

CLIENT ALERT

U.S. Department of Labor Adopts the Retirement Security Rule: Definition of an Investment Advice Fiduciary for Purposes of ERISA and the Code

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On April 23, 2024, the U.S. Department of Labor (the “DOL”) adopted the Retirement Security Rule (the “Final Rule”) defining when a person who renders investment advice is an investment advice fiduciary for purposes of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and parallel provisions of the Internal Revenue Code of 1986, as amended (the “Code”).¹ In addition to the Final Rule, the DOL adopted final amendments to the following Prohibited Transaction Exemptions that investment advisers rely on in connection with their recommendations of investment products to ERISA plans and other retirement investors (the “PTEs”): PTE 2020-02 (the “PTE 2020-02 Amendment”); PTE 84-24 (the “PTE 84-24 Amendment”); and several other existing PTEs (together with the PTE 2020-02 Amendment and the PTE 84-24 Amendment, the “PTE Amendments”).² The Final Rule and PTE Amendments were initially proposed by the DOL on October 31, 2023 (the “Proposed Rule”).

The Final Rule describes the circumstances in which an investment adviser or other financial professional would be considered a “fiduciary” under ERISA and/or Section 4975 of the Code when such professional provides investment recommendations to “retirement investors” (including ERISA plans, individual retirement accounts and other plans subject to Section 4975 of the Code (collectively, “IRAs”), participants in such plans, IRA owners, and fiduciaries to these plans). The PTE Amendments explain the conditions such advisers must follow to protect retirement investors from certain conflicts

¹ Retirement Security Rule: Definition of an Investment Advice Fiduciary (Apr. 23, 2024), available [here](#).

² Amendment to Prohibited Transaction Exemption 2020-02 (Apr. 23, 2024), available [here](#); Amendment to Prohibited Transaction Exemption 84-24 (Apr. 23, 2024), available [here](#); Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128 (Apr. 23, 2024), available [here](#).

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in those circumstances. As further described below, under the Final Rule, investment advice provided by an adviser would be subject to a fiduciary standard under ERISA, the Code, or both if the advice satisfies each prong of a new test.

The Final Rule and the PTE Amendments generally become effective on September 23, 2024, although there is a one-year transition period after the effective date for certain conditions in the PTE Amendments.

Background

Under ERISA, “a person is a fiduciary with respect to a plan to the extent ... he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.”³

In 1975, the DOL issued a regulation clarifying this definition of “fiduciary” under ERISA and the Code (the “1975 Regulation”). The 1975 Regulation provides a five-part test for determining when a person “renders investment advice” within the meaning of ERISA (and parallel provisions of the Code in the case of IRAs).

Under the 1975 Regulation, a financial services provider was an investment advice fiduciary only if (i) its advice was provided on a “regular basis” with respect to plan assets and (ii) there was “a mutual agreement, arrangement, or understanding” that such advice would serve as “a primary basis for investment decisions.”⁴ As a result of the “regular basis” requirement, advice that was provided on a one-time basis, including a recommendation to roll retirement savings out of a workplace retirement plan and into an IRA, was generally not treated as fiduciary advice within the meaning of ERISA or the Code. As discussed below, however, the Final Rule significantly expands the regular basis requirement and brings certain one-time recommendations within the meaning of fiduciary investment advice under ERISA and/or the Code, as applicable.

Definition of an Investment Advice Fiduciary

Notably, the Final Rule replaces the five-part test under the 1975 Regulation with a new test that, among other things, significantly expands the “regular basis” element of the test. The Final Rule provides that a person is an investment advice fiduciary if they provide a recommendation “for a fee or other compensation, direct or indirect,” as defined in the Final Rule, in one of the following contexts:

1. 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:
 - a. is based on review of the retirement investor’s particular needs or individual circumstances,

³ 29 U.S.C. § 1002(21)(A).

⁴ 40 Fed. Reg. 50842 (Oct. 31, 1975).

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- b. reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and
 - c. may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or
2. The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

The Final Rule reframes the meaning of “regular basis” to include one-time rollover advice by shifting the focus from the regularity of interactions between an adviser and a particular retirement investor to the regularity with which the adviser makes investment recommendations as part of its overall business. As a result, an adviser will be a fiduciary with respect to a one-time recommendation to roll over assets from a workplace retirement plan to an IRA if every element of the fiduciary definition is satisfied. More members of the financial services industry, such as insurance agents, will therefore be covered under the Final Rule.

In a significant departure from the Proposed Rule, the Final Rule does not impose investment advice fiduciary status on financial advisors, firms and their affiliates merely because such entities and individuals already have investment discretion over client assets.

Amendments to the PTEs

Going forward, as a result of the PTE Amendments, there are two administrative PTEs available to help fiduciaries manage conflicts of interest with respect to fiduciary investment advice under ERISA and Section 4975 of the Code. PTE 2020-02 is broadly available for advice with respect to the wide universe of investments recommended to retirement investors. PTE 84-24 is more narrowly tailored for use by independent insurance agents and is intended to facilitate their ability to make best interest recommendations under their business model.

PTE 2020-02 allows an investment advice fiduciary to receive compensation that would otherwise be prohibited by ERISA or the Code, as long as that fiduciary complies with the PTE's conditions. The PTE 2020-02 conditions, which include duty of care and loyalty obligations, emphasize mitigating conflicts of interest and ensuring that retirement investors receive prudent and loyal advice. The PTE 2020-02 Amendment makes clarifying changes, including with respect to disclosure and internal policy and procedure obligations, that build on the existing exemption conditions to provide more certainty for fiduciary investment advice providers and more protection for retirement investors.

PTE 84-24 is tailored to the special challenges of overseeing investment recommendations by independent insurance agents who recommend annuities issued by more than one insurance company. The PTE 84-24 Amendment adds a new section providing relief for independent insurance agents who receive compensation that would otherwise be prohibited in connection with their recommendation and sale of annuity products to retirement investors, subject to conditions like those in PTE 2020-02.

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Unlike PTE 2020-02, an insurance company selling its products through an independent agent is not required to provide a fiduciary acknowledgment and is not treated as a fiduciary merely because it exercises oversight responsibilities over independent agents. Instead, the independent insurance agent is required to acknowledge its fiduciary status, and the insurance company is required to exercise supervisory authority over the independent agent with regard to an agent's recommendation of the insurance company's own products. The remaining provisions of PTE 84-24 remain available for transactions that don't involve advice, with minor language changes.

The other PTE Amendments remove investment advice transactions from the covered transactions in each exemption and make other administrative changes.

Implications

Under the Final Rule and the PTE Amendments, more financial services entities are likely to be deemed investment advice fiduciaries and, consequently, they will be required to adhere to heightened fiduciary standards under ERISA and standards and conditions required by the PTEs. As a result, various advice, including (1) one-time recommendations to roll over assets from an ERISA retirement plan to an IRA; (2) recommendations to purchase retirement products, such as fixed indexed annuities, real estate, certain certificates of deposit and other bank products; and (3) investment recommendations to plan fiduciaries with authority or control with respect to the plan will be considered "fiduciary" investment advice under ERISA and the Code.

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