

Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters with Amended Applicability Dates

DATES: *Applicability Date:* The amendment to and partial revocation to PTE 84-24 set forth at 81 FR 21147 (April 8, 2016) is applicable to transactions occurring on or after January 1, 2018. PTE 84-24, as set forth herein, is applicable to transactions occurring on or after June 9, 2017, through January 1, 2018.

Section I--Retroactive Application

The restrictions of sections 406(a)(1)(A) through (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in section III of this exemption in connection with purchases made before November 1, 1977, if the conditions set forth in section IV are met.

Section II--Prospective Application

The restrictions of section 406(a)(1)(A) through (D) and 406(b) of the Act and the taxes imposed by section 4975 of the Code do not apply to any of the transactions described in section III of this exemption in connection with purchases made after October 31, 1977, if the conditions set forth in sections IV and V are met.

Section III--Transactions

(a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a sales commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract.

(b) The receipt of a sales commission by a principal underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment

company) in connection with the purchase, with plan assets, of securities issued by an investment company.

(c) The effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company.

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company.

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a master or prototype plan.

(f) 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: (1) The sponsorship of a master or prototype plan; or (2) the provision of nondiscretionary trust services to the plan; or (3) both (1) and (2).

Section IV--Conditions With Respect to Transactions Described in Section III

(a) The transaction is effected by the insurance agent or broker, pension consultant, insurance company or investment company principal underwriter in the ordinary course of its business as such a person.

(b) The transaction is on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be.

(c) The combined total of all fees, commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter:

(1) For the provision of services to the plan; and

(2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of “reasonable compensation” within the contemplation of section 408(b)(2) and 408(c)(2) of the Act and sections 4975(d)(2) and 4975(d)(10) of the Code. If such total is in excess of “reasonable compensation,” the “amount involved” for purposes of the civil penalties of section 502(i) of the Act and the excise taxes imposed by section 4975 (a) and (b) of the Code is the amount of compensation in excess of “reasonable compensation.”

Section V--Conditions for Transactions Described in Section III (a) Through (d)

The following conditions apply solely to a transaction described in paragraphs (a), (b), (c) or (d) of section III:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter is not (1) a trustee of the plan (other than a nondiscretionary trustee who does not render investment advice with respect to any assets of the plan), (2) a plan administrator (within the meaning of section 3(16)(A) of the Act and section 414(g) of the Code), (3) a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the assets of the plan on a discretionary basis, or (4) for transactions described in sections III (a) through (d) entered into after December 31, 1978, an employer any of whose employees are covered by the plan. Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter that is affiliated with a trustee or an investment manager (within the meaning of section VI(b)) with respect to a

plan may engage in a transaction described in section III(a) through (d) of this exemption on behalf of the plan if such trustee or investment manager has no discretionary authority or control over the plan assets involved in the transaction other than as a nondiscretionary trustee.

(b)(1) With respect to a transaction involving the purchase with plan assets of an insurance or annuity contract or the receipt of a sales commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary with respect to the plan prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an affiliate of the insurance company whose contract is being recommended, or if the ability of such agent, broker or consultant to recommend insurance or annuity contracts is limited by any agreement with such insurance company, the nature of such affiliation, limitation, or relationship;

(B) The sales commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the recommended contract; and

(C) For purchases made after June 30, 1979, a description of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination or sale of such contract.

(2) Following the receipt of the information required to be disclosed in paragraph (b)(1), and prior to the execution of the transaction, the independent fiduciary acknowledges in writing receipt of such information and approves the transaction on behalf of the plan. Such fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or

broker, pension consultant or insurance company involved in the transaction. Such fiduciary may not receive, directly or indirectly (*e.g.* through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(c)(1) With respect to a transaction involving the purchase with plan assets of securities issued by an investment company or the receipt of a sales commission thereon by an investment company principal underwriter, the investment company principal underwriter provides to an independent fiduciary with respect to the plan, prior to the execution of the transaction, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the person recommending securities issued by an investment company is the principal underwriter of the investment company whose securities are being recommended, the nature of such relationship and of any limitation it places upon the principal underwriter's ability to recommend investment company securities;

(B) The sales commission, expressed as a percentage of the dollar amount of the plan's gross payment and of the amount actually invested, that will be received by the principal underwriter in connection with the purchase of the recommended securities issued by the investment company; and

(C) For purchases made after December 31, 1978, a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination or sale of such securities.

(2) Following the receipt of the information required to be disclosed in paragraph (c)(1), and prior to the execution of the transaction, the independent fiduciary approves the transaction on

behalf of the plan. Unless facts or circumstances would indicate the contrary, such approval may be presumed if the fiduciary permits the transaction to proceed after receipt of the written disclosure. Such fiduciary may be an employer of employees covered by the plan, but may not be a principal underwriter involved in the transaction. Such fiduciary may not receive, directly or indirectly (*e.g.* through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(d) With respect to additional purchases of insurance or annuity contracts or securities issued by an investment company, the written disclosure required under paragraphs (b) and (c) of this section V need not be repeated, unless--

(1) More than three years have passed since such disclosure was made with respect to the same kind of contract or security, or

(2) The contract or security being recommended for purchase or the commission with respect thereto is materially different from that for which the approval described in paragraphs (b) and (c) of this section was obtained.

(e)(1) In the case of any transaction described in paragraphs (a), (b), or (c) of section III, the insurance agent or broker (or the insurance company whose contract is being described if designated by the agent or broker), pension consultant or investment company principal underwriter shall retain or cause to be retained for a period of six years from the date of such transaction, the following:

(A) The information disclosed pursuant to paragraphs (b), (c), and (d) of this section V;

(B) Any additional information or documents provided to the fiduciary described in paragraphs (b) and (c) of this section V with respect to such transaction; and

(C) The written acknowledgement described in paragraph (b) of this section.

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the insurance agent or broker, pension consultant, or principal underwriter, such records are lost or destroyed prior to the end of such six-year period.

(3) Notwithstanding anything to the contrary in section 504(a)(2) and (b) of the Act, such records are unconditionally available for examination during normal business hours by duly authorized employees or representatives of the Department of Labor, the Internal Revenue Service, plan participants and beneficiaries, any employer of plan participants and beneficiaries, and any employee organization any of whose members are covered by the plan.

Section VI--Definitions

For purposes of this exemption:

(a) The term “principal underwriter” is defined in the same manner as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29)).

(b) The terms “insurance agent or broker,” “pension consultant,” “insurance company,” “investment company,” and “principal underwriter” mean such persons and any affiliates thereof.

(c) The term “affiliate” of a person means:

(1) Any person directly or indirectly controlling, controlled by, or under common control with such person;

(2) Any officer, director, employee (including, in the case of principal underwriter, any registered representative thereof, whether or not such person is a common law employee of such principal underwriter), or relative of any such person, or any partner in such person; or

(3) Any corporation or partnership of which such person is an officer, director, or employee, or in which such person is a partner.

(d) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(e) The term “relative” means a “relative” as that term is defined in section 3(15) of the Act (or a “member of the family” as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(f) The term “master or prototype plan” means a plan which is approved by the Service under Rev. Proc. 72-7, 1972-1 C.B. 715, or Rev. Proc. 72-8, 1972-1 C.B. 716, or their successors.

(g) The term “nondiscretionary trust services” means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1). The term “nondiscretionary trustee” of a plan means a trustee whose powers and duties with respect to the plan are limited to the provision of nondiscretionary trust services. For purposes of this exemption, a person who is otherwise a nondiscretionary trustee will not fail to be a nondiscretionary trustee solely by reason of his having been delegated, by the sponsor of a master or prototype plan, the power to amend such plan.

(h) The insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter that is a fiduciary acts in the “Best Interest” of the Plan or IRA when the fiduciary acts with 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 Plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party.

(i) A “Material Conflict of Interest” exists when a person has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to a Plan or IRA.

Section VII. Impartial Conduct Standards

On or after June 9, 2017, if the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter is a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the following conditions must be satisfied, with respect to the transaction to the extent they are applicable to the fiduciary's actions:

(a) When exercising fiduciary authority described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter acts in the Best Interest of the Plan or IRA at the time of the transaction; and

(b) The statements by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter about recommended investments, fees, Material Conflicts of Interest, and any other matters relevant to a Plan's or IRA owner's investment decisions, are not materially misleading at the time they are made. For this purpose, the insurance agent's or broker's, pension consultant's, insurance company's or investment company Principal Underwriter's failure to disclose a Material Conflict of Interest relevant to the services it is providing or other actions it is taking in relation to a Plan's or IRA owner's investment decisions is considered a misleading statement.