

## DOL Issues Final Rule Regarding Fiduciary Investment Advice

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On Tuesday, April 23, 2024, the U.S. Department of Labor (the “DOL”) released its new final rule (the “Final Rule”) regarding when a person becomes a “fiduciary” by virtue of providing investment advice for purposes of the Employee Retirement Income Security Act of 1974 (“ERISA”) and Section 4975 of the [Internal Revenue Code of 1986](#) (the “Code”). Upon becoming effective, the Final Rule will meaningfully expand the definition of fiduciary as it pertains to the provision of investment advice. The Final Rule is the latest in the DOL’s efforts to change this definition. In 2018, the Fifth Circuit Court of Appeals vacated the DOL’s 2016 fiduciary regulation, its last formal rulemaking effort in this regard.

Under the [current DOL regulation](#), issued in 1975, a person is an investment advice fiduciary if he or she meets all elements of a five-part test set forth therein. 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 believes a change is necessary to modernize the definition of an investment advice fiduciary under ERISA and Section 4975 of the Code given certain market changes since 1975, including the rise of participant-directed plans and IRAs. The DOL also noted in the related preamble that the Final Rule closes what the DOL believes are loopholes in the five-part test that serve to “defeat retirement investors’ legitimate investor expectations when they received investment advice from trusted advice providers in the modern market place . . .”

Under the Final Rule, a person renders fiduciary “investment advice” for purposes of ERISA and Section 4975 of the Code if he or she makes a recommendation regarding any securities transaction or other investment transaction or any investment strategy involving securities or other investment property to a retirement investor (including any plan, plan participant or beneficiary, IRA, IRA owner, IRA beneficiary, and any fiduciary with authority or control) for a fee or other compensation (direct or indirect), and either of the following is satisfied:

- (i) 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 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; or

- o (ii) the person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Section 4975 of the Code, or both, with respect to the recommendation.

The Final Rule represents a significant departure from the existing rule. Among other changes, the Final Rule scraps the "regular basis," "mutual agreement" and "primary basis" prongs of the existing regulation's five-part test (including to address the DOL's loophole concerns) in favor of the new standard in (i), above. As noted previously, the Final Rule represents a meaningful expansion of the investment advice fiduciary definition.

For purposes of the final rule, recommendations addressing the following are picked up:

- the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, investment strategy, or how securities or other investment property should be invested following a rollover, transfer, or distribution;
- the management of securities or other investment property, including, among other things, recommendations on policies or strategies, portfolio composition, selection of others to provide investment advice or management services, selection of account arrangements or voting of proxies; and
- rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of a rollover, transfer, or distribution.

The DOL confirmed that it intends that whether a recommendation has been made will be construed consistent with the Securities and Exchange Commission's Regulation Best Interest, with a focus on whether there has been a "call to action."

The Final Rule also provides that:

- salesperson recommendations will not trigger fiduciary status if such person does not provide such recommendations in either context outlined above for providing fiduciary advice;
- the mere provision of investment information or education without an investment recommendation is not covered advice; and
- written statements disclaiming fiduciary status under ERISA or Section 4975 of the Code, the Fiduciary Rule or the conditions to providing advice set forth above, will not control to the extent such statements are inconsistent with other oral and written communications, applicable Federal and State law or other interactions with the retirement investor.

In connection with the Final Rule, the DOL also amended the following prohibited transaction class exemptions ("PTCE") – PTCE 2020-02, PTCE 86-128, PTCE 84-24, PTCE 83-1, PTCE 80-83, PTCE 77-4 and PTCE 75-1. As a general matter, [PTCE 2020-02](#) (which generally

provides relief for covered persons providing fiduciary advice to receive compensation that would otherwise be prohibited) will now be the primary class exemption available to provide exemptive relief for the receipt of compensation by investment advice fiduciaries that would otherwise be prohibited by ERISA and Section 4975 of the Code, although [PTCE 84-24](#) (which has been available to provide relief for certain transactions involving insurance agents and brokers, pension consultants, insurance and investment companies and investment company underwriters) will now provide relief for independent insurance agents receiving compensation that would otherwise be prohibited in connection with the provision of certain investment advice. The DOL removed the other existing relief in PTCE 84-24 for investment advice transactions and also removed relief for investment advice transactions from the transactions covered by each of [PTCE 86-128](#), [PTCE 83-1](#), [PTCE 80-83](#), [PTCE 77-4](#) and [PTCE 75-1](#), Parts III and IV.

The effective date for the Final Rule and the changes to the relevant PTCEs is September 23, 2024. There is a one-year transition period after the effective date for certain conditions in PTCE 2020-02 and PTCE 84-24.