



## Final DOL Investment Advice Fiduciary Rule Casts a Broader Fiduciary Net

On April 25, 2024, the Department of Labor (DOL) published its Retirement Security Rule: Definition of an Investment Advice Fiduciary (the “Retirement Security Rule”), a package of finalized regulations and amendments to several advice-related prohibited transaction exemptions (PTEs), including PTE 2020-02 and 84-24, as well as others. The final rule defines when an entity or person is considered a fiduciary in connection with providing advice for a fee to a “retirement investor” and seeks to protect those retirement investors from harmful conflicts of interest.

The regulations generally define “retirement investor” as retirement plans, plan participants or beneficiaries, Individual Retirement Arrangements (IRAs), IRA owners or beneficiaries, plan fiduciaries with discretionary authority, an IRA fiduciary, as well as Health Savings Accounts.

The final rule, as well as the amended PTEs, are effective September 23, 2024. Both amended PTEs 2020-02 and PTE 84-24 include a one-year transition period after their effective dates under which parties must only comply with the “Impartial Conduct Standards” and provide a written acknowledgment of fiduciary status for relief under these PTEs. Filings of lawsuits challenging the new rule have already begun.

## Why This Matters to Plan Sponsors

Plan sponsors, as fiduciaries, are included in the definition of retirement investors who are the beneficiaries of the new rule's protections (i.e., tighter regulation of investment advice). In this regard, while there will be circumstances in which such protection is a benefit (e.g., imposing a standard of care and duty of loyalty on the advisor that might not otherwise apply), the advisor's resultant increased compliance burden (e.g., complying with a PTE) and expense may, in some cases, be effectively passed through, potentially resulting in increased costs to the plan sponsor and/or participants.

While the investment advice fiduciary guidance is targeted at financial advisors and institutions, in certain circumstances, it may turn other persons (e.g., call center operators affiliated with financial institutions) who previously understood themselves to be just "service providers" into "advice fiduciaries." This may require plan fiduciaries to monitor those advice fiduciaries' compliance with the associated PTE. Plan sponsors will want to review the extent and scope of that monitoring obligation with their legal counsel and discuss with their providers how they intend to comply with the new advice fiduciary rule and PTEs.

In addition, there may be situations in which sponsor officials themselves (e.g., discussing plan investment decisions with plan participants), might be considered investment advice fiduciaries under the new rule. We note, however, that in the final regulation the DOL has tried to limit this application of the regulation.

## Out with the Old, In with the New Definition of Advice Fiduciary

At a high level under the DOL's final rule, a person or entity ("provider") will be an investment advice fiduciary, subject to ERISA's standard of care, loyalty and prudence if the following are true:

- The provider makes, directly or indirectly, a professional investment recommendation to a retirement investor for a fee or other compensation, and
- The provider holds itself out as a trusted adviser by
  - Specifically stating that it is acting as an ERISA fiduciary; or
  - Making the recommendation in a way that would indicate to a reasonable investor that it is acting as a trusted adviser making individualized recommendations based on the investor's best interest.

The final regulations also explicitly provide the following exceptions:

### ***Sales pitches are not fiduciary advice***

A recommendation provider does not provide "investment advice" if the provider makes a recommendation that would not fit the above criteria. For example, the DOL discusses a salesperson who touts an individual stock but does not suggest that the pitch was individualized, that the salesperson considered the individual's particular needs or circumstances, that the salesperson applied professional judgement to the individual's particular needs or circumstances, or was providing a recommendation to advance the best interest of the individual.

## ***Disclaimers are not controlling***

Written statements disclaiming fiduciary status, “... will not control to the extent they are inconsistent with the person’s oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.”

## **Old Five-Part Fiduciary Test vs. the New Rule**

This regulation represents a change in the definition of who is considered an ERISA advice fiduciary, expanding it to cover broad new classes of persons. To understand exactly what these changes are, let’s briefly review what the “old” rule from 1975 (known as the “Five-Part Test”) stipulated.

Under the DOL’s Five-Part Test, a person/entity is a fiduciary if they satisfy all the following requirements:

1. Renders advice to an investor as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property;
2. On a regular basis;
3. Pursuant to a mutual agreement, arrangement, or understanding with the investor that;
4. The advice will serve as a primary basis for investment decisions; and
5. The advice is individualized based on the particular needs of the investor.

The new fiduciary advice test under the Retirement Security Rule:

- Changes the “regular basis” requirement to one that simply requires the advice fiduciary to be in the business of providing professional investment advice on regular basis to its clients/customers. Thus, someone in the “investment advice business” may satisfy this requirement even if the advice in question was a one-off (e.g., a one-time recommendation with respect to a rollover).
- Makes the question of the advisee’s reliance on the adviser’s recommendation one of fact (the advice need only be, “under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on a review of the retirement investor’s particular needs or individual circumstances ..., etc.”).
- Provides that disclaimers by the adviser “will not control to the extent they are inconsistent with the person’s oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.”
- Eliminates the old rule’s “a primary basis” language, instead requiring only “that the recommendation is made under circumstances that would indicate ... that the recommendation ... may be relied upon by the retirement investor as intended to advance the retirement investor’s best interest.”

## **Fiduciary Carve-Outs**

Under the Retirement Security Rule the DOL provides some carve-outs from fiduciary status for certain specific circumstances:

- A “hire me” communication without an accompanying recommendation made in the normal course of marketing advisory or investment management services, generally, may not be considered investment advice under the rule. However, a recommendation, for example, to a plan committee that it hire a particular (third party) investment adviser may be covered investment advice.
- Platform providers and Pooled Plan Providers who merely identify investment alternatives may not be considered an investment advice fiduciary.
- Valuation services, appraisal services, or fairness opinions are not considered covered recommendations under the rule.
- Wholesaling activity, generally, is not investment advice. For example, the interactions between a wholesaler and a financial professional who might also be a plan fiduciary may not be investment advice under the final rule as it would not be based on the individual needs or particular circumstances of any plan or IRA.

### **Rollovers, Investment Policies Considered Advice**

Rollovers are included as a type of transaction subject to fiduciary advice recommendations, as well as recommendations as to how securities or other investment property should be invested after the rollover, transfer or distribution from a plan or IRA.

“Recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage versus advisory) or voting of proxies appurtenant to securities” would also be included as fiduciary advice.

### **Amended PTEs**

The redefinition of advice fiduciary will likely result in a number of persons becoming fiduciaries that were not previously considered fiduciaries under the soon-to-be obsolete Five-Part Test. If, with respect to a particular transaction, an advice fiduciary receives compensation that creates a conflict of interest for them (e.g., incentive payments from their employer to favor certain products over others) the transaction may be prohibited and, therefore, require the use of a Prohibited Transaction Exemption (PTE) to proceed legally.

The final rule package contemplates the PTEs available for the management of conflicts of interest with respect to fiduciary advice, two of which are PTE 2020-02 and 84-24. Both exemptions require that investment recommendations adhere to “Impartial Conduct Standards” explained next.

### **Amended PTE 2020-02**

PTE 2020-02 allows a broad array of investment advice fiduciaries to receive compensation that would otherwise be prohibited, given that they comply with the exemption’s conditions. Briefly, PTE 2020-02 relief, as amended, is conditioned in part on the following.

- Compliance with “Impartial Conduct Standards,” which means 1) providing advice in the advisee’s best interest through satisfying the care and loyalty obligations described in PTE 2020-02, 2) charging only reasonable compensation, and 3) making no materially misleading statements.
- With respect to rollovers, prior to the rollover, producing documentation of the reasons a recommended rollover is in the advisee’s best interest.
- The affiliated financial institution acknowledges fiduciary status and describes the services it provides and any material conflicts of interest.
- The affiliated financial institution adopts policies to ensure compliance with the Impartial Conduct Standards and conducts a “retrospective review” of compliance, certified by a senior executive officer.

### Amended PTE 84-24

PTE 84-24 is tailored for use by independent insurance agents who recommend non-security annuities issued by more than one insurance company. The DOL added a new section to PTE 84-24 to provide relief for independent insurance agents providing fiduciary advice, subject to conditions like those in PTE 2020-02.

However, unlike PTE 2020-02, the insurance company selling its products through the independent agent is not required to provide a fiduciary acknowledgment and is not treated as a fiduciary merely because it exercised 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 oversight of the independent agent to monitor whether an agent should be authorized to sell its products.

### Conclusion

There is much still to understand about the new rules and amended PTEs. With the tightening of the investment advice rules, more individuals will be considered to be providing fiduciary advice, subject to ERISA’s strict standards, as of the September 24, 2024 effective date. Prior to finalization, interested industry parties filed over 19,000 comments with the DOL. Since the final rule package’s release, at least one lawsuit has been filed in federal court opposing the new rules, with more anticipated to follow. We will continue to provide updates as they become available.

For more information, contact the  
Pentegra Solutions Center at [solutions@pentegra.com](mailto:solutions@pentegra.com) or 855-549-6689  
for expert guidance on how to make the most of the new rules.

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