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DOL Issues New Proposed Fiduciary Rule



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On Tuesday, October 31, 2023, the U.S. Department of Labor (the "DOL") issued a new [proposed rule](#) pertaining to the definition of "fiduciary" under ERISA and Section 4975 of the Code. If adopted, the proposed rule would replace the DOL's long-standing regulation addressing when a person is a fiduciary under ERISA in connection with the provision of investment advice. As drafted, the proposed rule would meaningfully expand the number of persons that would be considered fiduciaries in connection with the provision of investment advice. This proposed rule is the latest attempt by the DOL to change the definition of an investment advice fiduciary under ERISA and the Code. In 2018, the Fifth Circuit Court of Appeals vacated the DOL's 2016 fiduciary regulation, its previous rulemaking effort to change this definition.

Under the [existing DOL regulation](#), originally issued in 1975, a person is an investment advice fiduciary if he or she meets all elements of a five-part test set forth in the regulation. Under this test, a person is an investment advice fiduciary only if (1) he or she renders investment advice as to the value of securities or other property, or makes recommendations regarding the advisability of investing in, acquiring or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement or understanding, (4) that the advice will serve as a primary basis for investment decisions with respect to plan assets and (5) such advice is individualized based on the particular needs of the plan.

The DOL proposes changing this to provide that a person will be an investment advice fiduciary under ERISA and Section 4975 of the Code if he or she provides investment advice or makes a recommendation to a retirement investor (including an employee benefit plan, IRA, plan fiduciary, plan participant or plan beneficiary) for a fee or other compensation (direct or indirect) in one of the three following contexts:

- the person directly or indirectly (*e.g.*, through or together with any affiliate) has discretionary authority or control (whether or not pursuant to an

agreement, arrangement or understanding) with respect to purchasing or selling securities or other property for the retirement investor;

- the person directly or indirectly (*e.g.*, through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by such investor as a basis for investment decisions that are in such investor's best interest; or
- the person making the recommendation represents or acknowledges that he or she is acting as a fiduciary when making such recommendation.

According to the DOL, the existing regulation is outdated and too narrow in application, and it believes the proposed rule “better reflects the text and purposes of [ERISA] and better protects the interests of retirement investors. . . .”

In connection with this proposal and the contemplated changes to the investment advice fiduciary definition, the DOL is also proposing amendments to the following prohibited transaction class exemptions (PTCE) available to investment advice fiduciaries– [PTCE 2020-02](#), [PTCE 86-128](#), [PTCE 84-14](#), [PTCE 83-1](#), [PTCE 80-83](#), [PTCE 77-4](#) and [PTCE 75-1](#), [Parts III and IV](#).

Comments on the proposed rule and proposed class exemption amendments are due on or before January 2, 2024. The DOL also anticipates holding a public hearing.
