

DOL Releases New Fiduciary Rule, Broadens Definition of Investment Advice Under ERISA

April 29, 2024

On April 23, 2024, the Department of Labor published its long-awaited [final retirement security rule](#) broadening the definition of who is an “investment advice fiduciary” under section 3(21) of the Employee Retirement Income Security Act and section 4975 of the Internal Revenue Code. This is the [fourth attempt](#) by the DOL to broaden the definition of “investment advice” that was first provided in a regulation issued in 1975. Along with the rule, the DOL published changes to a number of prohibited transaction exemptions, including PTE 2020-02 and PTE 84-24. The rule, and the changes to relevant PTEs except PTE 2020-02 and PTE 84-24, are effective September 22, 2024. For PTE 2020-02 and PTE 84-24, there is an additional one-year transitional rule where exemptive relief will require a written acknowledgment of fiduciary status and compliance with the impartial conduct standards in the exemptions. **Retirement Security Rule: Definition of an Investment Advice Fiduciary** The definition of a covered recommendation is based on the facts and circumstances of a communication and whether a communication could reasonably be viewed as a *call to action*, meaning that it would reasonably influence the retirement investor to take action. The more individualized a communication is to a specific customer or group of customers about any securities transaction or other investment transaction, or any investment strategy involving securities or other investment property, the greater the likelihood the communication will be viewed as a recommendation. The preamble to the final rule states that the DOL intends that whether a recommendation has been made will be construed in a manner consistent with the SEC's framework in Regulation Best Interest. Under the final rule, a person is an investment advice fiduciary where they receive compensation from a third party and in conjunction with that compensation provide a

recommendation to a retirement investor in one of the following contexts:

1. The person either directly or indirectly (e.g., through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:
 - a. Is based on a review of the retirement investor's particular needs or individual circumstances;
 - b. Reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances; and
 - c. May be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or
2. The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both, with respect to the recommendation. The recommendation also must be provided "for a fee or other compensation, direct or indirect" as defined in the final rule.

For purposes of the rule, a retirement investor includes a plan, plan participant or beneficiary, IRA, IRA owner or beneficiary, plan fiduciary, or IRA custodian or fiduciary. The rule seemingly makes limited space for secondary players, such as wholesalers and call center employees, to do their jobs without incurring fiduciary liability. So long as there is no recommendation in conjunction with a sales pitch or the provision of investment education, the communication will not be viewed as the provision of investment advice. That being said, there is still risk even in these areas, if the person making the sales pitch or providing investment education is viewed, based on the facts and circumstances, as having made a recommendation. **Disclaimers** The preamble discussion in the adopting release talks about disclaimers of fiduciary status — basically saying that, in order for a disclaimer to be valid, the words of the disclaimer and the actions of the advice provider must match. In the DOL's example, a boilerplate disclaimer of fiduciary status is insufficient to defeat fiduciary status under the rule when the rest of the advice provider's communications are calculated to reassure the investor that, in fact, the advice is precisely the sort of trustworthy advice that meets the regulatory standard. **Exemptions** For those individuals who are deemed to be investment advice fiduciaries, in order to receive third-party compensation, they will need to rely on a prohibited transaction exemption or risk excise taxes and enforcement action. PTE 2020-02 has broad applicability and is available for any investment product sold to a retirement investor and any compensation received for such sale. It requires acknowledgment of fiduciary status to the retirement investor, compliance with impartial conduct standards, establishment of policies and procedures designed to prevent conflicts of interest, and significant disclosure requirements. There also is a requirement that a financial institution conduct an annual retrospective review. In the final

version of PTE 2020-02, the DOL:

- Tries to bring the language of the impartial conduct standards closer to the language in SEC Regulation Best Interest by referring to the duties of “care” and “loyalty”;
- Creates more flexibility in the timing of disclosures requiring notices be made prior to the time the financial institution is entitled to receive compensation as a result of the regulation;
- Allows both robo-advisers and pooled plan providers to use PTE 2020-02;
- Broadens the disqualification to include affiliate convictions and foreign convictions (similar to recent changes to the QPAM Exemption PTE 84-14);
- Requires reporting non-exempt prohibited transactions to the IRS and the payment of any excise taxes;
- Calls out account type as one of the recommendations that will require the use of a PTE; and
- Adds non-bank trustees and custodians to the definition of financial institution.

PTE 84-24 is a commonly used exemption for the receipt of commissions from third parties by insurance agents and brokers. The earlier proposed changes to PTE 84-24, which apply PTE 84-24 only to independent insurance agents of unaffiliated financial institutions selling only non-security products remain, but the requirement that only insurance sales commissions be received for the purchase of a non-security product has been eliminated. The final version requires the receipt of “reasonable compensation” from all sources, including revenue-sharing payments, marketing fees, administrative payments, and other third-party payments subject to compliance with the exemption’s “impartial conduct standards” and other requirements. **What Do Financial Institutions and Providers Need to Do?** Because the adopted rule broadens the definition of who is an investment advice fiduciary, more entities and advisers will likely be subject to the rule and will need to rely on PTEs to effectuate sales and receive compensation. Institutions relying on PTE 2020-02 and PTE 84-24 as adopted will be required to update disclosures and make changes to their policies and procedures to align them with mitigating conflicts and complying with impartial conduct standards. The impartial conduct standards include a care standard, a loyalty standard, a reasonable compensation standard, and a requirement to make no misleading statements about investment transactions and other relevant matters. As mentioned above, for PTE 2020-02 and PTE 84-24 there will be a one-year transitional rule where exemptive relief will require a written acknowledgment of fiduciary status and compliance with the impartial conduct standards. Those already complying with the existing PTE 2020-02 should have less of a burden complying in the interim or modifying the earlier version of PTE 2020-02 that had already been adopted. We anticipate there will be court actions challenging the rule and related PTE amendments. Copies of the rule and related exemptions can be found on the [Department of Labor’s website](#).

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