

The DOL Fiduciary Rule Is Here – Are You an Investment Advice Fiduciary?

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The Department of Labor’s final rule for the definition of “investment advice” fiduciary makes many more individuals fiduciaries under both the Employee Retirement Income Security Act (ERISA) and/or the Internal Revenue Code (IRC). For decades there was a five-part test that made a distinction between sales activity and ongoing, individualized investment advice that was relied upon by an investor as a primary basis for investment. This has now been replaced by the new definition and tries to cover all investment professionals who interact with retirement investors and make recommendations for investments in a way that a reasonable retirement investor might think they were acting as a fiduciary. The rule now encompasses both individual retirement accounts (IRAs) and single rollover transactions from ERISA plans and IRAs. The effective date of the DOL fiduciary rule is September 23, 2024. However, there is a yearlong phase-in-period in which covered individuals can receive compensation for sales from third parties (such as insurers and independent marketing organizations), by complying with the impartial conduct standards and making a written acknowledgment that they are acting as a fiduciary under ERISA, the IRC, or both ERISA and the IRC. The ERISA and the IRC prohibited transaction rules are complicated. Once you are a fiduciary, you have even more prohibitions on your interactions with plans and IRAs. The new rule defining an investment advice fiduciary is very dense. The test is now based on facts and circumstances rather than objective criteria and tries to align with whether a reasonable retirement investor would think a financial professional was acting as a fiduciary. Consequently, there are a lot of questions about who might be a fiduciary, and the obligations that would then follow. Notably, where someone is acting as an investment advice fiduciary, they will need a prohibited transaction exemption (PTE) to collect related third-party compensation. Where no PTE is used, a prohibited transaction would result and where ERISA applies this could lead to personal liability for any losses. Additionally, where the IRC applies there could be adverse tax consequences, including penalties to the provider and the retirement account. As these are new rules and have not yet been tested, there may also be additional theories under which fiduciaries could be sued in any instance. To help you understand the new fiduciary rule, Carlton Fields’ ERISA and financial services regulatory attorneys have created an

Investment Advice Fiduciary Toolkit. The toolkit includes a decision matrix to help individuals self-assess whether their actions make them an investment advice fiduciary under ERISA or the Internal Revenue Code, as well as high-level checklists for the two most relevant PTEs to help you understand what compliance might look like with these exemptions.

- [Am I Acting as an Investment Advice Fiduciary?](#)
- [Amended Prohibited Transaction Exemption \(PTE\) 84-24 Checklist](#)
- [Requirements for Amended Prohibited Transaction Exemption \(PTE\) 2020-02](#)

If you have questions about the new fiduciary rule, or questions related to retirement accounts or benefits, please contact the authors of this article or a member of our [Employee Benefits, Compensation & ERISA](#) team.

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