many instances, ran afoul of other laws. While we do not discuss these in detail here, we note the following.

- DOL disagreed that it should have deferred to federal securities laws (including the Dodd-Frank Act) and state insurance laws, viewing such deference as inconsistent with Congress' intent or the purposes of ERISA.[65]
- DOL extensively detailed how—in its own view—its process, including the Proposal,

the regulatory impact analysis, and the comment process, did not violate the Administrative Procedure Act (APA).[66]
- DOL also discounted arguments that its actions in the Final Package call into question the McCarran-Ferguson Act's limit on federal preemption of state laws regulating the business of insurance. Among other things, DOL asserted that the Final Package works with and complements, and does not invalidate, state insurance laws.[67]
- DOL viewed the Major Questions Doctrine as inapplicable to the Final Package, as the Final Package built upon ERISA's fundamental definition of fiduciary and an extensive history of regulatory and sub-regulatory guidance. Regardless, DOL viewed Title I of ERISA as expressly granting DOL authority to issue the Final Package.[68]
- DOL rejected one commenter's argument that the Final Rule presumptively violates the First Amendment in that it amounts to content-based and viewpoint-based regulation of speech.[69] DOL pointed out that the Final Package directly advances the government's substantial interest in protecting retirement savers, and does so in a way sufficiently drawn to advance this interest.

Amended PTE 2020-02

Amended PTE 2020-02 is now (as of its effective date) the sole administrative class exemption available for providing fiduciary investment advice for a fee (except for the limited application of PTE 84-24 to insurance products). Amended PTE 2020-02 replaces numerous long-standing PTEs that parties have used (in some cases for almost 45 years) to provide fiduciary investment advice in various contexts.

In adopting amended PTE 2020-02, DOL made numerous changes from the Proposal that address concerns ICI and others highlighted. That said, DOL discounted many other concerns commenters expressed.

Scope of Exemption

Amended PTE 2020-02 is available for a broad range of purchases or sales of investment products to/from a retirement investor, including insurance and annuity products and all principal transactions. The exemption is not available if: (i) the plan is an ERISA Title I plan where the financial institution or investment professional (or any affiliate thereof) is either (a) the employer of employees covered by the plan, or (b) the named fiduciary or administrator of the plan, including a pooled plan provider, unless such entity is selected to provide investment advice by a fiduciary independent of the financial institution and investment professional (or any affiliate thereof); or (ii) the transaction at issue involves a financial institution or investment professional acting in a fiduciary capacity other than as an ERISA 3(21)(a)(ii) investment advice fiduciary.

Principal Transactions

The Proposal and the current PTE 2020-02 limited relief for principal transactions to purchase/sales of assets in "riskless principal transactions" and a narrow definition of "covered principal transactions." ICI in our Comment Letter had urged DOL to extend PTE 2020-02 to all principal transactions. At a minimum, we urged DOL to provide relief for sales to a plan or IRA of closed-end fund shares during an initial public offering. Amended PTE 2020-02 adopts ICI's broader recommendation. While DOL provided relief for all principal transactions under amended PTE 2020-02, the preamble notes DOL's continuing concerns regarding principal transactions, including that in its view financial institutions selling products on a principal basis "must carefully address how they will mitigate the inherent conflicts of interest associated with recommending these products to Retirement

Investors."[70]

Robo-advice

DOL confirmed that amended PTE 2020-02, consistent with the Proposal, will cover all robo-advice arrangements—whether or not they involve personal interaction.

HSA non-bank trustees and custodians

DOL expanded the scope of PTE 2020-02 by newly including in the definition of "financial institution" IRS-approved non-bank trustees or custodians, but only to the extent they are serving as non-bank trustees or custodians for health savings accounts (HSAs). DOL explained that it implemented this expansion at the request of several commenters who were concerned that absent the change numerous non-bank trustees serving "a meaningful portion of the HSA market" may be forced to exit this line of business.

ERISA § 3(38) investment managers

Section II(f) of amended PTE 2020-02 newly provides streamlined exemptive relief for ERISA section 3(38) investment managers who provide fiduciary investment advice when responding to requests for proposal (RFPs) for their services. If the manager is subsequently retained, it may receive compensation as a result of the investment advice provided in the RFP response provided it adheres to amended PTE 2020-02's impartial conduct standards (Care Obligation, Loyalty Obligation, reasonable compensation, and no materially misleading statements), discussed below.

Updated impartial conduct standards

Amended PTE 2020-02 requires that financial institutions and investment professionals comply with the following impartial conduct standards.

- Care Obligation and Loyalty Obligation. These obligations (described further below) replace the "best interest" standard from the Proposal and the current PTE 2020-02.
- Reasonable compensation. The total direct and indirect compensation received by the financial institution and investment professional (including affiliates) must not exceed reasonable compensation, and these parties must seek to obtain best execution of the transaction under the circumstances.
- No materially misleading statements. Any written or oral statements from a financial institution or an investment professional to a retirement investor must not be materially misleading at the time they are made—including not omitting information a retirement investor needs to make the information provided to them not misleading under the circumstances.

DOL observed that the new Care Obligation[71] and Loyalty Obligation,[72] taken together, are "unchanged in substance" from the "best interest" obligation in the Proposal, and that this nomenclature change addresses commenter concerns that the term "best interest" is used in different contexts in various rulemakings, including but not limited to Reg BI and the Final Rule). Amended PTE 2020-02 also adds examples to the text of the exemption to: (i) clarify that an Investment Professional may not recommend a product that is worse for a retirement investor because it is better either for the investment professional or for the financial institution's bottom line; and (ii) confirm that in recommending a brokerage versus an advisory account an investment professional must base their recommendation on the retirement investor's financial interest and not subordinate this interest to any competing

financial interests of the investment professional.[73]

DOL dismissed ICI's and other commenters' concerns that DOL exceeded its statutory authority in extending ERISA Title I's fiduciary duties of prudence and loyalty to IRAs regulated under the Code.

Disclosures

Amended PTE 2020-02 makes numerous changes to the Proposal's requirements as to the timing and content of the disclosures provided to retirement investors. In DOL's view, these changes are likely to ease compliance burdens for financial institutions. We address certain of these requirements below.

As finalized, amended PTE 2020-02 requires the following written disclosures to a retirement investor:

(1) 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 of ERISA, Title II of ERISA, or both with respect to the recommendation;

(2) A written statement of the Care Obligation and Loyalty Obligation, described in Section II(a), that is owed by the Investment Professional and Financial Institution to the Retirement Investor;

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

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

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

(4) All material facts relating to Conflicts of Interest that are associated with the recommendation.[74]

Amended PTE 2020-02 also requires special disclosures for rollover recommendations, discussed below.

Timing of disclosures

Financial institutions must provide these disclosures (other than the rollover disclosure) by the later of: (i) the date of the recommendation; or (ii) the date the financial institution or investment professional is entitled to compensation from making the recommendation. The Proposal would have required that the disclosures be provided prior to engaging in a transaction covered by PTE 2020-02.

Fiduciary acknowledgement

DOL in amended PTE 2020-02 clarified the scope and application of the written acknowledgement of fiduciary status in subsection (1) above. The acknowledgement:

- Applies only with respect to the particular recommendation at issue;

- May not be in the form of a "to the extent" or qualified/conditional fiduciary disclosure; and
- Is not intended to create a private right of action, and any remedies are limited to those available under ERISA Title I and Title II.

The Proposal by its terms did not limit the scope of the fiduciary acknowledgement to a given recommendation. ICI in our Comment Letter had expressed concern that, as proposed, the fiduciary acknowledgement would have established fiduciary status for all purposes under the proposed fiduciary rule, and also ignored the realities of why financial institutions provide qualified acknowledgements of fiduciary status. DOL discounted explanations as to how and why qualified fiduciary acknowledgements are used in practice; but did address some of ICI's concerns that the proposed acknowledgement of fiduciary status had an overly broad effect (through a combination in the Final Package of a revised definition of fiduciary advice and the explicit limitation of the acknowledgement to a given recommendation).

ICI also expressed concern that the proposed fiduciary acknowledgement could create a private right of action for IRA owners based on basic contract law principles. DOL strongly disagreed with this view, stating in the preamble its view that the exemption "does not impose any contract or warranty requirements on Financial Institutions of Investment Professionals," and further clarifying that the only remedies DOL contemplates for violations of PTE 2020-02 or engaging in a non-exempt prohibited transaction "are those provided by Title I of ERISA, which specifically provides a right of action for fiduciary violations with respect to ERISA-covered plans, and Title II of ERISA, which provides for imposition of the excise tax under Code section 4975."[75] DOL also noted that amended PTE 2020-02 does not compel a financial institution to make any contractually enforceable commitments, and that moreover a financial institution can expressly disclaim "any enforcement rights other than those specifically provided by Title I of ERISA or the Code, without violating any of the exemption's conditions."[76]

Disclosure of relationships and conflicts of interest

Subsections (3) and (4) above require an initial disclosure to a retirement investor describing the relationship (including fees and services) between the financial institution and the retirement investor, as well as any material facts relating to conflicts of interest. The Proposal required significantly more details as to these elements. Additionally, DOL had proposed that a retirement investor have a right to request a detailed disclosure as to costs, fees, and compensation to enable them to make an informed judgment about the costs of a transaction and any conflicts of interest; and also had requested comments as to whether to require an additional website disclosure that would be available to the investing public. ICI in our Comment Letter expressed significant concerns as to the usefulness and costs of these potential requirements. DOL did not adopt either, but noted that it may reconsider requiring a website disclosure in the future—though any such disclosure would be subject to formal notice and comment rulemaking.

IRA rollover disclosure

Amended PTE 2020-02 requires that before engaging in or recommending a rollover from a plan covered by Title I of ERISA (or recommending the post-rollover investment of assets currently held in such a plan), a financial institution and investment professional must consider and document the bases for the recommendation to engage in a rollover and provide this documentation to a retirement investor. Considerations include, but are not

limited to: (i) the alternatives to a rollover, including leaving funds in the plan; (ii) fees and expenses associated with each alternative; (iii) whether a party other than the retirement investor pays for some or all of the plan's administrative expenses; and (iv) the different levels of services and investments available under each alternative. Where information (such as for the plan) is not available to the financial institution, reasonable estimates should be used.

The Proposal contained a similar requirement, though with a few notable differences. First, the disclosure had to be provided before engaging in the rollover. Second, the Proposal extended the disclosure requirement to IRA-to-IRA rollovers and to rollovers among different types of accounts. While DOL removed the disclosure requirement for IRA-to-IRA and account type rollovers, DOL cautioned that in its view "it is likely to be difficult for a firm to demonstrate compliance with its obligations, or to assess the adequacy of its policies and procedures, without documenting the basis for such recommendations."[77]

ICI also commented that the proposed rollover disclosure was too proscriptive, and instead recommended DOL consider an approach in line with Reg BI whereby the contents of the disclosure may vary depending on the circumstances. Additionally, ICI cautioned that requiring use of estimates where plan information is not available to the financial institution would only lead to inaccurate disclosures, and instead recommended that no comparison be required where a plan participant declined to provide necessary information to the financial institution. DOL dismissed these concerns.

Policies and procedures

Amended PTE 2020-02 requires that financial institutions establish, maintain, and enforce "written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions."[78] The policies and procedures must mitigate conflicts of interest, including (as discussed below) heightened review of certain compensation and incentive practices. DOL in the preamble included substantial discussion of conflict mitigation under the policies and procedures, in particular its views on differential compensation.

Two changes from the text of the Proposal are notable. First, the amendment requires a firm's policies and procedures to be designed to ensure compliance with all the exemption's conditions, rather than only the impartial conduct standards. Second, in response to comments (including from ICI) DOL extended the time frame to provide requested policies and procedures to DOL from 10 business days to 30 days.

Mitigation of conflicts of interest

Amended PTE 2020-02 requires, similar to the Proposal (aside from some "ministerial" word changes), that:

> [t]he 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 the Financial Institution or Investment Professional to place their interests, or those of any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives in a manner that

> is intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.[79]

ICI in our Comment Letter expressed significant concerns that the Proposal would create a presumption that differential compensation (compensation that varies depending on the specific product recommendation) is impermissible. The preamble to amended PTE 2020-02 clarifies that DOL is not requiring elimination of differential compensation.[80] Rather, DOL states that a financial institution must pay attention to conflicts inherent in its compensation system, and take special care to ensure that it does not adopt compensation practices that are intended (or that a reasonable person would conclude are likely) to result in recommendations that do not meet the Care or Loyalty obligations.[81] The preamble goes on to state that firms must manage any conflicts caused by differential compensation so that the interest of the retirement investor is paramount, rather than misaligned relative to the financial interests of the investment professional or financial institution.[82]

DOL provides additional commentary on how these conflict mitigation principles apply to situations where a firm is transitioning to other compensation models or practices, including that the firm should be careful to avoid harm to the investor's existing holdings. DOL provides an example where an investor has invested in front-end load shares, but the firm is moving away from recommending such shares. In this case, DOL states that the firm should pay close attention to the Care and Loyalty obligations before advising an exchange or liquidation of an investor's existing holdings.[83]

Similarly, the preamble confirms that the conflicts mitigation requirement should not be read to prevent recommendations of Class A share mutual funds.

> [T]he Department disagrees with the few commenters who suggested that the conflict-mitigation requirement would necessarily prevent Financial Institutions and Investment Professionals from recommending such specific investments as Class A share mutual fund investors. One commenter specifically expressed concern that Retirement Investors may want to pay up front for certain additional rights that Class A shares can include, such as rights of appreciation (ROA) and/or rights of exchange (ROE). While the Department is not endorsing any particular products, the Department confirms that the exemption does not preclude the recommendation of such shares when the recommendation satisfies the Care Obligation and Loyalty Obligation for a particular Retirement Investor.[84]

This comment directly responds to a concern raised by ICI that proposed PTE 2020-02 could be read to restrict or eliminate the sale to retirement investors of Class A chare mutual funds that include ROA and ROE.

The preamble to amended PTE 2020-02 confirms that the conflict mitigation principles apply to recommendations of proprietary products or products that generate third-party payments, and that the exemption does not preclude such recommendations.[85] It asserts that recommendations of these products are subject to the same standards as other investment product recommendations. DOL notes, however, that financial institutions may choose to take additional steps in recommending proprietary products (which DOL sets out by way of example) to ensure that they are meeting the requirements of the

exemption.[86] ICI in our comment letter highlighted our concern that the Proposal created a presumption that these products are inherently conflicted and at a minimum warrant heightened scrutiny. DOL's preamble clarifications attempt to provide comfort that there is no presumption against proprietary product recommendations.

Retrospective review and certification

Amended PTE 2020-02 requires that a financial institution conduct a retrospective review at least annually. The review must be "reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of this exemption, including the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption."[87] As part of the retrospective review process, a senior executive officer must certify annually that: (i) they have reviewed the retrospective review report: (ii) the financial institution has reported (or will timely report) to the IRS any non-exempt prohibited transaction it discovers and paid (or will pay) any required excise taxes: (iii) the financial institution has written policies and procedures compliant with PTE 2020-02; and (iv) the financial institution has a prudent process to modify its policies and procedures as required. The review, report, and certification must be completed within six months of the end of the period to which the review applies; and the report, certification, and supporting data must be retained for six years.

The requirement that a financial institution conduct a retrospective review is unchanged from the Proposal, other than some "ministerial" word changes and an extension of the time in which to respond to a DOL request for the retrospective review report, certification, and supporting data. The Proposal would have required making available this information to DOL "within 10 business days of request," but the amended PTE extends this to "30 days." ICI had recommended that the 10-business day response time be extended.

ICI had expressed numerous additional concerns with the Proposal, including the requirement that a senior executive officer certify as to the filing of Forms 5330 with IRS and our view that the retrospective review requirement does not comport with how compliance functions operate in practice. DOL generally dismissed these and other commenters' concerns, reaffirming its view that it has authority to ensure financial institutions engaging in otherwise prohibited transactions comply with the law (including payment of excise taxes). Helpfully, DOL clarified in the preamble that the retrospective review does not require perfection and that self-correction is available to correct violations found in a retrospective review. Moreover, DOL also stated that findings of violations (whether in litigation or otherwise) do not necessarily mean that policies and procedures were inadequate or that a retrospective review was insufficient. As DOL observed: "[e]ven strong policies and procedures cannot be perfectly effective in avoiding isolated violations."[88]

Self-Correction

In the case of violation of an exemption condition described above, the party relying on the exemption may self-correct the violation if:

- The violation did not result in any losses to the investor, or the financial institution makes the investor whole for any resulting losses;
- The party corrects the violation;
- The correction is made no later than 90 days after the party learns (or reasonably should have learned) of the violation; and

- The party notifies the person responsible for conducting the retrospective review during the review cycle, and the violation/correction is included in the required written report.

Under the final exemption, the party need not report self-correction of exemption violations to DOL (this was a requirement in the Proposal).

Eligibility

A financial institution or investment professional will become ineligible to rely on PTE 2020-02 in the event of certain specified criminal convictions (domestic and foreign) or specified federal or state court judgments (or court-approved settlements) occurring on or after September 23, 2024. These disqualification events are similar to those in newly amended PTE 84-14 (the QPAM exemption),[89] except that PTE 2020-02 does not provide for ineligibility upon entering into certain non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) with a US federal or state prosecutor or regulatory agency.

A specified criminal conviction is one where the financial institution, an entity in the same "controlled group" as the financial institution,[90] or an investment professional is convicted by a US federal or state court of a felony involving abuse or misuse of such person's employee benefit plan position or employment (or position or employment with a labor organization) or certain other business or financial crimes.[91] It also includes conviction in a foreign court of competent jurisdiction as a result of any crime that is substantially equivalent to an offense described above, but does not include convictions that occur within a foreign country that is designated as a "foreign adversary."[92] Unlike in the Proposal, there is no opportunity to be heard prior to disqualification due to a foreign conviction. Additionally, unlike in the existing PTE 2020-02, disqualifying convictions are not limited to those arising out of the provision of investment advice to retirement investors.

A specified federal or state court judgement (or court-approved settlement) is one in which the financial institution, an entity in the same "controlled group" as the financial institution, or an investment professional is found or determined in a proceeding brought by DOL, Treasury, or other specified agencies, to have participated in one or more of the following categories of conduct (even if the court does not specifically consider PTE 2020-02 or its terms):

- engaging in a systematic pattern or practice of conduct that violates the conditions of the exemption;
- intentionally engaging in conduct that violates the conditions of the exemption;
- engaging in a systematic pattern or practice of failing to correct prohibited transactions, to report those transactions to IRS on Form 5330, or to pay the resulting excise taxes imposed by Code section 4975 in connection with nonexempt prohibited transactions involving investment advice; or
- providing materially misleading information to DOL, Treasury, or other specified agencies in connection with the conditions of the exemption.

A party that is subject to a specified conviction or court judgement will become ineligible on the date of the conviction or the date of the final judgement (or court approved settlement). The party that becomes ineligible may, however, continue to rely on the exemption for up to 12 months if the party notifies DOL within 30 days of the conviction or judgement.[93] Eligibility may be restored upon the earliest of (i) a subsequent reversal of the conviction or judgement; (ii) 10 years after ineligibility begins (or, if later, 10 years after

the party is released from imprisonment resulting from the conviction); or (iii) the effective date of an individual exemption granted by DOL. We note that the final exemption does not expressly state that an event leading to ineligibility of an individual investment professional will also result in ineligibility for the entire employing financial institution.

Finally, the exemption acknowledges that an ineligible party may be able to provide advice by relying on another exemption (such as an existing statutory exemption or a separate class exemption or individual exemption).

Recordkeeping

Amended PTE 2020-02 requires that a financial institution retain, for six years following a transaction subject to PTE 2020-02, records demonstrating compliance with PTE 2020-02; and make such records available (to the extent permitted by law) to authorized employees of DOL, Treasury, and IRS. This recordkeeping requirement is largely unchanged from the Proposal. Notably, DOL did not expand access to records to parties beyond DOL, Treasury, and IRS; the preamble to the Proposal had suggested that access be expanded to other parties including employers, unions, and participants and beneficiaries and IRA owners. ICI in our Comment Letter opposed this proposed expanded access to records.

Amended PTE 84-24

Consistent with the Proposal, DOL has significantly scaled back the availability of PTE 84-24. PTE 84-24 currently provides relief for the purchase of annuity/insurance contracts and the purchase/sale of investment company securities by a plan or IRA, and for the receipt by an insurance agent or an investment company principal underwriter of sales commissions paid in connection with the transaction. The amended PTE 84-24 pushes virtually all advice-related transactions previously covered by PTE 84-24 into PTE 2020-02, with the exception of certain sales of non-security annuities or other non-security insurance products through independent insurance agents. Although PTE 2020-02 is available for use in recommending these non-security insurance products, DOL intends amended PTE 84-24 to provide specifically tailored, alternative exemptive relief for independent insurance agents to receive commissions from insurance companies with respect to insurance product recommendations, without requiring the insurance companies to assume or acknowledge their fiduciary status under ERISA and the Code. To the extent that amended PTE 84-24 continues to be available for advice through independent insurance agents, most of the requirements of PTE 84-24 are replaced with provisions similar to those of amended PTE 2020-02, including the impartial conduct standards, disclosure obligations, and the ineligibility and recordkeeping provisions.

Amended PTE 84-24 continues to be available for certain transactions involving securities issued by an investment company and insurance/annuity contracts that do not involve a fiduciary's provision of investment advice (e.g., transactions by non-fiduciaries and nondiscretionary trustees). With respect to mutual funds, amended PTE 84-24 remains available for the receipt of sales commissions by a principal underwriter in connection with the purchase, with plan assets, of securities issued by an investment company (and for a principal underwriter's effecting the purchase of investment company securities), but is no longer available for recommending affiliated funds.

The Proposal would have narrowed the types of commissions and other compensation covered by the exemption through the proposed new terms "Insurance Sales Commission"[94] and "Mutual Fund Commission." The Proposal would have defined "Mutual Fund Commission" to include only a commission or sales load paid by either the plan or the

investment company for the service of effecting or executing the purchase of investment company securities, and specifically exclude 12b-1 fees, revenue sharing payments, administrative fees, and marketing fees. In response to comments that the new terms, particularly on the insurance side, were unduly narrow and would be disruptive to the market, the final amendment reverts to the existing undefined term "sales commission," which term covers a broader range of types of compensation.

The final exemption reflects ICI's recommendation that PTE 84-24 continue to be available for pre-approved plan providers offering proprietary funds. Specifically, amended PTE 84-24 is available for the purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company principal underwriter, when such investment company, principal underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (i) the sponsorship of a preapproved plan; and/or (ii) the provision of nondiscretionary trust services to the plan. Section III(f) of the amended PTE 84-24 confirms that exemption does not apply if the purchase of investment company securities is a result of the provision of investment advice.

Amended PTE 77-4

Consistent with the Proposal, DOL amended PTE 77-4 and several other exemptions ((PTEs 75-1, 80-83, 83-1, and 86-128) to make them unavailable for investment advice, generally shifting all administrative class exemptive relief for providing fiduciary investment advice to PTE 2020-02. DOL dismissed concerns raised by ICI and others that this change to the current exemption framework would be harmful, expensive, and unsupported by either evidence that these exemptions are not sufficiently protective of investors in the advice context or an adequate analysis of costs resulting from the amendments.[95]

DOL also made limited amendments to PTE 75-1 by: (i) expanding the extension of credit provision in Part V; and (ii) adding a definition of the term "IRA" in Part V; and limited amendments to PTE 86-128 by: (i) revising the exemption's "Recapture of Profits" exception; and (ii) making certain technical corrections and editorial changes.

Future of the Final Fiduciary Investment Advice Package (Including Litigation)

As we explained in our Comment Letter, we believe the Proposal did not adequately account for the Fifth Circuit's 2018 decision, and once again exceeded the trust and confidence standard the Fifth Circuit looked to.[96] We cautioned that if the Proposal was finalized as written, its strong resemblance to the 2016 Rule would risk that the rule would be vacated once again by a court following the precedent set by the Fifth Circuit.

Though DOL did make several important improvements in the Final Package, the definition in the Final Rule still is considerably broader than the existing 5-part test and could be seen as covering sales conversations and other interactions where there is no true relationship of trust and confidence. DOL does not change positions that seem in direct contradiction to the Fifth Circuit decision. Namely, in the Final Package, DOL arguably continues to expand the concept of fiduciary beyond that intended by Congress and, through PTE 2020-02, imposes ERISA Title I duties of prudence and loyalty on advice with respect to Title II arrangements (IRAs).

As expected, one lawsuit has already been filed. On May 2, 2024, the Federation of Americans for Consumer Choice (FACC) filed suit against DOL in the Eastern District of

Texas.[97] The lawsuit seeks to vacate the Final Rule and the amendments to PTE-84-24 under the APA on the grounds that they are contrary to law and arbitrary and capricious and that DOL has exceed its authority. FACC also seeks a preliminary injunction with respect to the Final Rule and amendments to PTE 84-24. We expect that additional lawsuits will be filed.

In addition to the lawsuit, we are anticipating members of Congress will introduce a Congressional Review Act (CRA) measure to nullify the Final Rule. Because of the timing of DOL's issuance of the package, however, this effort is primarily a messaging effort -even if the resolution were to pass both Houses, for a regulation to be invalidated under the CRA, the Congressional resolution of disapproval must be either signed by the President or passed over the President's veto by two thirds of both Houses of Congress. President Biden would issue a veto, and given the current makeup of Congress there would be no chance of it being overturned.

Elena Barone Chism
Deputy General Counsel - Retirement Policy

Shannon Salinas
Associate General Counsel - Retirement Policy

David Cohen
Associate General Counsel, Retirement Policy

Notes

[1] DOL's news release is available at https://www.dol.gov/newsroom/releases/ebsa/ebsa20240423. DOL's fact sheet is available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/retirement-security-rule-and-amendments-to-class-pte-for-investment-advice-fiduciaries.

[2] For an overview of the 2023 Proposal, see ICI Memorandum No. 35508, dated November 13, 2023, available at https://www.ici.org/memo35508. For an overview of ICI's comments on the 2023 Proposal, see ICI Memorandum No. 35570, dated January 04, 2024, available at https://www.ici.org/memo35570. For a summary of ICI's April 8, 2024 meeting with representatives from the White House's Office of Management and Budget (OMB), see ICI Memorandum No. 35671, dated April 10, 2024, available at https://www.ici.org/memo35671.

[3] The Final Rule defining the term Investment Advice Fiduciary was published at 89 Fed. Reg. 32122 (April 25, 2024), available at https://www.govinfo.gov/content/pkg/FR-2024-04-25/pdf/2024-08065.pdf. The final amendment to PTE 2020-02 was published at 89 Fed. Reg. 32260 (April 25, 2024), available at https://www.govinfo.gov/content/pkg/FR-2024-04-25/pdf/2024-08066.pdf. The final amendment to PTE 84-24 was published at 89 Fed. Reg. 32302 (April 25, 2024), available at https://www.govinfo.gov/content/pkg/FR-2024-04-25/pdf/2024-08067.pdf. The final amendment to the five additional PTEs was published at 89 Fed. Reg. 32346 (April 25, 2024), available at

https://www.govinfo.gov/content/pkg/FR-2024-04-25/pdf/2024-08068.pdf.

[4] Our Comment Letter, submitted on January 2, 2024, is available at https://www.ici.org/letters/23-cl-fiduciary-definition. For an overview of the Comment Letter, see ICI Memorandum No. 35570, dated January 4, 2024, available at https://www.ici.org/memo35570.

[5] 89 Fed. Reg. at 32172.

[6] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019) ("Reg BI").

[7] For an overview of the Fifth Circuit decision, see ICI Memorandum No. 31137, dated March 16, 2018, available at https://www.ici.org/memo31137.

[8] For an overview of the 2016 Rule, see ICI Memorandum No. 29837, dated April 13, 2016, available at https://www.ici.org/memo29837.

[9] See ICI Memorandum No. 32581, dated July 6, 2020, available at https://www.ici.org/memo32581.

[10] For a summary of the finalized PTE 2020-02, see ICI Memorandum No. 32999, dated December 18, 2020, available at https://www.ici.org/memo32999.

[11] For a summary of the FAQ guidance, see ICI Memorandum No. 33485, dated April 19, 2021, available at https://www.ici.org/memo33485.

[12] See ICI Memorandum No. 35053, dated March 1, 2023, available at https://www.ici.org/memo35053. The court disagreed with DOL's position that, for the "regular basis" prong of the test, a recommendation to roll over from a plan to an IRA can be the beginning of an intended future ongoing relationship. The court's holding relies on the 5-part test's requirement that the advice is provided on a regular basis "to the plan" (i.e., the plan holding the assets at the time of the recommendation). DOL did not appeal this decision.

[13] Note that a magistrate judge has made a recommendation to the district court, recommending that the court vacate the portions of PTE 2020-02's text and preamble that allow consideration of Title II investment advice relationships when determining Title I fiduciary status.

[14] ICI, together with 17 other organizations, submitted a joint trade letter to urge DOL to extend the comment period and to hold the hearing only after the comment period has closed. See letter to Assistant Secretary Lisa Gomez (November 8, 2023), available at https://www.ici.org/system/files/2023-11/35508a.pdf.

[15] Elena Chism, behalf of ICI, testified that DOL should reconsider the rulemaking in light of the changes to the regulatory framework since 2016 and the potential that finalizing the rule could introduce another round of regulatory instability. A copy of the oral testimony is available at https://www.ici.org/testimony/23-dol-fiduciary-proposal. DOL posted a video of the hearing along with a transcript on its website, at https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02-hearing.

[16] For a summary of ICI's meeting with OMB, see ICI Memorandum No. 35671, dated April 10, 2024, available at https://www.ici.org/memo35671.

[17] The term "IRA" includes any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code. According to the preamble, DOL received several requests to exclude HSAs from the definition of IRA; however, DOL declined to do so. 89 Fed. Reg. at 32161-32162.

[18] The Final Rule's definition of "for a fee or other compensation, direct or indirect" in paragraph (e) is essentially unchanged from the Proposal (which in turn was similar to how the 2016 Rule defined it). DOL explains that "compensation is treated as paid 'in connection with or as a result of' the provision of advice only if it would not have been paid but for the recommended transaction or the provision of advice, or if the investment advice provider's eligibility for the compensation (or its amount) is based in whole or part on the recommended transaction or the provision of advice." 89 Fed. Reg. at 32157 (emphasis added).

[19] 89 Fed. Reg. at 32151.

[20] 89 Fed. Reg. at 32151 ("The Department will apply the test based on the activities of the 'person', which would include the firm, and its employees, agents and representatives. The fact that the firm is a broker or dealer registered under the Securities Exchange Act of 1934 or a financial institution described in ERISA section 3(38)(B), would indicate that the test would likely be met, but the final rule is not limited to these financial institutions. Further, not all employees, independent contractors, agents, or representatives of a financial institution would be considered to provide investment recommendations on a regular basis. The test will also focus on the role of the individual providing the recommendation in relation to the retirement investor.").

[21] 89 Fed. Reg. at 32151-32152.

[22] 89 Fed. Reg. at 32153.

[23] 89 Fed. Reg. at 32153.

[24] 89 Fed. Reg. at 32150.

[25] 89 Fed. Reg. at 32155, citing Chamber, 885 F.3d 360, 369 (5th Cir. 2018).

[26] As a reminder, in the preamble to the Proposal, DOL said that it disagreed with the Fifth Circuit's distinction between sales activity and advice, saying "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." 88 Fed. Reg. at 75907.

[27] The Proposal did not include this definition in the definition section of the rule text, rather it was embedded within the functional test in paragraph (c)(1). The Final Rule moves this language to the definition section in paragraph (f)(11). Note that the Final Rule does not include paragraph (c)(1)(iv) from the Proposal, which provided that "For purposes of this paragraph, when advice is directed to a plan or IRA fiduciary, the relevant retirement investor is both the plan or IRA and the fiduciary." In the preamble to Final Rule, DOL

confirms that for when applying the facts and circumstances test to advice provided to a plan or IRA fiduciary, "the relevant 'particular needs or individual circumstances' are those of the plan or IRA, and the determination of whether the recommendation may be relied on by the 'retirement investor' as intended to advance the 'retirement investor's best interest', focuses on the plan or IRA." 89 Fed. Reg. at 32155 and 32161.

[28] The definition in paragraph (f)(11) includes plan fiduciaries within the meaning of ERISA section (3)(21)(A)(i) or (iii) (i.e., those fiduciaries who (i) exercise any discretionary authority or discretionary control respecting management of such plan or exercise any authority or control respecting management or disposition of its assets or (ii) have any discretionary authority or discretionary responsibility in the administration of such plan).

[29] See section 2.1.4 of our Comment Letter, beginning on page 26.

[30] In addition to ICI's suggestions, several other commenters expressed the need for a change, including various suggested ways DOL could address the problem. 89 Fed. Reg. at 32159-32160.

[31] 89 Fed. Reg. at 32160. DOL explains that it "believes that rather than attempt to define financial sophistication through a particular asset test or other specific regulatory limitation as suggested by a few commenters, including the commenter advocating for a carve-out for 'communications with sophisticated and independent parties,' it is preferable to retain the facts and circumstances test set forth in this rule for all recommendations. For example, when a financially sophisticated retirement investor engages in an arm's length transaction with a counterparty who makes an investment recommendation, absent an acknowledgment of fiduciary status under ERISA Title I or Title II, it is appropriate to consider whether a reasonable investor in like circumstances would rely on the recommendation as intended to advance the investor's best interest." 89 Fed. Reg. at 32160.

[32] 89 Fed. Reg. at 32161.

[33] 89 Fed. Reg. at 32155-32156. Further, DOL notes one commenter's suggestion that "the final rule should allow an 'ERISA disclaimer' that would allow parties to operate under Regulation Best Interest or other securities law but would limit their services merely to investment education to avoid ERISA fiduciary status." 32155. DOL instead states that it "does not agree, however, that there should be an 'ERISA disclaimer' under which parties that would otherwise satisfy all of the provisions in the final rule could nevertheless disclaim ERISA fiduciary status and only comply with securities law conduct standards." 32156.

[34] 89 Fed. Reg. at 32156.

[35] Id.

[36] Id.

[37] 89 Fed. Reg. at 32157.

[38] 89 Fed. Reg. at 32145.

[39] See section 2.1.1 of our Comment Letter, beginning on page 14.

[40] 89 Fed. Reg. at 32143.

[41] DOL expresses disagreement with commenters who suggested that these two statements are not consistent with the SEC's approach. 89 Fed. Reg. at 32143-32144.

[42] The 2016 Rule included exclusions for certain activities that, by themselves, would not be considered fiduciary advice, except in cases where the advice provider represents or acknowledges fiduciary status. It also outlined four different types of activity that will not be considered a "recommendation."

[43] As a reason for not including carveouts, DOL states that the Fifth Circuit criticized the use of carveouts and special provisions in the 2016 Rule as evidence of an overbroad rule. 89 Fed. Reg. at 32162. Regarding comments suggesting that DOL include questions and answers in the text of the rule, DOL responds that it "does not believe that including questions and answers on these specific factual circumstances would be an efficient or effective way to respond to myriad different factual patterns that could arise under the final rule." 89 Fed. Reg. at 32163.

[44] 88 Fed. Reg. at 75906.

[45] See section 2.1.2 of our Comment Letter, beginning on page 15.

[46] 89 Fed. Reg. at 32164.

[47] Also see below the discussion of Section II(f) in amended PTE 2020-02, which provides streamlined exemptive relief for ERISA section 3(38) investment managers who provide fiduciary investment advice when responding to RFPs for their services.

[48] 88 Fed. Reg. at 75908.

[49] See pages 22-23 of our Comment Letter.

[50] 89 Fed. Reg. at 32165-32166. DOL further notes that recommendations on the construction of a plan lineup "is often profoundly important given that it defines and constrains the range of options available to plan participants for their retirement." 89 Fed. Reg. at 32166.

[51] 89 Fed. Reg. at 32166.

[52] 89 Fed. Reg. at 32166. In other words, "when a [Pooled Plan Provider] or another service provider interacts with an employer about investment options under the plan, whether they have made a recommendation under the proposal will turn, in part, on whether they present the investments as selected for, and appropriate for, the plan, its participants, or beneficiaries."

[53] 88 Fed. Reg. at 75911.

[54] See pages 23-24 of our Comment Letter.

[55] 89 Fed. Reg. at 32167.

[56] 89 Fed. Reg. at 32167-32168. DOL cites the need to take an RMD and loans and hardships at page 32145.

[57] Further, DOL recently posted on its website this provision from the 2016 Rule. This document is available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/erisa/retirement-security/2016-fiduciary-rule-investment-education-provision. On the document, DOL explains that it stated in the Final Rule "that furnishing the categories of investment-related information and materials described in paragraph (b)(2)(iv) of the 2016 Fiduciary Rule will not result in the provision of fiduciary investment advice."

[58] This language in the 2016 Rule (paragraph (b)(2)(iv)) clarified that the distinction between non-fiduciary education and fiduciary advice applies equally to information provided to plan fiduciaries, as well as to information provided to plan participants and beneficiaries and IRA holders, and that it also applies equally with respect to participant-directed plans and other plans. In addition, the Final Rule retains the clarification that the provision of certain general information that helps an individual assess and understand retirement income needs (such as longevity and inflation risk) or explains general methods for the individual to manage those risks, both within and outside the plan, would not result in fiduciary status.

[59] This language in the 2016 Rule (paragraph (b)(2)(iv)(C)) provided that asset allocation models and interactive investment materials may identify a specific investment alternative available under a plan if it is a designated investment alternative (within the meaning of 29 C.F.R. 2550.404a-5(h)(4)) (a "DIA") subject to oversight by a plan fiduciary, and the model or materials identify all of the plan's other DIAs with similar risk and return characteristics, if any, and are accompanied by a statement that those other DIAs have similar risk and return characteristics and indicating where to obtain information on those DIAs. Importantly, the investment education exclusion in the 2016 Rule did not permit the identification of specific investment alternatives within an asset allocation model or interactive investment materials with respect to IRAs. DOL explained that it did not extend the exclusion in this regard to IRAs because of the lack of involvement by an independent plan fiduciary who selects and monitors the investment options presented to the investor.

[60] 89 Fed. Reg. at 32168. DOL says, "Although the Department is not updating IB 96-1 at this time, it intends to monitor investment education practices to determine whether the principles in the IB are being used to evade fiduciary status under circumstances that would otherwise support the conclusion that a recommendation is being made by persons who occupy a position of trust and confidence. The Department may at a later date determine that the IB should be revisited."

[61] 89 Fed. Reg. at 32168.

[62] 89 Fed. Reg. at 32169.

[63] 88 Fed. Reg. at 75908.

[64] 89 Fed. Reg. at 32172.

[65] 89 Fed. Reg. at 32136.

[66] 89 Fed. Reg. at 32172-74.

[67] 89 Fed. Reg. at 32175.

[68] Id.

[69] 89 Fed. Reg. at 32175-76.

[70] 89 Fed. Reg. at 32263-64.

[71] To meet the Care Obligation defined in Section V(b), advice must reflect "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor."

[72] To meet the Loyalty Obligation defined in Section V(h), the advice must "not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to those of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party."

[73] 89 Fed. Reg. at 32266.

[74] Amended PTE 2020-2 § II(b), 89 Fed. Reg. at 32296.

[75] 89 Fed. Reg. at 32271.

[76] 89 Fed. Reg. at 32271.

[77] 89 Fed. Reg. at 32273.

[78] Amended PTE 2020-2 § II(c)(1), 89 Fed. Reg. at 32296.

[79] Amended PTE 2020-2 § II(c)(2), 89 Fed. Reg. at 32296 (emphasis added).

[80] 89 Fed. Reg. at 32276.

[81] 89 Fed. Reg. at 32274.

[82] 89 Fed. Reg. at 32276.

[83] 89 Fed. Reg. at 32276.

[84] 89 Fed. Reg. at 32276

[85] 89 Fed. Reg. at 32276.

[86] Id.

[87] Amended PTE 2020-2 § II(d)(1), 89 Fed. Reg. at 32296.

[88] 89 Fed. Reg. at 32278.

[89] See ICI Memorandum No. 35680, dated April 16, 2024, available at https://www.ici.org/memo35680.

[90] The Proposal would have extended ineligibility to a financial institution upon the conviction of an "Affiliate," but the final exemption reverts to the narrower reference to "an entity in the same Controlled Group" for purposes of determining ineligibility for the

exemption.

[91] The enumerated business and financial crimes are: 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.

[92] The Department of Commerce's list of "foreign adversaries" is codified in 15 CFR §7.4 as amended.

[93] The Proposal would have applied a 6-month transition period before ineligibility takes effect.

[94] "Insurance Sales Commission" was defined in the Proposal to mean a sales commission paid by the Insurance Company or an Affiliate to the Independent Producer for the service of recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees, but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees.

[95] 89 Fed. Reg. 32349 ("After reviewing the entire record, the Department maintains its position that the enhanced protections afforded to plans and IRAs, and the uniformity of the regulatory environment, will provide stability and savings to plans and IRAs that outweighs the cost concerns raised by commenters. The Department also believes that the imposition of a common set of protective standards for a wide range of advice transactions in PTE 84-24 and PTE 2020-02 promotes efficiency and clarity, inasmuch as one need only look to the terms of these two exemptions, which are materially similar, for relief from advice transactions, rather than a complex patchwork of exemptions covering different transactions.").

[96] In vacating the 2016 Rule, the Fifth Circuit emphasized the importance of the existence of a relationship of trust and confidence between the fiduciary and client for a fiduciary relationship to exist. The court also noted the importance of the difference between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does. In the preambles to both the Proposal and the Final Rule, DOL includes frequent use of the terms "trust and confidence." DOL, however, generally characterizes the proposed definition as capturing the contexts in which retirement investors could reasonably place their trust and confidence in the advice provider (seemingly a one-way view of trust and confidence, rather than a two-way relationship).

[97] FACC represents independent insurance agents and is the plaintiff in the existing pending litigation challenging DOL's 2020 preamble interpretation of fiduciary advice status, discussed in note 13 supra.

should not be considered a substitute for, legal advice.