

The Department of Labor's Final Investment Advice Rule

June 20, 2024

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On April 25, 2024, the Department of Labor ("DOL") published in the Federal Register its final regulation on its "fiduciary rule" (the "[Final Regulation](#)") clarifying when fiduciary status under the Employee Retirement Income Security Act of 1974, as amended ("[ERISA](#)") and section 4975 of the Internal Revenue Code of 1986, as amended (the "[Code](#)") attaches to the provision of investment advice to certain "retirement investors" (as defined in the Final Regulation and described below)¹. At the same time, the DOL released amendments to a few existing prohibited transaction class exemptions ("[PTEs](#)") (most notably PTE 2020-02) that provide the terms and conditions under which an investment advice fiduciary can receive direct or indirect compensation without violating ERISA.

The proposal of the fiduciary rule (the "[Proposed Regulation](#)") was published in the Federal Register on November 3, 2023 (see our prior [Alert](#) for a description of the key provisions of the Proposed Regulation). The Final Regulation revises some provisions of the Proposed Regulation in response to comments the DOL received. The Final Regulation and amendments to the PTEs will be effective on September 23, 2024.

This Alert describes the changes to the definition of "investment advice" and related concepts under the Final Regulation and to PTE 2020-02, which is a key exemption available for investment advice fiduciaries.

Updated Definition of Fiduciary "Investment Advice"

Overview

As with the Proposed Regulation, the updates to the definition of "investment advice" in the Final Regulation focus on whether the relationship between the provider of the investment advice and the recipient would suggest that the advice was given by someone in a position of trust and confidence. In particular, to be considered fiduciary investment advice, the person giving the advice must either:

- Make professional investment recommendations as a regular part of their business and make the particular recommendation at issue under circumstances that (1) would be viewed by a reasonable investor as being based on a review of the investor's individual needs and circumstances, (2) is reflective of the person's professional judgment and expertise as applied to the investor's individual needs and circumstances, and (3) may be relied upon by the investor as being intended to advance the investor's best interest; or
- Acknowledge that they are giving the advice as a fiduciary under ERISA (with respect to an employer retirement plan) or the Internal Revenue Code (with respect to an individual retirement account).²

The Final Regulation narrowed and clarified the contexts in which a person would be a fiduciary as compared to the Proposed Regulation. In the preamble to the Final Regulation, the DOL says its focus is on whether there is a reasonable expectation that the recommendation is made on the retirement investor's behalf or in the retirement investor's best interest. In such circumstances, "a retirement investor would be entitled to treat their relationship with the person making the recommendation as one of trust and confidence."³ The preamble explains that by referring to "professional" investment recommendations, the DOL intends to confirm that ordinary communications from a human resources employee who is not an investment professional would not be considered fiduciary investment advice.⁴

Importantly, the DOL cautions in the preamble to the Final Regulation that the "retirement investor doesn't need to be expressly told the recommendation is individualized when it follows the collection of information on the investor's personal financial needs or circumstances."⁵ Instead, the determination of whether fiduciary investment advice has been given depends on the various facts and circumstances of the parties' interactions, evaluated under the objective standard of a reasonable investor in like circumstances.

Effect of Disclaimers of Fiduciary Status

Under the Final Regulation, those who acknowledge fiduciary status with respect to investment advice will be considered fiduciaries. However, the preamble to the Final Regulation notes that disclaiming fiduciary status would not avoid fiduciary status if the disclaimer was inconsistent with oral or written communications between the provider of investment advice and the retirement investor. Further, the preamble says that a disclaimer of fiduciary status by a broker-dealer or registered investment adviser may be ineffective to the extent that they have obligations to act in a retail customer's best interest under SEC Regulation Best Interest.⁶

Retirement Investor

The Final Regulation generally defines "retirement investor" as a "plan, plan participant or beneficiary, IRA, IRA owner or beneficiary, plan fiduciary or IRA fiduciary."⁷ The term "retirement investor" is drafted broadly enough to apply to HSAs and ERISA-covered health and welfare benefit plans but the DOL acknowledged that many HSA providers would not be deemed to be fiduciaries of retirement investors under the Final Regulation (if, for example, they are platform providers, or if they "merely identify investment alternatives... without additional screening or recommendations based on the interest of the retirement investor").⁸ Further, recommendations about health and welfare plans that don't have an investment component (for example, recommendations to purchase certain insurance products) are not fiduciary investment advice under the Final Regulation.⁹

Finally, while the DOL considered further clarifying the definition of "retirement investor" to carve out certain parties that are financially sophisticated, it declined to do so in the Final Regulation. Instead, the DOL noted that it intends to rely on the facts and circumstances test articulated in the Final Regulation to analyze the fiduciary status of all recommendations, stating that: "when a financially sophisticated retirement investor engages in an arm's length transaction with a counterparty who makes an investment recommendation, absent an acknowledgment of fiduciary status under ERISA Title I or Title II, it is appropriate to consider whether a reasonable investor *in like circumstances* would rely on the recommendation as intended to advance the investor's best interest."¹⁰

Management of Other Investments

The Proposed Regulation provided that, in addition to the circumstances noted above, a person would be a fiduciary of a retirement investor if the person has discretionary authority or control with respect to purchasing or selling securities or other investment property for the retirement investor, which could include discretionary authority over an individual's non-retirement plan assets. The Final Regulation eliminated this aspect of the Proposed Regulation, relying instead on the general facts and circumstances approach articulated in the remainder of the Final Regulation's definition of investment advice.

Recommendations

Fiduciary investment advice can only occur when a "recommendation" is made. In the preamble to the Proposed Regulation, the DOL had stated that in its view, a "recommendation" is a communication that would be reasonably viewed as suggesting that a retirement investor engage in or refrain from taking a particular action. The DOL clarified in the preamble to the Final Regulation that whether a "recommendation" has been made will depend on objective factors, including whether it would reasonably be viewed as a call to action, and the more tailored a communication is to a retirement investor, the more likely it would be viewed as a recommendation. In this respect, the DOL intends that whether a recommendation has been made will be construed consistently with the SEC Regulation Benefit Interest.

"Investment education" will generally not be considered to be a recommendation under the Final Regulation. DOL Interpretive Bulletin 96-1, relating to participant investment education, is not changed by the Final Regulation. Therefore, plan sponsors and their advisors and consultants can continue to provide participants with certain nonfiduciary investment education (such as general financial and investment information) and service providers can provide investment education or information to plan sponsors in certain circumstances, in each case without being deemed to be investment advice fiduciaries with respect to the education or information. However, the DOL cautions that firms and individuals who cross the line between an investment recommendation and investment education (i.e., where there is a call to action) wouldn't be exempt from the imposition of fiduciary status under the Final Regulation.

The Final Regulation provides limited relief for sales presentations. Under the Final Regulation, sales presentations can occur without fiduciary status attaching as long as either (1) the recommendation does not satisfy the other elements of the definition of investment advice in the Final Regulation; or (2) the communication is not a recommendation. The preamble to the Final Regulation addresses that general marketing materials that tout advisory services would not by themselves give rise to fiduciary investment advice. However, communications made as part of a sales pitch may be considered to be fiduciary investment advice based on the facts and circumstances.¹¹

Fee or Other Compensation (Direct or Indirect)

The provision of investment advice alone does not render one a fiduciary under ERISA and the Code. Fiduciary status only results when such investment advice is provided for a fee or other compensation. The DOL has always taken an expansive view of what constitutes a fee or other compensation for this purpose. The Final Regulation states that investment advice is considered to be provided "for a fee or other compensation" if any explicit fees are received directly from the retirement investor or indirectly through commissions, revenue sharing payments, finder's fees, gifts, or other payments from third parties in connection with the advice.¹²

Amendments to PTE 2020-02

A "prohibited transaction" can occur when a fiduciary provides investment advice to a retirement investor that results in the fiduciary receiving additional or greater compensation, whether directly or indirectly. For example, a prohibited transaction may result if an investment adviser provides fiduciary investment advice to a client to roll assets out of a 401(k) plan into an IRA managed by the adviser if the adviser will receive additional fees from the rollover IRA. Fiduciaries who engage in prohibited transactions involving employer retirement plans and IRAs may be subject to adverse consequences, including IRS excise taxes and a requirement to "unwind" the transaction and disgorge any profits the fiduciary earned from the prohibited transaction. However, several prohibited transaction exemptions are available that permit fiduciaries to receive compensation relating to fiduciary investment advice as long as the fiduciary complies with the conditions of the applicable prohibited transaction exemptions.

In connection with the Final Regulation, the DOL amended PTE 2020-02, which provides relief for investment advice fiduciaries, including registered investment advisers, banks, insurance companies, and their respective employees and agents, that satisfy its disclosure obligations and other conditions. These requirements from the original PTE 2020-02 are described in our earlier post: [PTE 2020-02 for Investment Advice Fiduciaries: Overview and Checklist](#). In addition, several other existing PTEs that may apply for certain types of investment advice by financial institutions, including banks, registered investment advisers, insurance companies and agents, and broker-dealers, have been amended in connection with the issuance of the Final Regulation. Discussion of these other existing PTEs is beyond the scope of this article.

At the core of PTE 2020-02, as amended, are the "Care Obligation," which is similar to an ERISA prudence standard, and the "Loyalty Obligation," which requires that the advice must not put the financial institution's or financial professional's interests ahead of the retirement investor's interests. The amendment to PTE 2020-02 requires these standards to be described in a written statement to the retirement investor. The DOL believes that investment advisers or broker-dealers with retail investors may already satisfy this obligation through their Form ADV.¹³

PTE 2020-02 also requires disclosures of material facts relating to the transactions, the services provided to the retirement investor, and any conflicts of interest. Additionally, PTE 2020-02 requires policies and procedures to be in place to mitigate potential conflicts of interest, including compensation arrangements that could conflict with the Care Obligation or Loyalty Obligation, and a retrospective review of compliance by a Senior Executive Officer.

Among the other key changes to PTE 2020-02 are:

- **Acknowledgement of Fiduciary Status.** Currently, PTE 2020-02 requires an acknowledgement of fiduciary status. However, the DOL offered sample language that said: "*When we provide investment advice to you regarding your retirement plan account or individual retirement account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts.*"¹⁴ By using this language, advisers would not necessarily be acknowledging that they are a fiduciary with respect to the specific advice given, only that they are fiduciaries "when we provide investment advice." This could potentially allow for advisers to take the position that PTE 2020-02 disclosures could be provided without conceding that any fiduciary investment advice had been offered.

The amendment to PTE 2020-02 seeks to end this possibility by requiring that it be "unambiguously clear" that the recommendation is being made in a fiduciary capacity in order to rely on the exemption.¹⁵ The DOL also provided the following new disclosure language:

*We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts.*¹⁶

This is a key point because under the Final Regulation an acknowledgement of fiduciary status is sufficient for a recommendation to be considered fiduciary investment

advice. As a result, financial institutions will need to assess whether they want to make an explicit acknowledgement of fiduciary status, especially with respect to rollover transactions, which would be required for reliance upon the exemption.

- Rollover Disclosures. As amended, PTE 2020-02 requires a detailed analysis supporting the basis of a rollover recommendation, including a comparison to the alternative of leaving money in a 401(k) plan. The DOL believes that this information should be available by obtaining participant fee disclosures or the Form 5500 filing for the plan. However, the rollover disclosures will not be required for transactions that do not involve only IRAs (such as the transfer of an IRA to an account with a different fee structure).

Financial institutions will need to assess whether they will need to rely on PTE 2020-02 relating to investment advice to retirement investors, and the extent to which any changes will be required to their policies and procedures (including disclosure documents), before the September 23, 2024 effective date of the Final Regulation and the amendment to PTE 2020-02.

Footnotes

¹ Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32122 – 32258 (April 25, 2024) (revising 29 C.F.R. § 2510.3-21).

² 29 C.F.R. § 2510.3-21(c).

³ 89 Fed. Reg. at 32137.

⁴ 89 Fed. Reg. at 32151.

⁵ 89 Fed. Reg. at 32152.

⁶ 89 Fed. Reg. at 32155.

⁷ 29 C.F.R. § 2510.3-21(f)(11).

⁸ 89 Fed. Reg. at 32162.

⁹ 29 C.F.R. § 2510.3-21(f)(12).

¹⁰ 89 Fed. Reg. at 32160 (emphasis in original).

¹¹ 89 Fed. Reg. at 32164.

¹² 29 C.F.R. § 2510.3-21(e).

¹³ 89 Fed. Reg. at 32289.

¹⁴ New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions (April 2021), <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption>.

¹⁵ 89 Fed. Reg. at 32270.

¹⁶ 89 Fed. Reg. at 32271.

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