# Am I Acting as an Investment Advice Fiduciary?

## DOL Fiduciary Rule Definition of Investment Advice

ERISA section 3(21) defines an investment advice fiduciary as a person to the extent "he renders investment advice for a fee or other compensation, direct or indirect," with respect to plan assets. Where an investment professional meets the definition under 3(21) of ERISA, the receipt of compensation from a third party (anyone other than the advice recipient) would be a prohibited transaction and an exemption would need to be used to receive such compensation.

**Two ways to become a fiduciary while making an investment recommendation to a retirement investor for a fee:**

**1** A 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 that person makes a recommendation to a retirement investor under circumstances that would indicate to a reasonable investor that the recommendation:

- Is based on review of the retirement investor's particular needs or individual circumstances;
- Reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances; and
- May be relied upon by the retirement investor as intended to advance the retirement investor's best interest.

**2** The person represents or acknowledges that he/she is acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

For both of these definitions, there are additional questions you must ask to determine whether a person has given covered fiduciary investment advice.

**Questions to help determine whether an investment professional rendered advice covered by the investment advice fiduciary definition, thereby becoming an investment advice fiduciary under ERISA or the Internal Revenue Code.**

**1** Was there a written or verbal communication with a **retirement plan investor**? Retirement plan investor includes: an IRA, IRA fiduciary, IRA owner or beneficiary, an ERISA plan, a plan participant or beneficiary, or a fiduciary of an ERISA plan. (However, this doesn't include plan and IRA fiduciaries who are only themselves acting as investment advice fiduciaries and do not have discretion or control over assets.)

If **YES**, continue to question 2. If **NO**, you will not be an investment advice fiduciary. Without a communication to a retirement plan investor, the definition will not apply.

**2** Did you represent or acknowledge you are acting as a fiduciary under Title I, Title II or both Titles of ERISA?

If **YES**, continue to question 8. If **NO**, continue to question 3.

**3** Was the information given general in nature, and through its context and content was it purely educational or for the purpose of getting hired? The DOL has indicated that, absent a recommendation, this type of information will likely not result in a person becoming a fiduciary. However, the more specific the information, the more likely it is to rise to the level of a recommendation. Providing a sample investment lineup that is individualized, or stating investments are appropriate to a plan, might be enough to rise to the level of a recommendation, depending on the facts and circumstances.

If **YES**, you are likely not acting as an investment advice fiduciary. If **NO**, continue to question 4.

**4** Was the communication regarding (a) the advisability of acquiring, holding, disposing of, or exchanging a security or other property (this can include a one-time IRA, or plan account rollover, if your regular business is providing investment advice); (b) using an investment strategy or policy; (c) structuring the composition of a portfolio; (d) selecting other persons to provide investment advice; or (e) voting proxies? Simply being an order taker or marketing services may not rise to the level of advice.

If **YES**, continue to 5. If **NO**, you are likely not acting as an investment advice fiduciary.

**5** Whether a recommendation has been made will turn on the facts and circumstances of the particular situation, including whether the communication reasonably could be viewed as a "call to action." The more individually tailored the communication to a specific customer or a targeted group of customers about a security or other investment or group of securities or other investments, the greater the likelihood the communication may be viewed as a recommendation. Did it include messaging that would reasonably influence an investor to make a decision about the investment/strategy/options listed in question 4?

If **YES**, continue to question 6. If **NO**, you are likely not acting as an investment advice fiduciary.

**6** Does the investment professional either directly or indirectly provide professional investment advice to individuals or other parties as a regular part of his business?

If **YES**, continue to 7. If **NO**, you are likely not acting as an investment advice fiduciary. Note that if you are engaged regularly in sales of annuities or investments under Regulation BI or the NAIC Model Suitability Regulation, you will likely meet this criteria.

**7** Was the recommendation made in a way that would indicate to a reasonable investor in like circumstances that the recommendation:

- Is based on a review of the retirement investor's particular needs or individual circumstances;
- Reflects the application of professional or expert judgment to the retirement investor's particular needs; and
- May be relied upon by the retirement investor as intended to advance the retirement investor's best interest?

If all three are **YES**, continue to question 8. If **NO**, you are likely not acting as an investment advice fiduciary.

**For compensation direct or indirect**

**8** Do you or an affiliate receive fees, commissions or other non-cash compensation from a third party related to these transactions, understanding payments can be direct or indirect? The DOL uses a broad definition to determine whether an investment advice fiduciary has received compensation.

If **YES**, you are likely an investment advice fiduciary and must, as a result, comply with an exemption to make investment recommendations to retirement plan investors and receive compensation from a third party. If **NO**, you are likely not an investment advice fiduciary.

## What do financial institutions and providers need to do if investment professionals are acting as fiduciaries?

Those acting as investment advice fiduciaries will need to rely on exemptions to receive third-party compensation related to investment advice. Advice givers will likely need to rely on either prohibited transaction exemption (PTE) 2020-02 or PTE 84-24. PTE 2020-02 is available for a wide range of activities. PTE 84-24 is limited to independent producers selling non-security insurance contracts of two or more unrelated insurers.