



2024 LIFE  
INSURANCE  
& ANNUITY  
CONFERENCE

**Powering  
Growth**

**Evaluating the  
Department of  
Labor's Fiduciary  
Advice Effort**





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# Background & Context

- DOL, Dodd Frank and the SEC
- 2010
- 2015-2016
- 2020
- 2023-2024

# Background & Context

- **DOL Objectives:**
  - Capture *all* rollover recommendations as fiduciary advice.
  - Disallow use of disclaimers to avoid fiduciary status.
  - Create a “uniform” ERISA-based regulatory standard.
  - Fill perceived gaps, particularly with respect to fixed index annuity sales.
- **Largely Reprises DOL’s 2016 Rule.**
  - DOL “rejects the purported dichotomy” between selling and advice.
  - Specifically targets rollover transactions.
  - Fixed index market singled out for criticism.

# “Recommendations”

- **Broadly defined:**
  - Generally consistent with SEC Reg BI definition (a communication that could reasonably be viewed as a call to action).
- **Includes advisability of:**
  - Securities or investment transactions;
  - Investment policies or strategies;
  - Other persons as investment advisors or managers;
  - Distributions, rollovers;
  - Account type choice;
  - Proxies.

# 1975 Rule

v.

# Proposal

1. Make recommendations to purchase, sell a security or other property
2. On a regular basis
3. Pursuant to a mutual agreement
4. Advice serves as a primary basis for investment decision
5. Advice is individualized based on the particular needs

1. Makes recommendation to a Retirement Investor
2. Makes recommendations on a regular basis *as part of business*
3. *May* be relied upon as a basis for investment decision
4. Based on particular needs or individual circumstances

# Observations

- DOL purports to retain much of the five-part test while proposing a rule more akin to the 2016 rule.
  - Likely an attempt to bolster litigation position
- Fiduciary status analysis highly dependent on –
  - Precise wording of communication
  - Reasonable (arguably subjective) investor expectations
- Written fiduciary disclaimers ineffective if inconsistent with retirement investor’s “reasonable expectations.”
- New rule lacks any explicit carve-outs or “off ramps.”
  - *No sophisticated investor exceptions*

# PTE 84-24: the “Agent Fiduciary Exemption”

- Originally granted in 1977, PTE 84-24 is widely relied upon as a source of relief by insurance producers and companies who may be functioning in a fiduciary adviser capacity.
- Currently –
  - Contains no fiduciary acknowledgment requirement.
  - Frequently used as a “belt and suspenders” approach (i.e., the use of PTE 84-24 does not foreclose arguments that the 5-part test of fiduciary status is not met).
  - Relief conditions are primarily disclosure-based. These include written disclosures of sales commissions and of the producer’s relationship with the recommended insurer.
  - Disclosures must be provided in advance to the customer, who must acknowledge receipt and authorize the transaction.



# PTE 84-24: Proposed Changes

- Scope of relief available for recommendations of insurance products would be narrowed in three key respects –
  1. *Only Recommendations of Non-Securities are Covered.* Currently PTE 84-24 covers insurance products of all types, including variable products registered as securities. The proposed amendment would exclude recommendations of securities products regulated by the SEC.
  2. *Only Recommendations by Independent Producers are Covered.* “Independent Producers” are persons or entities licensed to sell, solicit or negotiate insurance contracts who sell products of multiple unaffiliated insurance companies. Insurers and their employees, including Code section 3121 statutory employees (i.e., career agents) are excluded.
  3. *Only the Direct Insurance Sales Commissions is Covered.* Sales commissions paid to an Independent Producer by an insurer or affiliate (including through an IMO/FMO paying agent relationship) are covered. Revenue sharing, administrative fees, marketing payments and third-party payments of any kind, whether cash or non-cash, are excluded.

# PTE 84-24: Proposed Changes

- Separate sets of conditions would apply to the Independent Producer and Insurer.
- Generally, these parallel the conditions of PTE 2020-02 except an Insurer is not required to provide the fiduciary acknowledgement PTE 2020-02 requires of Financial Institutions.
- Independent Producers are required to –
  1. Adhere to Impartial Conduct Standards (i.e., provide “Best Interest” recommendations); receive compensation not in excess of what is reasonable; and refrain from materially misleading statements;
  2. Deliver written disclosures, including a fiduciary acknowledgement and best interest statement and a statement of insurance commissions to be received.
  3. Document the basis for its recommendations and furnish copies to the Retirement Investor and to the Insurer prior to the transaction.

# PTE 84-24: Proposed Changes

- Insurer Obligations –
  1. Establish, maintain, implement and enforce policies and procedures for the review of recommendations of its own products by Independent Producers;
  2. Mitigate Conflicts of Interest that might otherwise create an incentive for an Independent Producer to place its interests or those of the Insurer ahead of the Retirement Investor's;
  3. Evaluate and Review Independent Producers authorized to sell the Insurers products
  4. Conduct a Retrospective Review at least annually, to be certified by a Senior Executive Officer, including Form 5330 excise tax certifications.

# PTE 84-24: Proposed Changes

- Independent Producers currently receive various forms of support from IMOs/FMOs including—
  - Override participation;
  - Marketing allowances to support production goals;
  - Awards, trips and conference attendance'
  - Sales support programs, including customer leads
  - Website capabilities and related marketing programs
- None of the above are covered under the DOL proposal -- the *only* form of covered compensation would be direct compensation in the form of sales commissions paid by insurers.

# PTE 84-24: Proposed Changes

- Ineligibility Provisions – certain occurrences may render an Independent Producer or an Insurer ineligible to use the exemption for 10 years --
  - Conviction of certain financial crimes, including those of an Affiliate and including convictions in foreign courts.
  - Determinations of written ineligibility by DOL for –
    - Engaging in a systematic pattern or practice of violating exemption conditions;
    - Intentionally violating, or knowingly participating in violation of the exemption conditions;
    - Providing materially misleading information to DOL in connection with the conditions of the exemption; and
    - Engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS and pay prohibited transaction taxes as applicable.

# PTE 2020-02 At A Glance

- DOL would prefer that all fiduciary advisers “rely solely” on PTE 2020-02.
- Remains available as a source of broad exemptive relief in connection with the provision of non-discretionary investment advice. Unlike PTE 84-24, covers third-party compensation.
- Requires that a Financial Institution (Bank, BD, RIA or Insurance Company) acknowledge its own fiduciary status for each recommendation
- Basic Framework:
  - Impartial Conduct Standards
  - Policies and Procedures
  - Disclosures
  - Retrospective review

# Proposed Changes to PTE 2020-02

- Overview of changes –
  - Covers robo-advice arrangements.
  - Affirmatively requires financial institutions to correct, report to IRS, and pay excise taxes in connection with non-exempt prohibited transactions engaged in as a result of providing fiduciary investment advice.
  - Increases disclosure and documentation requirements, including with respect to standard of care, compensation, and conflicts of interest.
  - Expands list of disqualifying events.
  - Fiduciary acknowledgement cannot be “to the extent”.

# Proposed Changes to PTE 2020-02

- New prescriptive compensation limitations:
  - Financial institutions “may not use quotas, appraisal, performance or personnel actions, bonuses, contests, special awards, *differential compensation*, or other similar actions or incentives” that a reasonable person would conclude are likely to result in non-Best Interest recommendations.
  - DOL: it is not enough merely to pay Investment Professionals the same percentage of the Financial Institution’s compensation for a recommended product as for other products if the Financial Institution receives more compensation for sales of certain products.



# Proposed Changes to PTE 2020-02

- **Disclosure Changes –**
  - *Best Interest Statement* – Written statement of Best Interest Standard of care must accompany fiduciary acknowledgment;
  - *Third Party Payments and Additional Info.* – Disclosures of services and material Conflicts of Interest broadened to include a statement on whether the arrangement involves Third Party Payments and a statement that the Retirement Investor may obtain additional information on costs, fees and compensation (expressed in dollar amounts, percentages or formulas) free of charge;
  - *Public Website?* – DOL invites comment on whether Financial Institutions should be required to maintain a public website describing business model, conflicts and typical fee schedules.

# Proposed Changes to PTE 2020-02

- **Added DOL Enforcement Tools**
  - *Affiliate Criminal Convictions* – Criminal convictions of affiliates beyond the Financial Institution’s controlled group (including foreign criminal convictions) render the exemption unavailable;
  - *DOL Determinations of Ineligibility* – Basis for ineligibility determinations expanded beyond systematic or intentional violations of exemption conditions to add systematic failures to correct prohibited transactions, file Form 5330 excise tax returns and pay excise taxes.

# Political Landscape

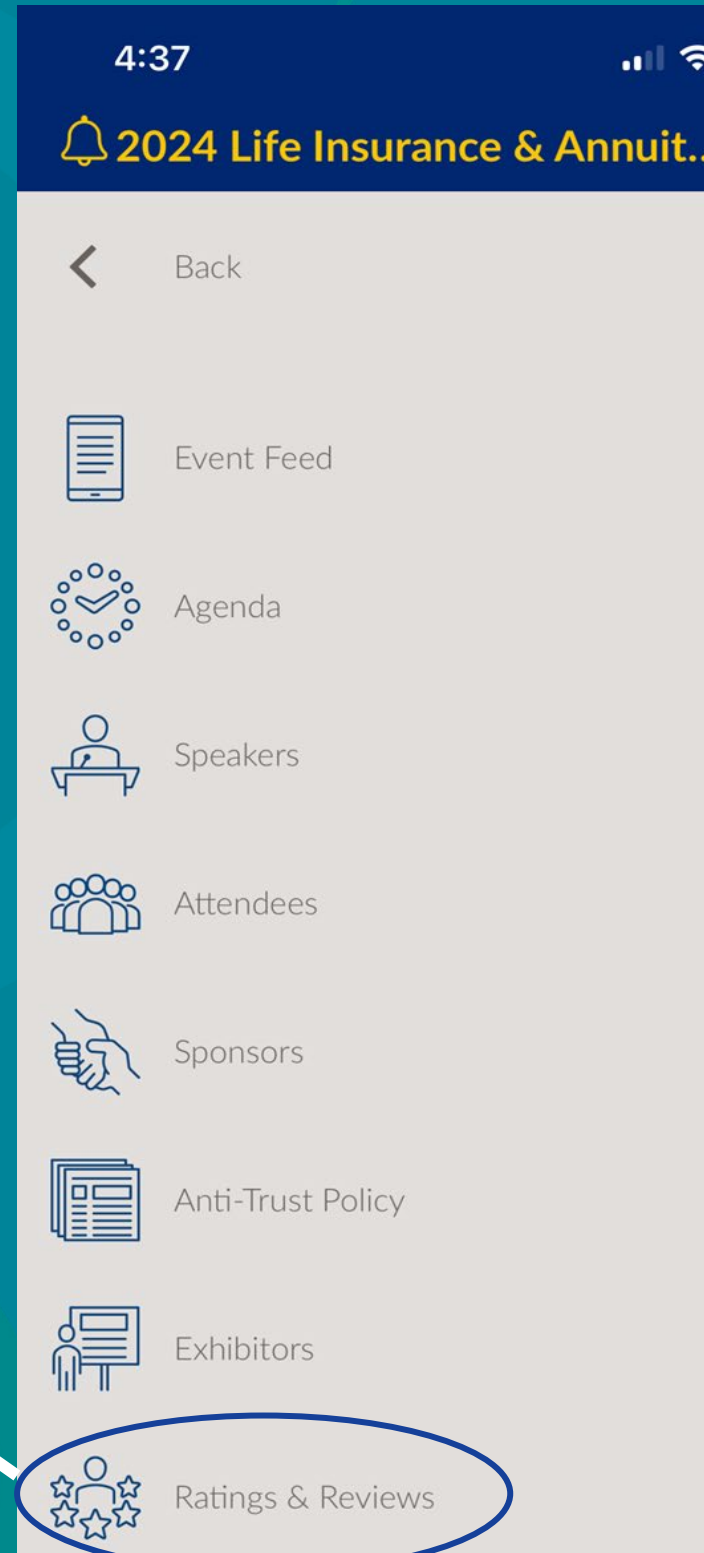
- NAIC
- Capitol Hill
  - Comment letters
  - Appropriations rider
  - Congressional Review Act
- 2024 Election

# Q&A

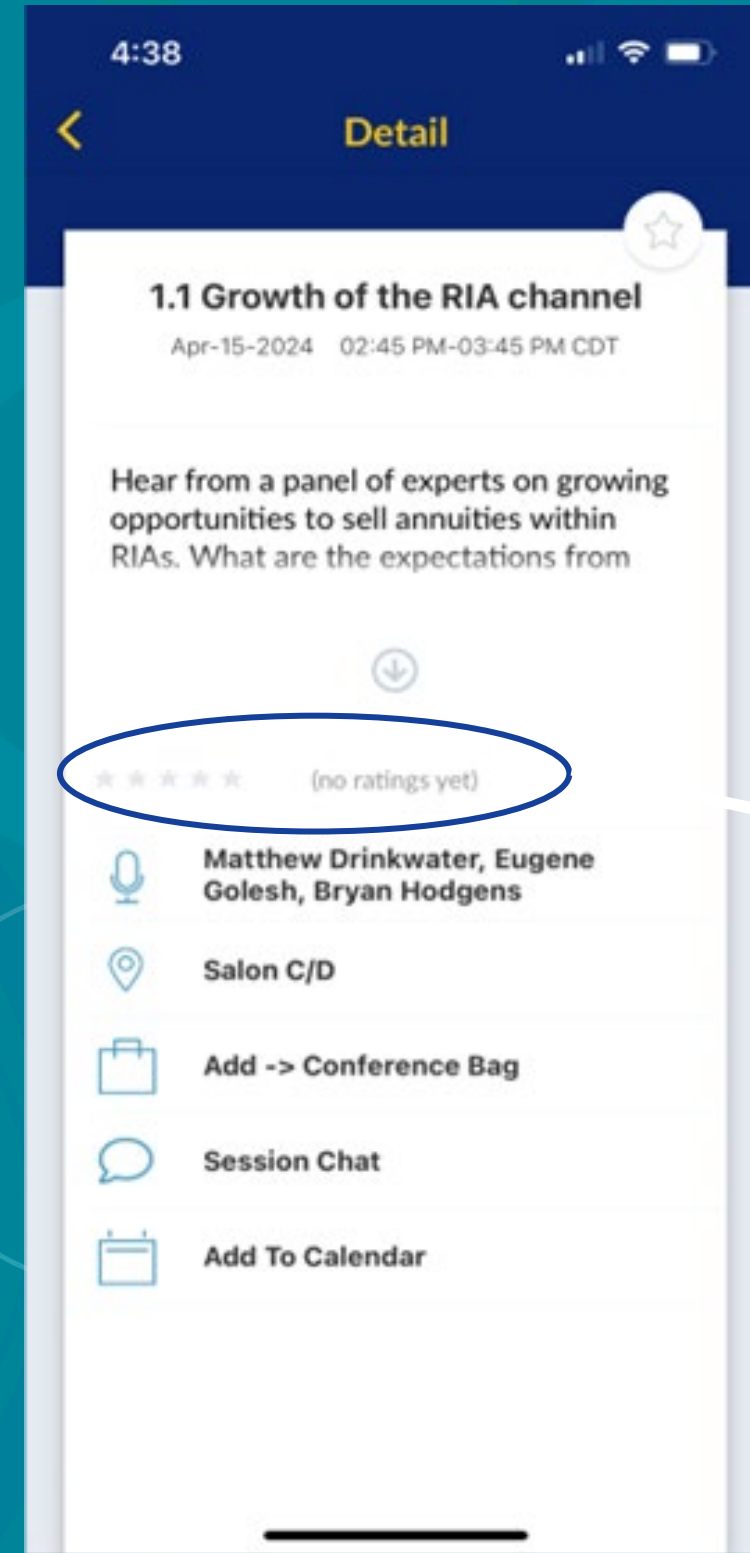


# Please Provide Your Feedback on the Conference App

## OPTION 1



## OPTION 2



# Thank You

