

Amended Prohibited Transaction Exemption (PTE) 84-24 Checklist

In April 2024, the U.S. Department of Labor (DOL) published its final regulation for the definition of fiduciary for the provision of investment advice to plans or Individual Retirement Accounts (IRAs) under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC). The package included updates to Prohibited Transaction Exemption (PTE) 2020-02, which covers reasonable compensation received for fiduciary advice in conjunction with sales of a broad range of investment products and a very pared-down amended PTE 84-24, which covers compensation for non-security insurance contracts that are purchased as part of investment advice given by independent producers. To assist you in complying with the PTE, we have developed the following checklist, outlining the major requirements of the PTE.

The final PTE 84-24 has some notable differences from the previous exemption as well as from the 2023 proposal. It should be noted:

1. The effective date of the amendment to 84-24 is September 23, 2024. However, there is a year-long phase-in-period in which independent producers (IPs) can receive compensation for non-security insurance contract sales including fixed annuities, by complying with the impartial conduct standards and making a written acknowledgment they are acting as an ERISA or IRC fiduciary.
2. PTE 84-24 can only be used by IPs who sell non-security insurance contracts, including annuities of two or more unrelated insurers. It does not cover insurance company employees or statutory employees for transactions in which they have a financial interest. This means PTE 84-24 cannot be used with the recommendation of variable annuities or other securities. For these investments, all financial institutions and all types of investment professionals will be required to use PTE 2020-02.
3. The concept of restricted insurance sales commissions in the proposed amendment was dropped, and now both direct and indirect compensation will be covered so long as together the compensation is no more than reasonable compensation.
4. Most conditions are akin to PTE 2020-02 and must be met by the independent producer.
5. Insurer (Firm) must adopt, maintain, and enforce policies and procedures to mitigate and avoid conflicts of interest in sales of its products and monitor the sale of its own products. Firm is also required to conduct an annual retrospective review of each IP that is aimed at finding violations of the PTE. If the Firm finds violations of the prohibited transaction rules, the Firm must instruct the independent producer (IP) to correct prohibited transactions and the IPs must file an IRS Form 5330 and pay any excise taxes owed.
6. The DOL clarified that independent marketing organizations (IMO) and field marketing organizations (FMOs) could receive all 84-24 related compensation directly and in turn compensate IPs who give the investment advice, and that reasonable compensation can include in-kind services like back-office support and website development.
7. The standards under ERISA and the IRC are explicitly recognized in the NAIC Model Suitability Regulation's safe harbor, which provides that recommendations and sales of annuities in compliance with comparable standards to the NAIC Model Suitability Regulation satisfy its requirements, including those applicable to fiduciaries under ERISA section 3(21) and IRC section 4975(e)(3).

PTE 84-24 Requirements

High-Level Requirements for the Independent Producers (IPs)

- ❑ IP must make an unequivocal fiduciary acknowledgment in writing to retirement investor.
- ❑ IP must provide certain disclosures to the retirement investor including:
 - The scope of the investment relationship.
 - Any limitations on the investment advice given.
 - Material facts about any conflicts of interest.
 - Specific written disclosure to the retirement investor about the impartial conduct standards (sample can be found in the proposed regulation package).
 - The reasons for the recommendation.
- ❑ IP can receive third-party compensation both indirect and indirect; however, IP must comply with the impartial conduct standards:
 - IP must act with prudence (care obligation).
 - IP must act in the sole interest of the retirement investor (loyalty obligation).
 - IP must give advice free from misleading statements.
 - IP must charge no more than reasonable compensation.
- ❑ Advice must comply with best execution under federal securities law.
- ❑ IP must disclose the reasons for the recommendation to the retirement investor.
- ❑ Special documentation and disclosures must be made for ERISA plan to IRA rollover recommendations and not IRA-to-IRA transfers or plan-to-plan transfers (includes investment alternatives, plan-specific information, and the rights an investor loses moving from an ERISA-covered plan to an IRA, etc.).

High-Level Requirements for the Financial Institution (Firm)

- ❑ Firm must prudently assess IP's background to ensure they have the education, training, prior conduct, and history necessary to sell fixed annuity products prior to allowing an IP to sell. This is consistent with but requires more than the NAIC Model Suitability Regulation.
- ❑ Firm must charge no more than reasonable compensation.
- ❑ Firm cannot use quotas, bonuses, special awards, etc., that a reasonable person would conclude are likely to encourage noncompliance with the impartial conduct standards. This is consistent with but more protective than the NAIC Model Suitability Regulation.
- ❑ Firm must review each recommendation made by an IP prior to the issuance of any annuity contract. This is consistent with the suitability requirements under the NAIC Model Suitability Regulation.
- ❑ Firm must establish, maintain, and enforce policies and procedures designed to ensure IPs comply with the impartial conduct standards. This is more stringent than the requirement of the NAIC Model Suitability Regulation.
- ❑ Firm must establish, maintain, and enforce policies and procedures designed to detect and mitigate any conflicts of interest and ensure compensation practices are not creating incentives for IP and Firm to not give advice that is in the best interest of the retirement investor. This is more stringent than the requirement of the NAIC Model Suitability Regulation.
- ❑ Firm does not need to acknowledge fiduciary status for the IP recommendation.
- ❑ Firm must conduct an annual retrospective review of each IP meeting certain requirements including a report to and certification by a senior executive.
- ❑ Where they discover nonexempt prohibited transactions during the annual review, the Firm must inform IPs and instruct them to correct the prohibited transaction, file Form 5330 and pay excise taxes owed to the IRS.