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DOL Proposes Expanded Definition of Investment Advice Fiduciary

The Department of Labor (DOL) recently released a regulatory package that includes a proposed amendment to the regulations that define what constitutes an investment advice fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the “[Retirement Security Rule](#)”). The DOL also released proposed amendments to several prohibited transaction exemptions (PTEs) available to investment advice fiduciaries, including [Prohibited Transaction Exemption \(PTE\) 2020-02, Improving Investment Advice for Workers & Retirees](#); [PTE 84-24, Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, Investment Companies, and Investment Company Principal Underwriters](#); [PTE 75-1](#); [PTE 77-4](#); [PTE 80-83](#); [PTE 83-1](#); and [PTE 86-128](#).

The proposed rule expands the definition of fiduciary; requires that advice being given to a broader range of retirement investors meet fiduciary standards; and treats more rollover recommendations as fiduciary advice.

Background

An individual that is considered a fiduciary is subject to certain duties and restrictions under ERISA and is also subject to prohibitions against transactions involving conflicts of interest under the Internal Revenue Code. Regulations defining a fiduciary for investment advice purposes were originally issued in 1975, at a time when pension plans were the predominant type of retirement plan, participant-directed 401(k) plans did not exist, and Traditional IRAs were in their first year of availability. Today, the DOL's stated intent is to update the regulations to make them more consistent with the text of the statutory definition, better protect retirement investors who more commonly accept primary responsibility for their personal investment decisions, and further provide a uniform standard for all retirement investors in light of rulemaking by other regulators—including the Securities and Exchange Commission (SEC) and National Association of Insurance Commissioners (NAIC).

The current regulations provide a “[five-part test](#),” which defines whether an individual is a fiduciary for investment advice purposes under ERISA and the Internal Revenue Code. Changes to the regulations were made final in 2016, but were ultimately vacated in 2018, along with several accompanying PTEs, by the U.S. Court of Appeals for the Fifth Circuit. Consequently, the 1975 regulatory text known as the five-part test was reinstated.

In December 2020, the DOL finalized PTE 2020-02, a class exemption and interpretation, which essentially replaced the guidance package that was vacated in 2018. PTE 2020-02 was later supplemented by a set of frequently asked questions (FAQs) issued by the DOL in April 2021. In 2023, a trial court invalidated DOL guidance published in the FAQ on whether an individual becomes a fiduciary under ERISA by advising a plan participant to complete a rollover.

Definition of Investment Advice Fiduciary

The DOL has identified shortcomings with several aspects of the current five-part test. The DOL believes these shortcomings can undermine the legitimate expectations of retirement investors who may reasonably believe they are receiving fiduciary advice when they are not.

To address these and other issues, the DOL proposes a three-part test to determine if an individual meets the definition of a fiduciary when providing investment advice. This proposal is intended to address the Fifth Circuit's finding that the 2016 final rule overextended to relationships that lacked the "trust and confidence that characterizes fiduciary status."

Under the proposal, individuals are investment advice fiduciaries if

- they meet one of the following three criteria:
 - have discretionary authority or control with respect to purchasing or selling securities or other investment property of the retirement investor,
 - make 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 the retirement investor as a basis for investment decisions that are in the retirement investor's best interest, or
 - acknowledge that they are acting as a fiduciary when making investment recommendations; and
- they make a recommendation regarding an investment transaction or investment strategy involving securities or other investment property to a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary, or IRA fiduciary ("retirement investors"); and
- they receive a fee or other compensation, direct or indirect in connection with the recommendation.

The rule applies fiduciary status on a functional basis (i.e., an individual is only a fiduciary under the rule to the extent she meets the rule's requirements related to the specific advice transaction at issue). Some examples of activities that would fall within the scope of investment advice include recommendations on distributions (including rollovers or transfers into another plan or IRA), or recommendations to entrust plan assets to a particular IRA provider.

The DOL proposal generally applies to IRAs. In addition, the definition of "IRA" for purposes of the proposed rule also includes health savings accounts (HSAs), Archer medical savings accounts (MSAs), and Coverdell education savings accounts (ESAs).

In the preamble to the proposed rule, the DOL provides examples of certain activities that generally would not rise to the level of fiduciary investment advice, including

- platform providers who merely identify investment alternatives using objective third-party criteria;
- investment professionals that market the quality of services they offer;
- the provision of guidelines on voting policies for proxies provided to a broad class of investors;
- investment education; and
- providing valuation services, appraisal services, or fairness opinions (will be addressed in a separate rulemaking, according to the DOL).

Proposed Amendment to the Prohibited Transaction Exemption 2020-02

The DOL has also proposed an amendment to PTE 2020-02 that addresses how fiduciaries manage conflicts of interest with respect to giving investment advice. The proposed amendment would maintain all of the current requirements, including that the financial institution and its investment professionals

- comply with the "Impartial Conduct Standards," including the best interest standard;
- acknowledge their fiduciary status in writing;
- disclose their services and material conflicts of interest;
- adopt policies and procedures to ensure compliance with the exemption's conditions;
- document and disclose the basis for any rollover recommendations; and
- conduct an annual compliance review.

The proposed amendment adds several additional conditions and makes other clarifying changes. Specifically, the proposal would

- require additional disclosures, including a written statement of the best interest standard of care owed;
- expand the availability of the exemption to financial institutions providing advice through computer models (i.e., robo-advice) and investment advice provided by an investment professional, financial institution, or any affiliate that is a pooled plan provider;
- require financial institutions to provide their complete policies and procedures to the DOL upon request within 10 business days of request;
- require financial institutions to report any nonexempt prohibited transactions associated with fiduciary investment advice by filing [Form 5330](#), *Return of Excise Taxes Related to Employee Benefit Plans*;
- add to the list of behaviors that could make a financial institution ineligible to rely on PTE 2020-02 for a period of ten years, specifically, a systematic pattern of failing to correct prohibited transactions, report those transactions on Form 5330, and pay the excise tax; and
- not require a contract or other enforceable warranties for investment advice to IRAs.

The existing rules under the current exemption (PTE 2020-02) will apply until the final amendment to PTE 2020-02 becomes effective. Notably, the amendment would not apply to compensation received if the recommendation was made or a systematic purchase program was established before the amendment's effective date.

Proposed Amendments to Other Prohibited Transaction Exemptions

Amendments to PTE 84-24

Currently, PTE 84-24 permits insurance agents or brokers, pension consultants, and principal underwriters to receive compensation from the sale of insurance or annuity contracts or investment company securities to plans and IRAs. The proposed amendment would exclude investment advice fiduciaries from relief under the existing sections of PTE-84-24 and add a new section to PTE 84-24 providing relief to a select group of investment advice fiduciaries that are independent insurance agents (called Independent Producers). The DOL proposes this new exemptive relief as an alternative to PTE 2020-02 based on assertions by insurance companies that they face certain challenges in complying with PTE 2020-02 when dealing through independent insurance agents.

The proposed new section of PTE 84-24 would be available only for investment advice provided to a retirement investor by an independent insurance agent

- who works with multiple insurance companies;
- sells nonsecurities annuities or other insurance products not regulated by the SEC, including as part of a rollover;
- who fully discloses fees or commissions related to recommendations; and
- who complies with conditions similar to PTE 2020-02, with certain changes tailored to the unique conflicts of interest that arise when independent insurance agents provide advice regarding the purchase of an annuity.

Financial institutions and investment professionals, including insurance companies that are investment advice fiduciaries, which engage in all other investment advice transactions would rely on PTE 2020-02.

The current exemption (PTE 84-24) would remain available for all insurance agents and insurance companies that now rely on the exemption until the final amendment to PTE 84-24 becomes effective.

Amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128

The DOL also proposed amendments to several other prohibited transaction exemptions that provide relief for investment advice fiduciaries that enter into specific transactions. Primarily, the proposed amendments remove fiduciary investment advice from the list of covered transactions. As a result, investment advice fiduciaries would be required to rely on PTE 2020-02 to receive otherwise prohibited compensation.

Next Steps

The DOL proposes to make each of the amendments effective 60 days after they are published in the *Federal Register*. The DOL is accepting written public comments on the proposed amendments until January 2, 2024, with a public hearing anticipated to be set approximately 45 days following the date of publication of the proposed regulations in the *Federal Register*. Visit ascensus.com for the latest developments regarding the Retirement Security Rule and related proposed PTE changes.