MassMutual

January 2, 2024

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attention: Definition of Fiduciary -RIN 1210-AC02; ZRIN 1210-ZA33; ZRIN 1210-ZA32
Submitted electronically via Federal eRulemaking Portal: http://www.regulations.gov

Re: Retirement Security Rule: Definition of Investment Advice Fiduciary (RIN 1210-AC02)
Proposed Amendment to Prohibited Transaction Exemption 84-24 (ZRIN 1210-ZA33, Application No. D-12060)
Proposed Amendment to Prohibited Transaction Exemption 2020-02 (ZRIN 1210-ZA32, Application No. D-12057)

Ladies and Gentlemen:

Massachusetts Mutual Life Insurance Company ("MassMutual") respectfully submits these comments to the Department of Labor (the "Department") in connection with the Department's (1) proposed rule defining "Investment Advice Fiduciary" for purposes of Title 1 and Title II of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and (2) proposed amendments to class prohibited transaction exemption ("PTE") 84-24 and PTE 2020-02 (collectively, the "Proposals").

About MassMutual

MassMutual is a leading mutual life insurance company that is run for the benefit of its members and participating policyowners. Founded in 1851, the Company has been continually guided by one consistent purpose: we help people secure their future and protect the ones they love. With a focus on delivering long-term value, MassMutual offers a wide range of protection, accumulation, wealth management and retirement products and services. We currently serve over four million life, disability, long-term care and annuity customers. Together with our insurance company subsidiaries, we are the third largest in annuity sales[1] and sixth largest in life insurance sales in the United States[2], and paid over $7 billion in life insurance and annuity benefits to policyholders in 2022. We serve both retail and institutional clients and distribute our life,

[1] Life Insurance and Marketing Research Association ("LIMRA"), U.S. Individual Annuity Sales, Third Quarter 2023, https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q3/top-20-2023-q3-annuity-company-rankings.pdf
[2] *LIMRA U.S. Individual Annuities Sales Survey Participant's Report Third Quarter 2023*.

annuity and other insurance products through our career agency system, third-party, institutional and worksite channels, as well as direct-to-consumer. Acting in the best interest of our customers is at the core of our mission to secure their future and protect the ones they love.

Comments

MassMutual has a long record of supporting the goals of protecting investors and encouraging retirement savings. With these goals in mind, we have significant concerns about the Proposals as currently drafted. A number of these concerns have been raised by other commentors, who have urged the Department to withdraw the Proposals and reconsider the approach. We agree. We also recognize that the Department may nevertheless determine to proceed with the Proposals. The comments below address some of the significant issues presented by the Proposals, along with critical changes needed to individual provisions should the Department decide to proceed.

Part I – Changes to Proposed Amended PTE 84-24 and PTE 2020-02 are Required for Career Agency Systems

Like a number of its peer companies, MassMutual distributes annuity and insurance products through a "career agency system." MassMutual's career agency distribution system consists of a network of over 7,000 insurance producers (also referred to herein as "career agents"). They are independent contractors who are appointed by MassMutual to sell its insurance and annuity products, and who contractually agree that their principal business activity will be the solicitation and servicing of insurance and annuity products primarily for MassMutual, consistent with Section 7701(a)(20) of the Internal Revenue Code ("Code").[3] This contractual arrangement makes agents in our career agency system "full-time life insurance salesmen" under Code section 3121(d)(3)(B) and thus, pursuant to Code section 7701(a)(20), entitled to tax benefits normally limited to common law employees in respect of their participation in MassMutual welfare and retirement plans.

While career agents in our system are considered "statutory employees," it is critical to appreciate that the term "statutory employee" is merely a commonly used term within the insurance industry to refer to independently contracted agents who are treated under the Code as "employees" by an insurer for certain, limited purposes (i.e., inclusion in an insurer's benefits plans and employment taxes). Career agents in our system are not common law employees of MassMutual and are not "captive insurance agents" who exclusively sell MassMutual products. They are independent contractors who have the latitude to seek appointments with other companies as they see fit and have no obligation to report those appointments or sales of other companies' products to MassMutual. Similar to other insurance companies – and unlike a broker-dealer – MassMutual does not control the choice of other companies its career agents may represent or the shelf of products from other companies that its career agents can offer. The relative freedom that each MassMutual career agent has to structure his or her own practice, and to arrange for appointments to sell the products of unrelated carriers, is a key feature of our system.

[3] The career agents agree to produce a minimum amount of MassMutual business each year to maintain their career agent agreements.

MassMutual's career agency system is a time-honored distribution system for mutual insurance companies, a strength of the Company, and a benefit to our customers. The career agents are fully-trained in and supported for MassMutual products, but, as noted above, have the flexibility to place fixed annuity and insurance products elsewhere when that better serves the customer's needs. We are deeply concerned that the proposed amendments misconstrue the status of all career agents as "captive" agent sales forces. Under a captive model, an agent is under a contractual restriction to offer only products made available by a single company or group of related companies. While some companies adhere to captive career agent distribution models, many others do not. The critical distinction between captive and non-captive career agent distribution forces appears to have been overlooked and requires correction.

For the reasons set forth below, we urge in the strongest terms that changes be made to the proposed amendments to PTE 84-24 and PTE 2020-02 to preserve the consumer benefits of "career agency systems" and ensure that the final PTE amendments are workable for, and are business model neutral with respect to, insurance companies like MassMutual that sell their annuity and insurance products through a career agency system. These changes are necessary to avoid fundamental disruption of the career agency system in ways unintended by the Proposals.

A. PTE 84-24 Should Be Available to MassMutual and Its Career Agents

As proposed, PTE 84-24 excludes statutory employees from the definition of an "Independent Producer." Read literally, the definition would exclude a MassMutual career agent, who is a statutory employee of "an insurance company," from relying on PTE 84-24, even to effect the sale of an unaffiliated insurance company's product. And it would preclude insurance companies like MassMutual that distribute their products through a career agency system, from relying on PTE 84-24 when their career agents sell proprietary products. We believe this limitation is arbitrary, unwarranted and will deny retirement investors access to an important segment of the marketplace.

With respect to the ability of a statutory employee to use PTE 84-24 when selling unaffiliated products, we understand that amended PTE 84-24 is intended to be read in the context of the insurance transaction for which relief is required, and that the reference to "employee of an insurance company" in the Independent Producer definition is intended to mean the insurance company issuing the insurance product that has been recommended for sale. When a statutory employee of an insurance company sells another company's product, the statutory employee must be able to utilize PTE 84-24 and the insurance company whose product is recommended must similarly be able to utilize PTE 84-24, as only that company is in a position to supervise the sale and ensure compliance with the conditions of the exemption applicable to the insurer. Any other reading would be irrational and limit choice by forcing insurance companies with statutory employees to sell only proprietary products. For clarity and to avoid substantial disruption in the market, the Department should clarify that a statutory employee can avail herself of PTE 84-24 when "selling away".[4]

[4] The Department can also accomplish this result by substituting the phrase "of the Insurer" for "an insurance company" in the "Independent Producer" definition.

Furthermore, insurance companies that distribute their products through a career agency system like MassMutual should be able to utilize PTE 84-24 when their career agents sell proprietary products. In explaining why it provided relief for insurance transactions involving Independent Producers under PTE 84-24 as an alternative to PTE 2020-02 relief, the Department acknowledged the following concerns expressed by the insurance industry:

- companies cannot effectively exercise fiduciary authority over independent insurance agents who do not work for any one insurance company and are not obligated to recommend only one company's annuities; and

- the issuing company for a given transaction does not have the necessary control over the independent agent to manage the independent agent's product offerings and does not know the full range of products the independent agent is authorized to sell.[5]

That precise same rationale applies equally to our career agency system.

- Our career agents are independent contractors who are neither exclusive to MassMutual nor limited to selling the products of MassMutual and its affiliates.[6]

- MassMutual does not control or have knowledge or information about the full range of products of other companies that the career agents can offer or sell.

We understand that the Department ideally would channel recommendations in need of exemptive relief through PTE 2020-02 and is proposing to retain PTE 84-24 only as a necessary accommodation for the independent insurance agent channel. This accommodation, however, is equally necessary for companies like MassMutual whose career agents are functionally equivalent to other independent agents but for their statutory employee status under Code section 3121.[7] The singling out of non-captive agents for different treatment as proposed would result in unsupportable distinctions between otherwise similarly situated competitors merely because statutory employees are eligible for certain benefit programs, rather than by any substantive difference in business model or by any exclusivity requirement limiting the products the insurance producer can offer to retirement investors.

Accordingly, we recommend the following changes to PTE 84-24 to permit career agents to utilize PTE 84-24 when selling proprietary products.

[5] Proposed Amendment to Prohibited Transaction Exemption 84-24, 88 Fed. Reg. 76004, 76005 (Nov. 3, 2023).
[6] The MassMutual career agent contract does not require career agents to sell exclusively for MassMutual.
[7] Unlike the independent and captive agent systems, the career agency system is not discussed in the preambles to the Proposals, and we expect that means the Department was not apprised of and did not affirmatively consider our system in the development of the Proposals, including in the proposed disposition of transactions between PTE 84-24 and PTE 2020-02.

Recommended Changes:

i. Amend the definition of Independent Producer to Include Statutory Employees:

- (d) "Independent Producer" means a person or entity that is licensed *and appointed* [8] under the laws of a state to sell, solicit or negotiate insurance contracts, including annuities, ~~and that sells to Retirement Investors products~~ of two or more[9] unaffiliated insurance companies~~, but is not an employee of an insurance company (including a statutory employee under Code section 3121).~~*; and who is not limited, either contractually or otherwise by the terms of their appointments or employment, to exclusively selling the products of a single insurance company and its affiliates*.[10,11]

ii. Delete the limitation in Section III(g) to insurance products of an Insurer that is not an Affiliate.

Background Explanation: By defining Independent Producer to exclude employees of the Insurer or an Affiliate, as suggested above, it is not necessary to retain the limitation in Section III(g) to the products of an Insurer that is not an Affiliate. Incorporating that limitation in the Independent Producer definition better effectuates the intent of the Proposals.

Recommended Change:

(g) The receipt, directly or indirectly, by an Independent Producer of an Insurance Sales Commission as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(b), regarding the purchase of a non-security annuity contract or other insurance product not regulated by the Securities and Exchange Commission (SEC) of an Insurer ~~that is not an Affiliate~~, including as part of a rollover from a Plan to an IRA as defined in Code section 4975(e)(1)(B) and (C*).*

[8] In industry terms, an "appointment" is the authorization for a licensed agent to represent a given insurance company and offer its products.

[9] This suggestion is to avoid any ambiguity regarding how many companies constitute "multiple" companies.

[10] With respect to our suggestion to substitute "the Insurer or an Affiliate" for "an insurance company," see comments A.ii. and B below.

[11] We are providing the following alternative definition of "Independent Producer" under PTE 84-24 for the Department's consideration: (d) "Independent Producer" means a person or entity that is licensed under the laws of a state *and appointed* to sell, solicit or negotiate insurance contracts, including annuities, ~~and that sells to Retirement Investors products~~ of ~~multiple~~ two or more unaffiliated insurance companies to Retirement Investors, ~~but~~ *and* is not an employee ~~of an insurance company~~ (~~including~~ *excluding* a statutory employee under Code section 3121) *of the Insurer or an Affiliate.*

iii. Confirm that the Conditions of PTE 84-24 Do Not Preclude Statutory Employee Benefits and Sale of Proprietary Products:

Recommended Change: For clarity, the preamble to the final amendment of PTE 84-24 should specifically confirm the following:

> Neither the sale of a proprietary product, nor the receipt of retirement, welfare or similar benefits, by an Independent Producer that is a statutory employee shall be deemed inconsistent, in and of itself, with the conditions of the exemption.

iv. If Necessary, the Relief Provided by PTE 84-24 Should Include Statutory Employee Benefits for Career Agents:

Background Explanation: Conventional employee benefits provided to career agents as statutory employees are a longstanding and traditional form of insurance compensation predating the enactment of ERISA. In this respect, they are comparable to the forms of Insurance Sales Commission allowable under PTE 84-24. In other respects, they differ from Insurance Sales Commission in that such benefits are contingent, do not relate to any particular transaction, and are not received in connection with any particular transaction. We believe that such benefits are sufficiently remote from any given transaction that, objectively, they do not create conflict of interest concerns and that no prohibited transaction relief is required for them. If the Department disagrees, the final exemption should provide relief for such benefits[12] and require that their availability should be disclosed to Retirement Investors, but should not require their quantification as in the disclosure of Insurance Sales Commissions. To make accurate any quantified value of contingent employee benefits remote from the specific transaction, the accompanying statement of qualifications and assumptions would be so complicated as to outweigh any possible utility to the Retirement Investor.

Recommended Changes. If the Department determines that relief is required:

- Amend Section III(g) to provide relief for employee benefits in addition to Insurance Sales Commission.

  > (g) The receipt, directly or indirectly, by an Independent Producer of an Insurance Sales Commission as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(b), regarding the purchase of a non-security annuity contract or other insurance product not regulated by the Securities and Exchange Commission (SEC) of an Insurer ~~that is not an Affiliate~~, including as part of a rollover from a Plan to an IRA as defined in Code section 4975(e)(1)(B) and (C*), and the eligibility for and receipt of any statutory employee benefits provided by the Insurer to the Independent Producer that takes account of such purchase*.

- Add a new subsection in Section VII(b) to require disclosure of employee benefits.

[12] Because PTE 2020-02 is open ended in the forms of compensation permitted, no corresponding change would be required to that exemption.

(4A) If applicable, a written statement that the Independent Producer is eligible to receive benefits under retirement, life insurance, health and similar programs maintained by the Insurer.

B. Clarify the Application of PTE 2020-02 to a Career Agent System.

As explained above, MassMutual's career agents are not captive agents who exclusively sell our insurance products. They are allowed to, and do, sell products issued by non-affiliated insurance companies. MassMutual does not control the shelf of insurance products the career agents can offer. Nor does MassMutual have knowledge or information about the full range of products of other companies that the career agents can offer or sell when selling non-MassMutual products.

In describing the need to retain a limited PTE 84-24, the Department explained its understanding that the main compliance challenge faced by insurance companies under PTE 2020-02 is that they cannot effectively exercise full supervisory authority over independent insurance agents who do not work exclusively for any one insurance company and are not obligated to recommend only one company's annuities:

> According to the insurance company representatives, unlike a broker-dealer that can readily control the products its representatives recommend and the compensation they receive, insurance companies working with independent agents have much less authority over the conduct and compensation of independent agents. These insurance companies also face much greater liability risk if they are required to provide a fiduciary acknowledgement, because they do not have the necessary control over the independent agents to manage the independent agent's product offerings and do not know the full range of products the independent agent is authorized to sell.[13]

MassMutual's career agency model is no different in this respect than the Independent Producer model contemplated by the Department in the preamble to amended PTE 84-24. Therefore, we believe that certain changes and clarifications are needed to the proposed amended PTE 2020-02 to ensure it provides the necessary relief and reflects an accurate understanding of how career agency systems like ours works.

i. Confirm that Existing Guidance for Insurance Companies Relying on PTE 2020-02 Remains Applicable.

Background Explanation: In adopting PTE 2020-02 in December 2020, the Department provided guidance regarding an insurance company's compliance with PTE 2020-02:

> In terms of the specific oversight requirements, the Department reiterates the statement in the proposal that the exemption requires insurance company Financial Institutions to be responsible only for an Investment Professional's recommendation and sale of products offered to Retirement Investors by the insurance company in conjunction with fiduciary investment advice, and not an unrelated and unaffiliated insurer. The Department also clarifies, in response to

[13] 88 Fed. Reg. at 76005.

> commenters, that the exemption does not require consideration of or comparison to specific options available to an independent insurance agent or compensation relating to those options, other than annuities or other products offered by the insurer.[14]

In April 2021, the Department issued additional guidance in FAQ 18 to PTE 2020-02 stating:

> PTE 2020–02 does not require insurance companies to exercise supervisory responsibility with respect to the practices of unrelated and unaffiliated insurance companies. When an insurance company is the supervisory financial institution for purposes of the exemption, its obligation is simply to ensure that the insurer, its affiliates, and related parties meet the exemption's terms with respect to the insurance company's annuity which is the subject of the transaction.[15]

Under the Proposals, the Department has proposed amendments to PTE 84-24 that reflect the guidance provided in the December 2020 Preamble to PTE 2020-02 and FAQ 18, define an Independent Producer, and require insurance companies that distribute their products through agents who do not fall within the Independent Producer definition to use PTE 2020-02.

While we believe that nothing in the Proposals should be read to either suggest that guidance in the December 2020 Preamble and FAQ 18 is no longer valid or that the term "independent agent" should be read to only include an Independent Producer as defined in PTE 84-24, the Department should add language in the final preamble to amended PTE 2020-02 to provide certainty on this critical issue.

Recommended Change: In the preamble to PTE 2020-02 as amended:

- Ratify FAQ 18;

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[14] Prohibited Transaction Exemption 2020-02, 85 Fed. Reg. 82798, 82812 (Dec. 18, 2020).

[15] *New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions*, U.S. Department of Labor (April 2021), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption. Specifically, Question 18 of the FAQs provided:

> When an independent insurance agent recommends an annuity under the exemption, the agent and the financial institution (*e.g.,* the insurance company) must satisfy the exemption's conditions, including the fiduciary acknowledgement and the Impartial Conduct Standards with respect to that transaction. In such cases, the insurance company must ensure that it has adopted policies and procedures to ensure compliance with the Impartial Conduct Standards and to avoid incentives that place the firm's or agent's interests ahead of the interests of retirement investors. While the independent agent may recommend products issued by a variety of insurance companies, PTE 2020–02 does not require insurance companies to exercise supervisory responsibility with respect to the practices of unrelated and unaffiliated insurance companies. When an insurance company is the supervisory financial institution for purposes of the exemption, its obligation is simply to ensure that the insurer, its affiliates, and related parties meet the exemption's terms with respect to the insurance company's annuity which is the subject of the transaction.

- Confirm that the term "independent insurance agent" as used in FAQ 18 is not restricted to the technical definition of an Independent Producer under PTE 84-24 and would include any agent who does not exclusively sell the products of one insurance company and its affiliates; and

- Confirm that, consistent with the PTE 2020-02 Preamble issued in December 2020 and FAQ 18, the insurer is not required to consider or compare the specific annuities or other insurance products that its agent sells or the compensation relating to them, unless they are products the insurer offers.

ii. The PTE 2020-02 Disclosure System Should be Refined to Accommodate a Career Agency System.

Background Explanation: Section II(b) requires Investment Professionals and Financial Institutions to acknowledge fiduciary status under Title I and/or the Code, and provide investors with a statement of the best interest standard of care, a written description of the services they will provide and their Conflicts of Interest, and rollover disclosure (as applicable). The preamble provides additional detail on these requirements. Because, for the reasons described above, MassMutual does not have the ability to supervise its career agents with respect to other insurer's products, or to compare the MassMutual products against products from other insurers the career agent may be able to sell, changes to the disclosure requirements are required to reflect this reality.

Recommended Changes: The preamble to amended PTE 2020-02 should clarify that:

- Any fiduciary acknowledgement provided by an insurance company as the Financial Institution may qualify and limit the scope of that acknowledgement to apply only to the insurance company's own products without regard to any other company's product that the producer may be authorized to recommend; and

- An insurance company Financial Institution is only responsible for meeting the best interest standard of care and disclosure conditions with regard to its own products.

In addition, section II(b)(1) & (2) should be amended to include the following: "with respect to products offered by the Financial Institution".

iii. **Clarify that Section 406(a) Relief for the Sale of the Annuity or Insurance Contract is within the Scope of PTE 2020-02.**

Background Explanation: PTE 84-24 provides specific relief from Section 406(a) and 406(b) of ERISA with respect to the purchase and sale of annuity contracts from an insurance company. Although PTE 2020-02 clearly provides Section 406(a)(1)(A) and (D) relief, in addition to Section 406(b) relief, for the recommendation of an annuity product by an investment advice fiduciary, Section I(b) of the exemption describes the covered transaction in terms of the "receipt of reasonable compensation". That section I(b) phrasing has led to a degree of confusion as to

whether the sale of the product itself by a party in interest insurer in connection with a fiduciary recommendation would be relieved from the restrictions of Section 406(a).

While we believe the relief provided by amended PTE 2020-02 is still intended to and necessarily does include relief for that transaction[16], in the same manner as any other investment transaction under the exemption, we are concerned that the difference in language between the two exemptions could be misconstrued to mean that a separate exemption would be required for the insurance/annuity sales transaction.

> ***Recommended Change:*** Re-confirm in the preamble to PTE 2020-02, consistent with the Department's guidance when it granted the exemption in December 2020, that the exemption provides relief to the insurance company for the sale of an annuity or insurance product.

Part II - Additional Changes Needed to PTE 84-24

Proposed PTE 84-24 would impose new requirements on insurers and producers that far exceed the robust regulatory requirements that apply under state insurance laws. The resulting costs go well beyond both the estimates set forth by the Department in its cost benefit analysis and any reasonable expected incremental benefits to consumers, given that insurance companies and producers already have to comply with the NAIC's Annuity Best Interest Model Regulation.

To avoid creating a costly and conflicting regulatory framework, we believe that the Department should adopt a safe harbor for insurance companies and producers to the extent they satisfy their respective obligations under the NAIC's Annuity Best Interest Model Regulation.

To the extent the Department does not accept this recommendation, we have highlighted below for the Department certain provisions that are particularly problematic and need to be addressed prior to issuing any final amendments to PTE 84-24.

A. Insurer's Obligations Regarding the Appointment of Independent Producers (Section VII(c)(3))

As proposed, amended PTE 84-24 requires an Insurer to document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards and review that determination annually. The Department should clarify that producer due diligence requirements are limited to objective criteria such as a criminal background check, FINRA check (if applicable), license verification, credit history check, and similar data readily available to the Insurer. We are concerned that an open-ended requirement could be viewed as requiring Insurers to perform subjective character assessments as to whether a producer is likely to adhere to the Impartial Conduct Standards at the time of contracting -- an inquiry for which the Insurer has neither the professional expertise nor the means to perform.

[16] 85 Fed. Reg at 82816 ("Importantly, certain transactions are not considered principal transactions for purposes of the exemption, and so can occur under the more general conditions. This includes the sale of an insurance or annuity contract, or a mutual fund transaction.").

B. Retrospective Review (Section VII(d))

The NAIC's Annuity Best Interest Model Regulation requires an insurer to annually provide a written report to senior management which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the insurer's supervision system, the exceptions found, and corrective action taken or recommended, if any. Section VII(d) of the proposed amendments to PTE 84-24 goes well beyond this requirement in at least three important respects, by: (1) requiring the retrospective review to include a review of independent producers' rollover recommendations, (2) requiring the retrospective review to include a determination whether to continue to permit individual Independent Producers to sell the Insurer's products, and (3) requiring the Insurer to provide to the Independent Producer the methodology and results of the retrospective review. These additional provisions are unnecessary and unduly burdensome.

- Requiring the Insurer to review every rollover recommendation made by Independent Producers (which number in the thousands for many large annuity writers), as part of the Insurer's retrospective review would be incredibly onerous and unwarranted. The Department should confirm that testing done as part of the retrospective review should be able to rely on standard sampling and testing techniques.

- Requiring the Insurer to annually review its initial approval of each Independent Producer to sell Insurer's products is wholly unnecessary in light of existing requirements. Insurers are required to monitor licensing renewals and appointment updates for each Independent Producer under state insurance laws. These requirements, along with new policies and procedures imposed on Insurers under proposed PTE 84-24 to address Independent Producers' failure to comply with Impartial Conduct standards, are more than adequate to provide ongoing monitoring of Independent Producers.

- Furthermore, there is no reason to require an insurer to provide to every Independent Producer the methodology and results of the retrospective review. If an Insurer detects an issue with an Independent Producer's recommendation or documentation, it should suffice that the Insurer's policies and procedures require the insurer to address any concerns with the Independent Producer in question. In particular, we are concerned that unlike the single retrospective review requirement of PTE 2020-02, the retrospective review requirement of PTE 84-24 may be read to suggest that the Insurer is required to conduct an individualized retrospective review of the recommendations provided by each Independent Producer over the course of the prior year, and to furnish a customized report to each such producer. Such a requirement would be administratively unfeasible and prohibitively costly. Clarification is requested that – consistent with the single annual retrospective review requirement of PTE 2020-02, only a single retrospective review is required of an Insurer under PTE 84-24.

C. Producer Disclosure of Services, Conflicts and Fees (Section VII(b)(3) and (4))

Sections VII(b)(3) and (4) would require the Independent Producer to provide a written description of the services to be provided, his or her conflicts of interest, and the amount of the Insurance Sales Commission that the Independent Producer will be paid. These disclosures cover similar topics as those required to be provided under the NAIC Annuity Best Interest Model Regulation[17] but differ materially in terms of the details needed to be provided. We believe that the NAIC required disclosures, using the form prescribed in the NAIC Model Regulation, provide clear and concise disclosure in a consistent format on these topics and should therefore also satisfy an Independent Producer's obligations under Section VII(b)(3) and (4). This clarification would be consistent with the Department's intent to utilize another regulator's forms of disclosure when possible.

Finally, we note that the requirement in (b)(3) to identify the specific Insurers and specific insurance products available for recommendation by the Independent Producer will often result in lengthy disclosure that (1) will be costly to produce and difficult to keep up to date and (2) provide a level of detail that in most cases will be meaningless to any particular investor.

Part III – Changes Needed to Both PTE 84-24 and PTE 2020-02

Set forth below are significant concerns with provisions that have been included in amendments to both PTE 84-24 and PTE 2020-02.

A. Compliance Deadline Must Include a Sufficient Implementation Period

The Department's proposal to make the final rule effective 60 days after publication in the *Federal Register* is unworkable. Two months is wholly inadequate to implement the necessary changes. It will take at least 18 months to build compliance programs, policies and procedures, disclosures, and system changes to comply with the new requirements in the final rule and the accompanying prohibited transaction exemptions. In the past, the Department has provided firms acting in good faith with additional time to implement compliance programs. Compliance with all aspects of the Proposal should take effect at least 18 months after publication in the *Federal Register*.

B. Fiduciary Acknowledgement

Both PTE 84-24 and PTE 2020-02 would require the Independent Producer or the Financial Institution, as applicable, to provide a written fiduciary acknowledgement. Although the Department has indicated that it is not intending to create a new cause of action, the enhanced disclosure could serve as a newly created basis for litigation. To the extent the Department determines to retain the disclosure requirement, it must allow for the Independent Producer (or Investment Professional /Financial Institution if under PTE 2020-02) to be able to specify the activities that will be provided on a fiduciary basis and those that are not, similar to the disclosure required under Section 408(b)(2) of ERISA. This clarification would allow for the Independent Producer, or Investment Professional and Financial Institution, to provide a more

[17] NAIC Suitability in Annuity Transactions Model Regulation ("NAIC Model Regulation"), *available at* https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.

useful disclosure and explicitly state, when applicable, that the fiduciary acknowledgement does not create any ongoing monitoring obligation on their part.

C. Producer - Rollover Disclosures

Proposed Section VII(b)(7) of PTE 84-24 and Section II(b)(5) of PTE 2020-02 would require Independent Producers or Investment Professionals and Financial Institutions to provide a rollover disclosure before "engaging in a rollover or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in the plan." This would require a disclosure even when the Independent Producer or Investment Professional does not make a recommendation to rollover. The rollover disclosure should not be required unless the Independent Producer or Investment Professional makes a rollover recommendation.[18]

In addition, the Department should acknowledge that in many cases the information needed to provide a comparison of fees and expenses will not be available. For example, the Independent Producer or Investment Professional will not have the ability to make an apples-to-apples comparison of plan fees and expenses to annuity product fees and expenses for fixed annuity products that provide guaranteed rates of interest and do not have the fees and expenses associated with non-guaranteed investment management products. These fixed products are sufficiently different from other investments that lend themselves to such comparison (e.g., mutual funds in a 401(k) retirement plan versus mutual funds in an individual retirement account), that an allowance for them should be provided.

D. Eligibility Provisions.

The Department has proposed expanding the circumstances for ineligibility under PTE 2020-02 and adding similar, but even more complex requirements to PTE 84-24. The proposal goes too far, particularly since the use of PTEs 84-24 or 2020-02 is no longer "optional."

Under the Proposal, an Insurer or Financial Institution would be immediately disqualified from relying on the PTEs based not just on its actions but the actions of any Affiliate. If any affiliated subsidiary or sister company of the Insurer or Financial Institution- even one that is a separately run business – is deemed ineligible, every company in the organization that deals with retirement investors is effectively put out of business. Even more shocking, the Proposal broadly defines "Affiliate" to include "any officer, director, partner, employee, or relative of the person" and "any corporation or partnership of which the person is an officer, director, or partner." This creates an almost boundless network of persons, most of whom will have absolutely no connection to the recommendations provided to retirement investors, whose actions can drive financial services workers and companies out of business to the detriment of the retirement investors relying on them.

We also share concerns that the Department gives itself authority to prohibit use of the PTE if it determines that the Financial Institution has engaged in a pattern of non-compliance with any of

[18] The proposal should also be clear that financial professionals are able to provide education on rollover options without it being deemed fiduciary investment advice.

the conditions the exemption, regardless of the materiality of the violation or harm to retirement investors. There appear to be no checks and balances on this authority.

E. Mitigation of Conflicts Requirements Should Align with Reg BI.

The Department proposes in both PTE 84-24 and PTE 2020-02, to require policies and procedures that prohibit quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to encourage Investment Professionals to make recommendations that are not in Retirement Investors' Best Interest. In the preamble to PTE 84-24, the Department, however, goes on to specifically prohibit certain incentives, such as trips and educational conferences, if attendance is based on sales volumes. PTE 2020-02 has a similar provision tied to the desirability of the destination of such trip or conference.

These proposed prohibitions did not exist even three years ago when the Department finalized the current version of PTE 2020-02. The Department provides no guidance on the reason for this shift, which is contrary to the approach taken more recently by SEC and NAIC regarding conflicts of interest. Further, we are concerned that this language will lead to the Department further restricting common compensation practices in a commission-based model. The Department should not preclude firms from recognizing successful producers and financial professionals based on, for example, total sales production over the course of an entire year. Firms should be able to build appropriate procedures that manage conflicts of interest and should not be subject to inappropriate second guessing of compliance and oversight procedures developed and implemented in good faith.

The Department should align its conflicts mitigation requirement with the SEC's requirements in Reg BI. There, the SEC was able to strike an appropriate balance of permitting firms to reward successful producers, while ensuring that the customers' best interest continues to come first. The SEC requires firms to identify and eliminate any sales contests, sales quotas, bonuses and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.[19] The NAIC requires the same approach with respect to annuities.[20] If the Department truly intends these exemptions to allow for a commission-based model, it should align the conflicts of interest requirements with Reg BI.

F. The Expansion of Recordkeeping Requirements Are Unnecessary and Unduly Burdensome.

Under the Proposal, Section IX of PTE 84-24 requires that Independent Producers or Insurers maintain records necessary to enable persons described in subsection (a)(2) to determine whether conditions of the exemption have been met with respect to a transaction. In addition to the Department and the IRS, Subsection (a)(2) includes the following persons and entities: "(A) … another state or Federal regulator; (B) any fiduciary of a Plan that engaged in a transaction pursuant to this exemption; (C) any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to this exemption; or (D)

[19] Regulation Best Interest Section 240.15l-1(a)(iii)(D).
[20] *See* Section 6.C.(2)(h) of the NAIC Model Regulation.

any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption."[21] While not yet proposed, the Department has requested comment on similarly expanding the recordkeeping requirements of PTE 2020-02.

It would be inappropriate and costly to require Insurers and Financial Institutions to make its internal business records such as the retrospective review, annual certifications, and policies and procedures, as well as unlimited types of other records that may be sought, available to any person or entity other than the Department or the IRS. Moreover, we do not believe it would provide any utility to Retirement Investors, in particular individual IRA owners, in making investment decisions.

G. The Department Should Not Condition the Availability of the Exemptions on Excise Tax Obligations that are Exclusively Within the Enforcement Authority of the Internal Revenue Service

As part of the retrospective review, the Proposal requires a Senior Executive Officer to certify that all non-exempt violations discovered by the Insurer or Financial Institution have been corrected and reported on Form 5330, and that the resulting excise tax imposed under Code section 4975 has been paid. The Proposal also adds the failure to make these corrections and filings, and pay the taxes, to the list of behaviors that could cause the Insurer or Financial Institution to be deemed ineligible to rely on PTE 84-24 or PTE 2020-02. Imposing a requirement for filing Form 5330 and paying excise taxes is inappropriate, unworkable in practice, and potentially contrary to tax law.[22] We urge the Department to remove altogether the Form 5330 reporting and related excise tax conditions of the exemptions.

H. The Department Should Not Require Public Website Disclosure

The Department seeks comment on whether Insurers and Financial Institutions under PTE 84-24 and PTE 2020-02, respectively, should be required to maintain a public website including pre-transaction disclosures, a description of the Financial Institution's or Insurer's business model, associated conflicts of interest (including arrangements that provide third-party payments), and a schedule of typical fees, among other information.[23] We strongly urge the Department not to go

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[21] 88 Fed. Reg. at 76030-31.

[22] With respect to proposed PTE 84-24, the instructions to IRS Form 5330 make it clear that Form 5330 is filed by a disqualified person who is *liable for tax* under IRC Section 4975 (emphasis added). Instructions for Form 5330, *available at* https://www.irs.gov/pub/irs-pdf/i5330.pdf. There is no option for an Insurer to file Form 5330 as an information return to report a prohibited transaction engaged in by a third party such as the Independent Producer. The Insurer should not be subject to an excise tax on a prohibited transaction of an Independent Producer when the Insurer reasonably believed the transaction to be exempt, nor should the Insurer be subject to the excise tax on a prohibited transaction when it cannot recover the commission and state law does not allow it to rescind the annuity contract unilaterally.

[23] Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75979, 75986 (Nov. 3, 2023) ("[T]he website would list all product manufacturers and other parties with whom the Financial Institution maintains arrangements that provide Third-Party Payments to the Investment Professional, the Financial Institution, or Affiliates with respect to specific investment products or classes of investments recommended to Retirement Investors; a description of the arrangements, including a statement on whether and how these arrangements impact Investment Professionals' compensation, and a statement on any benefits the Financial Institution provides to the product manufacturers or other parties in exchange for the Third-Party Payments. . . . The website may describe the

forward with this requirement. The Department's estimate of 8 hours of labor annually to establish and maintain the web page and disclosures grossly underestimates the time and cost by Insurers and Financial Institutions – including business, legal, compliance and technology personnel – to develop and maintain such a web page and disclosures. This requirement would add significant costs that would ultimately be passed on to Retirement Investors, to produce a potentially massive disclosure that would be of no practical utility to them.

Part IV – The Investment Advice Fiduciary Definition Inappropriately Captures Communications that are Clearly Non-Fiduciary in Nature

We believe that the approach taken in the Proposal with respect to the definition of "investment advice" fiduciary status is, similar to the 2016 Fiduciary Rule, so broad that it sweeps in interactions that are clearly not fiduciary in nature, including instances where neither party could have any reasonable expectation of entering into a fiduciary relationship. In 2016, the Department sought to address that issue – at least in part – by including several exceptions or "carve-outs" to preserve the non-fiduciary status of parties engaged in ordinary course sales and/or marketing discussions. But in the Proposal, unlike the 2016 Fiduciary Rule, the Department has not provided *any* specific exceptions or safe-harbor exclusions to preserve the non-fiduciary status of persons within the context of business interactions that neither party expects nor wants to be viewed as involving fiduciary investment advice. This is an untenable result that is likely to have a chilling effect on retirement investor access to information and products from Insurers and Financial Institutions that need to be wary about engaging in communications out of concerns related to potential fiduciary liability exposure. We have set forth below examples of cases where we believe sound retirement plan policy requires changes to the sweeping language of the new Investment Advice Fiduciary definition.

A. Institutional Sales are Not Investment Advice

The following common business interactions between institutions are never viewed or intended by the parties to be fiduciary investment advice.

Requests for Proposals. A plan fiduciary or representative typically solicits requests for proposals ("RFP") or engages in a similar informal fact-finding process before selecting an insurance product, investment or service provider. These are not requests for investment advice and the response is not intended or viewed as such. In the case of a formal RFP, they are a solicitation, typically extended to multiple competitors, to bid on a business proposal. In other cases, the fiduciary is performing due diligence by educating itself about potential investment products and may also be deciding between multiple providers and products. The plan fiduciary compares and considers information regarding the available alternatives, and ultimately makes its selection.

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above arrangements with product manufacturers, Investment Professionals, and others by reference to dollar amounts, percentages, formulas, or other means reasonably calculated to present a materially accurate description of the arrangements. Similarly, the Financial Institution may group disclosures on the website based on reasonably defined categories of investment products or classes, product manufacturers, Investment Professionals, and arrangements, and it may disclose reasonable ranges of values, rather than specific values as appropriate.").

Institutional Marketing. Similarly, an insurance company may initiate the sales process through marketing its products to institutional investors. In these circumstances, the Insurer provides information to the plan and/or an intermediary regarding the benefits or value proposition of its product offering. Once a product is selected, a negotiation over the price and terms often occurs between the plan's representative and the product manufacturer. This is an arm's length bargaining process between a willing buyer and a willing seller. When the seller makes representations about the value of its product in the buyer's circumstances, the buyer has no expectation other than the seller is acting in its own interest, within the parameters of good faith negotiations but not of fiduciary responsibilities.

Platform Providers. MassMutual and other providers often receive inquiries from plan fiduciaries or requests for more information about its products available through third-party plan platform providers. The plan fiduciary may be evaluating, for example, whether the plan qualifies to add the MassMutual product to its menu, whether the MassMutual product would be useful in its existing plan option line-up, or whether the MassMutual product could serve as a replacement for an underperforming option. Often, the plan fiduciary is making the same inquiry of multiple providers. Again, the plan fiduciary understands that it is in MassMutual's interest to be selected, and has no expectation that MassMutual is acting with, or for the benefit of, the plan's interest.

Recommended Change: The final rule should make clear that promoting institutional products and services to plan fiduciary counterparties (regardless of whether the process is initiated by the buyer, the seller or through a platform provider), or representing one's own interest within the context of a commercial business negotiation that is clearly understood as such by both parties, is not fiduciary investment advice.

B. Wholesalers are not Fiduciaries.

Wholesalers perform a variety of sales support and marketing functions on behalf of an Insurer or Financial Institution. For example, MassMutual's wholesalers and other sales support staff engage in the following activities: (1) marketing and "wholesaling" of MassMutual products and services to MassMutual career agents, insurance producers, independent marketing organizations and registered representatives of affiliated and third-party broker-dealers (together "financial professionals"); (2) providing training and education to financial professionals regarding MassMutual's products and services; and (3) preparing and presenting product illustrations as requested by the financial professional.[24] It is the financial professional serving as the investment advice fiduciary who has the relationship of trust and confidence with the end consumer retirement investors; not the wholesaler. The financial professional interacting with the wholesaler fully understands that the wholesaler represents the insurer and is not providing fiduciary investment advice. [25]

[24] In certain limited circumstances, at the request of a financial professional a wholesaler may participate in conversations with the financial professional and her client to answer factual questions about the product, service or illustration being recommended by the financial professional to the Retirement Investor.

[25] We note that wholesaling activity is typically not subject to Reg BI or other best interest requirements because wholesalers generally are not making recommendations to retirement investors. *See* NAIC Model Regulation Section 6(A)(5) ("Application of the best interest obligation. Any requirement applicable to a producer under this subsection shall apply to every producer who has exercised material control or influence in the making of a

Recommended Change: The final rule should clarify that those providing wholesaling services are not fiduciaries.

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We echo the concerns raised by other commenters that the Proposals are contrary to current law and believe that they should be withdrawn. If the Department nonetheless elects to proceed, our letter raises significant issues related to the Proposals and proposes specific adjustments that must be made to avoid arbitrary and capricious rulemaking. We would be happy to have further discussions with the Department on the points made in our letter. Please do not hesitate to contact us with any comments or questions, or if further information would be helpful.

Sincerely,

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recommendation and has received direct compensation as a result of the recommendation or sale, regardless of whether the producer has had any direct contact with the consumer. *Activities such as providing or delivering marketing or educational materials, product wholesaling or other back-office product support, and general supervision of a producer do not, in and of themselves, constitute material control or influence*." (emphasis added)). There is no material discussion of wholesaling in any of the Reg BI guidance issued by the SEC to date. *See generally* SEC, Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019).