

# DOL FIDUCIARY RULE Q&A

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**FRED REISH, ESQ.**

JUNE 18, 2024



Joint Educational  
Webinar Event

## **CEFLI Announcements:**

We'll get started shortly after the top of the hour.

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## We Will Provide

- A link to the recording
- A copy of the slides
- A Certificate of Attendance template (to attendees of the live event)

## Regarding Questions

- Our priority will be the questions submitted in advance via the survey linked in the webinar invitation.
- *If* we have time at the end, we'll invite you to submit any additional questions at that time.

# Webinar Agenda

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1. Introduction
2. Overview of the DOL Fiduciary Rule
3. Q&A Session  
*(Previously Submitted Questions)*
4. CEFLI Reminders



Fred Reish is a partner in the international law firm of Faegre Drinker Biddle & Reath, LLP. His practice focuses on fiduciary responsibility, prohibited transaction and plan qualification issues. He has been recognized as one of the “legends” of the retirement industry by both PlanSponsor and PlanAdviser magazines. He has also been given lifetime achievement awards by Institutional Investor and PlanSponsor publications and received recognition by the Internal Revenue Service for his contributions to the retirement community.

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# The DOL's Final Fiduciary Rules

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- Retirement Security Rule: Definition of an Investment Advice Fiduciary
- Amendment to Prohibited Transaction Exemption 2020–02
- Amendment to Prohibited Transaction Exemption 84–24

Note regarding lawsuits challenging the final rules.

# Effective Dates

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The fiduciary regulation is effective September 23, 2024.

The impartial conduct standards and the fiduciary acknowledgement in PTE 2020-02 and PTE 84-24 are effective on September 23, 2024.

The remaining provisions of the PTEs are effective September 23, 2025.

# The Definitions of Fiduciary Status

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The fiduciary regulation applies to recommendations to “retirement investors”—

- ERISA and qualified private sector retirement plans,
- Participants in those plans (including rollover recommendations), and
- IRAs (including transfers and exchanges)—individual retirement accounts and individual retirement annuities.

# The Definitions of Fiduciary Status

*The person makes professional investment recommendations to investors on a regular basis as part of their business and*

- *the recommendation is provided under circumstances that would **indicate to a reasonable investor** 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 needs or circumstances, and*
  - *may be relied upon by the retirement investor as **intended to advance the retirement investor's best interest**.*

- *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.*

*continued . . .*

The regulation covers 3 categories of fiduciary recommendations:

- *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;***

# Prohibited Transactions and Exemptions

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ERISA and the Code prohibit conflicts resulting from fiduciary recommendations—but relief can be provided by exemptions.

A prohibited transaction is a financial conflict of interest.

The DOL has the authority to issue “conditional” exemptions, or exceptions, from the prohibited transactions in the Code and ERISA.

# Prohibited Transactions and Exemptions

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PTE 2020-02 can be used by broker-dealers, investment advisers, banks, and insurance companies for prohibited transactions resulting from non-discretionary fiduciary recommendations, but the **“financial institution” would have to serve as a co-fiduciary** with the adviser or insurance agent.

- PTE 2020-02 has to be used for **annuities that are securities** and has to be used where **employees or statutory employees** are the producers; and
- PTE 84-24 could be used for independent producers for fiduciary recommendations of **insurance products that only require an insurance license**. The insurance company would not be a co-fiduciary, but would have enhanced oversight responsibilities.

# Prohibited Transaction Exemptions

Both PTE 2020-02 and PTE 84-24 generally requires satisfaction of these conditions:

- Impartial Conduct Standards (effective Sept. 23, 2024)
- Disclosures
  - Fiduciary acknowledgement (effective Sept. 23, 2024)
  - Remaining disclosures (effective Sept. 23, 2025)
- Policies and procedures (effective Sept. 23, 2025)
- Annual retrospective review and report (effective Sept. 23, 2025)

# Impartial Conduct Standards

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- A Care Obligation
- A Loyalty Obligation
- No more than reasonable compensation
- No materially misleading statements

- Acknowledgement of fiduciary status.
- Description of Care and Loyalty Obligations.
- All material facts relating to scope and terms of relationship, including:
  - Material fees and costs and the right to request information regarding cash compensation.
  - Type and scope of services.
- All material facts related to conflicts of interest.

# Recommendation of Annuity under PTE 84-24 *cefli*

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

*Before engaging in a rollover or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA, or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I of ERISA, the Financial Institution and Investment Professional **must consider and document the bases for their recommendation to engage in the rollover, and must provide that documentation to the Retirement Investor.***

*continued . . .*

Relevant factors to consider must include but are not limited to:

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

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

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

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

The “Financial Institution” is required to establish and enforce written policies and procedures to:

- Ensure compliance with the Impartial Conduct Standards.
- Mitigate conflicts of interest.
- Process for authorizing producers to sell the insurer’s products.

# Compensation

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Incentive compensation: *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.***

# Additional Requirements and Issues

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- Annual retrospective review and report.
- Corrections of failures: producer duty and insurance company assistance.
- Filing Form 5330 and payment of excise taxes.
- Eligibility.

# Self-Correction Procedures

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## Requirements:

- If losses resulted from the failure, the investor is made whole.
- Correction is made no later than 90 days after the firm learns of the violation or reasonably should have learned about it.
- Firm notifies the person responsible for the retrospective review and the violation is included in the written report.

If these requirements are not met, Form 5330 must be filed with the IRS and excise taxes paid.

In FAQ 15, the DOL explained:

*To satisfy the documentation requirement for rollovers from an employee benefit plan to an IRA, investment professionals and financial institutions **should make diligent and prudent efforts to obtain information** about the existing employee benefit plan and the participant's interests in it. In general, such information should be readily available as a result of Department regulations mandating disclosure of plan-related information to the plan's participants (see 29 CFR 2550.**404a-5**).*

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DOL FAQs on PTE 2020-02, April 2021

*continued . . .*

*If the retirement investor **won't provide the information, even after a full explanation of its significance**, and the information is not otherwise readily available, the financial institution and investment professional should make a reasonable estimation of expenses, asset values, risk, and returns based on publicly available information. The financial institution and investment professional should **document and explain the assumptions used and their limitations**.*

*continued . . .*

*In such cases, the financial institution and investment professional could rely on **alternative data** sources, such as the **most recent Form 5500 or reliable benchmarks** on typical fees and expenses for the type and size of plan at issue.*

# Questions



# The Effective Date





Financial institutions are prohibited from using quotas, bonuses, compensation, incentives, etc. that a reasonable person would conclude are likely to result in recommendations that do not meet the Care and Loyalty Obligations.

Producers must adhere to the impartial conduct standards by September 23, 2024. Adhering to the impartial conduct standards includes ensuring that compensation received is reasonable. For annuity sales, compensation is determined by the insurer. Does that mean the effective date for the insurer is actually September 23, 2024, not September 23, 2025?

Independent producers attempting to comply with PTE 84-24 may struggle to determine what is reasonable compensation as well as their overall compliance solutions since they do not have the same resources and infrastructure as insurers & IMOs.

Do you have specific thoughts regarding insurers' role in helping independent producers comply with the Rule by September 23, 2024?



The requirements of the annual retrospective review and annual report have a September 23, 2025 effective date. Regarding timing, would companies need to begin their reviews by 09/23/25 (with a look back to 09/23/24) or could companies start their reviews in 2026 (with a look back to the September 23, 2025 effective date)?



There is significant litigation surrounding the Rule. While insurers want to fully and timely comply with the requirements there is concern related to the investment of millions of dollars on solutions for a Rule that may be vacated. What is your sense regarding the likelihood that the Rule is vacated?

# Validating producer information and retrospective reviews





If an insurance company requires certification that the obligations of PTE 84-24 were met by an independent producer for a specific recommendation, does the carrier have a responsibility to validate the completeness or accuracy of the information provided by the producer to meet those obligations (such as, fees and expenses associated with the Plan from which the funds are sourced)?

Is an insurance company required to validate that a producer followed an established “process” to comply with the Impartial Conduct Standards and other exemption conditions with each recommendation?



The rule states “Insurers may rely in part on sampling of each Independent Producer’s transactions to conduct their retrospective reviews”

- On what criteria does the sampling needs to be based?
- Does the insurer need to validate the producer adequately facilitated a process to assess whether the rollover recommendation was in the “Retirement Investor’s Best Interest”?
- Is there guidance on how detailed the retrospective (of producer recommendations) should be and, if so, what does the guidance say?

# Care Obligation





Although there is no explicit documentation requirement included in the minimum requirements during the transition period, please share your thoughts on the extent to which documentation is necessary to satisfy the Care Obligation.

# Compensation





Effective September 23, 2024, under 84-24, independent producers need to comply with the Impartial Conduct Standards and written statement of fiduciary acknowledgement and advice when making covered recommendations.

How do annuity insurers get comfortable with paying transactional compensation to independent producers in connection with covered annuity recommendations without validating or verifying that the independent producer complied with the Impartial Conduct standards and written statement of fiduciary acknowledgement and advice?



The DOL Fiduciary Rule references "reasonable compensation." Has the DOL offered any insight regarding how it will determine whether compensation is reasonable? What factors should an insurer take into consider when making this determination.



Regarding Fixed Indexed Annuity sales, are there specific industry compensation practices will no longer be appropriate (under PTE 84-24) after the September 2024 Effective Date? What about after the September 2025 Compliance Date.



A customer informs a producer they are interested in purchasing an annuity with qualified funds. The producer refers the customer to another producer. The second producer sells the customer an annuity funded with qualified money and splits the commission with first (referring) producer. Is first/referring producer a fiduciary under the rule.



Does the conflicting compensation received by independent producers include both the writing agent and an upline, regional agent?

# Closing CEFLI Reminders

## Post Presentation

- Registrants who attended the live session will receive:
  - A short post-event survey
  - A Certificate of Attendance form
- All Registrants will receive:
  - A PDF of the presentation deck
  - A link to the recorded event

While CEFLI does not file its materials with any Compliance, Ethics, Fraud or State Bar Associations, it provides a Certificate of Attendance template to individuals who attend CEFLI's live events. The form, and the information below may be helpful to Member who elect to self submit for potential CLE or CE credit consideration from the organizations they are involved with. More information about CEFLI can be found at: <https://cefli.org/about-cefli/>

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- CEFLI Does not have a way of knowing how many attorneys attend its events.
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- Participants may ask questions during an event using the Q&A feature in the Webex.
- CEFLI is a compliance and ethics organization whose mission is to support compliance, ethics, legal and risk management professionals in the life insurance industry.

# CEFLI Reminders (continued)

## July Webinar:

- CEFLI's next Joint Educational Webinar will take place on Wednesday, July 17 at 1 PM ET/ Noon CT/ 11 AM MT/ 10 AM PT.
- The event will feature CEFLI Affiliate Member, **Guidehouse.**
- Registration will open on CEFLI.org by July 3rd and you will receive an email invitation regarding the event in the weeks ahead.

## CEFLI Annual Conference:

- We hope you can join us at CEFLI's Annual Conference taking place September 22-24 in Austin, Texas.
- Mr. Reish will be joining us for CEFLI's General Session on the DOL Rule.
- Registration is open and more information can be found at: <https://cefli.org/annual-conference/>



# Thank you, Fred!

**CEFLI Tip:** Mr. Reish has developed a number of DOL Fiduciary Rule-related articles that can be found at [FredReish.com](https://FredReish.com). If you have not explored the resource, we invite you to do so.



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Offering timely updates and insights on the retirement industry for service providers, plan sponsors, and registered investment advisors.

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## The New Fiduciary Rule (35): The Education Exception

June 4, 2024  
fiduciary, prohibited transaction, rollovers  
education, PTE, recommendation, retirement investor

### Key Takeaways

- The DOL's final regulation defining non-discretionary fiduciary advice will be effective on September 23 of this year.
- If a conflicted fiduciary recommendation is made, the requirements (called "conditions") of PTEs 2020-02 and 84-24 will need to be satisfied in order to retain any compensation resulting from the recommendation.
- However, absent a fiduciary recommendation, the relief afforded by the exemptions will not be needed.
- There are three ways to engage with retirement investors without making a recommendation. Those are: "hire me", education and unsolicited. This article discusses the educational approach.

The Department of Labor's (DOL) final regulation defining fiduciary status for investment advice to retirement investors is effective on September 23, 2024. The related exemptions—PTE 2020-02 and 84-24—are partially effective on the same date. The exemptions provide relief from prohibited conflicts and compensation resulting from fiduciary recommendations to "retirement investors"—private sector retirement plans, participants in those plans (including rollover recommendations), and IRAs (including transfer and exchange recommendations).

However, the relief provided by the PTEs is not needed unless a conflicted fiduciary recommendation is made. In the preamble to the fiduciary regulation, the DOL described a recommendation as follows:

*Whether a person has made a "recommendation" is a threshold element in establishing the existence of fiduciary investment advice. For purposes of the final rule, whether a recommendation*

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