

DOL Tries Once Again To Define What Constitutes Investment Advice Under ERISA

November 08, 2023

On Friday, November 3, the [Federal Register](#) published the U.S. Department of Labor's (DOL) latest attempt to redefine who is an "investment advice fiduciary" under ERISA. In conjunction with the regulatory proposal, the Federal Register also published DOL amendments to several existing prohibited transaction exemptions. The proposal has generated a strong adverse reaction from a broad coalition of industry trade groups. For example, the Insured Retirement Institute stated: "IRI will fight this proposal just as we did with DOL's 2016 poorly concocted fiduciary rule that also masqueraded as consumer protection but instead caused extensive harm." The National Association of Fixed Annuities stated: "The initiative also runs contrary to the fact that Congress passed, and the Administration recently signed, legislation to give Americans more access to annuities." Finally, the American Council of Life Insurers stated: "The proposal is out of touch with the anxieties of regular people who are worried about savings lasting through retirement, the effect of volatile markets on 401(k)s, and the high cost of living." **The Investment Advice 5-Part Test** The DOL's reexamination of the initial regulatory definition of investment advice, which was issued in 1975 and provided a 5-part test for establishing investment advice fiduciary status, began in 2010, and has culminated in this most recent iteration. The 5-part test required that (1) investment recommendations be made (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The current proposal eliminates the mutual agreement, arrangement, or understanding requirement as well as the primary basis requirement. Thus, someone could be classified as a fiduciary when providing individualized investment advice to customers or clients, in general, on a regular basis, even if they are not designated as investment advice fiduciaries in an agreement, and their advice is only one of several factors considered by the ultimate decision-maker. The proposal also amends the regular basis requirement to require that investment recommendations be "part of such person's business." Finally, a person will be considered an investment advice fiduciary if such person

represents or acknowledges fiduciary status when making recommendations. **Recommendation Definition** The DOL views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action. The more individually tailored the communication is to a specific retirement investor or investors, the more likely the communication will be viewed as a recommendation. In determining if there has been a “recommendation,” the DOL has stated that it will consider a recommendation that satisfies the requirements of the SEC’s Regulation Best Interest as a recommendation for purposes of its proposed regulation. **Regular Basis as Part of a Person’s Business** With regard to whether a person is making recommendations on a “regular basis as part of such person’s business,” the DOL provided the following examples that would satisfy this requirement under the proposal:

- An insurance agent’s recommendation to invest a retiree’s retirement savings in an annuity if the agent regularly makes investment recommendations to investors, and the circumstances indicate that the recommendation is based on the retiree’s particular needs and circumstances and may be relied upon for making an investment decision that is in the investor’s best interest.
- An insurance agent told the retiree that he/she was rendering fiduciary advice, even if it was one-time advice.

Rollovers as Investment Advice The DOL continues to insist that recommendations to roll over retirement assets are fiduciary recommendations. Accordingly, the proposed regulation provides as a category of covered recommendations, recommendations “as to rolling over, transferring, or distributing assets from an employee benefit plan or IRA, including recommendations as to whether to engage in the transaction, and the amount, the form, and the destination of such a rollover, transfer, or distribution.” In addition, recommendations as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA will be treated as fiduciary recommendations.

Amendments to Existing Prohibited Transaction Exemptions In addition to issuing the proposed regulation, the DOL is also proposing amendments to certain existing prohibited transaction exemptions, including PTE 84-24 and PTE 2020-02. **Proposed Changes to PTE 84-24** The DOL is proposing significant changes to PTE 84-24. First, investment advice fiduciaries who are not independent producers, as defined below, can no longer rely on the exemption for relief. Thus, insurance agents who have relied on PTE 84-24, and its predecessor PTE 77-9, in order to receive commissions in connection with any of the covered transactions, but who are not independent producers, will have to rely on PTE 2020-02 to do so. **Requirements for Insurers** Under the proposed amended PTE 84-24, in complying with the exemption’s conditions, insurers will not necessarily become a fiduciary. However, the proposed amended PTE 84-24 requires insurers to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of the exemption. In addition, insurers are required to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations

of, and achieve compliance with, the Impartial Conduct Standards and the terms of the exemption.

Independent Producers The proposed new PTE 84-24 would be available only for investment advice that is provided by an independent producer who works with two or more unrelated insurers to sell fixed annuities or other insurance products not regulated by the SEC. Investment advice regarding any other investment products will require compliance with PTE 2020-02. An independent producer is defined as a person or entity that is licensed under the laws of a state to sell, solicit or negotiate insurance contracts, including annuities, and that sells to retirement investors products of multiple unaffiliated insurance companies but is not an employee of an insurance company (including a statutory employee under Code section 3121). **Definition of Compensation** The

proposed new PTE 84-24 also limits the compensation that can be received under PTE 84-24 to "sales commissions for the service of recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the insurance company or its affiliates, or any other similar fees." **Proposed Changes to PTE 2020-02**

The proposed changes to PTE 2020-02 relate to (1) additional disclosures in order to comply with the current disclosure requirement in PTE 2020-02, and (2) additional guidance for complying with the Impartial Conduct Standards and implementing the requirement that policies and procedures be established. In addition, the proposed amendment would add failure to correct prohibited transactions and report those transactions to the IRS and pay the resulting excise tax imposed under the Code to the list of behaviors that could make a financial institution ineligible to rely on PTE 2020-02 for 10 years. Importantly, the DOL is not (1) proposing a contract for investment advice as was required in the 2010 proposals, (2) creating any new causes of action, or (3) requiring that financial institutions provide enforceable warranties to retirement investors. Comments are due on or before January 2, 2024. The DOL anticipates a public hearing 45 days after publication in the register.

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