

## Fiduciary Governance | December 1, 2023

# Déjà Vu All Over Again: DOL Proposes New Fiduciary Investment Advice Rule



In its latest attempt to expand the definition of an investment advice fiduciary, the U.S. Department of Labor (DOL) on Oct. 31 announced a proposed rule under Title I of the Employee Retirement Income Security Act (ERISA) and Section 4975 of the Internal Revenue Code.<sup>1</sup> The DOL also proposed amendments to several prohibited transaction exemptions (PTEs).<sup>2</sup>

### Public Hearing and Comment Period

A [public hearing](#) is set to be held beginning on Dec. 12. Requests to testify at the hearing were due by Nov. 29. This is unusual, as the DOL has historically held public hearings after comment periods have closed. This timeline suggests that the DOL is fast-tracking the finalization of the rulemaking package.

In a [Nov. 14 letter](#) to the Securities Industry and Financial Markets Association (SIFMA), the Assistant Secretary for the Employee Benefits Security Administration declined to extend the 60-day comment period. [Comments are due by Jan. 2, 2024.](#)<sup>3</sup>

### Proposed Changes to the Definition of Fiduciary Investment Advice

The DOL seeks to broadly expand the current definition of an investment advice fiduciary, which would virtually make all recommendations to retirement account investors fiduciary in nature. The proposed definition would apply to recommendations that an investor roll over assets from a workplace retirement plan to an individual retirement account (IRA).

Key impacts of the proposal include:

- **“Best Interest” Recommendations:** A person who makes investment recommendations to investors regularly as part of their business becomes a fiduciary where the recommendation is provided under the 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.

These proposed changes are most impactful to broker-dealers and insurance professionals but also apply to banks, investment advisers, trust companies and other service and product providers, including model managers, wholesalers, private fund managers, distributors and platform providers.

- **Rollover and Distribution Recommendations:** Recommendations for rolling over, transferring or distributing assets from a plan or IRA — including recommendations regarding whether to engage in a transaction, the amount, the form and the destination of such a rollover, transfer or distribution — could become fiduciary recommendations.

## Proposed PTE Amendments

### Proposed Amendments to PTE 2020-02

PTE 2020-02 currently permits an investment advice fiduciary to receive variable and third-party compensation for investment advice if the fiduciary provides advice that is in the investor's best interest and complies with additional conditions of the exemption.

Key impacts of the proposed amendments include:

- **Written Acknowledgement of Fiduciary Status and Other Disclosures:** Financial institutions would be required to acknowledge their fiduciary status and to provide investors with a statement of the best interest standard of care, along with a written description of the fiduciary's services and any conflicts of interest, and other applicable disclosures available upon request. There is also a potential website disclosure. Despite the DOL's pronouncements otherwise, these requirements may provide a private right of action.
- **Rollover Disclosures and Review:** Financial institutions would be required to make disclosures outlining the considerations for the basis of recommending that a retirement investor roll over plan or IRA assets. Such analysis must include alternatives to rollovers, fees and expenses associated with the plan and recommended investments or account; whether the administrative expenses are paid for by the employer or other party; and the different services and investments available under the plan and the recommended account.
- **Expanded Ineligibility Provisions:** An expanded scope of criminal convictions, including those of affiliates, would disqualify a financial institution from relying on the exemption.
- **Available to Robo-Advisers and Pooled Plan Providers:** PTE 2020-02 would be available for transactions recommended by robo-advisers and pooled plan providers.

### Proposed Amendments to PTE 84-24

- **Restrictions on Availability:** The exemption would be available only with respect to non-discretionary transactions recommended by "independent producers" selling for solely a commission, insurance products and annuities (from an unaffiliated financial institution) that are not securities. Third-party payments other than commissions would not be covered under the exemption.
- **Addition of Conditions Parallel to PTE 2020-02:** The proposed amendments would add conditions that parallel those of PTE 2020-02 for independent producers.

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

In an effort to force fiduciaries to rely on PTE 2020-02 for non-discretionary transactions, the DOL has proposed the following amendments to PTEs 75-1, 77-4, 80-83, 83-1 and 86-128:

- **Available Solely to Discretionary Fiduciaries:** Amendments would remove the ability of non-discretionary fiduciaries to rely on the exemptions. Non-discretionary fiduciaries would be required to rely on PTE 2020-02, PTE 84-24 or another applicable exemption.
- **Additional Amendments to PTE 86-128:** The exemption currently requires disclosure and authorization conditions for ERISA plans. The proposed amendments would extend such conditions to IRAs and other non-ERISA plans, as well as add recordkeeping requirements.

- **Additional Amendments to PTE 75-1:** The proposed amendments would no longer provide relief for mutual fund transactions under PTE 75-1, Part II, and would add recordkeeping requirements.

<sup>1</sup> [Retirement Security Rule: Definition of an Investment Advice Fiduciary](#), 88 Fed. Reg. 75,890 (proposed Nov. 3) (to be codified at 29 C.F.R. pt. 2510).

<sup>2</sup> [Proposed Amendment to Prohibited Transaction Exemption 2020-02](#), 88 Fed. Reg. 75,979 (proposed Nov. 3) (to be codified at 29 C.F.R. pt. 2550); [Proposed Amendment to Prohibited Transaction Exemption 84-24](#), 88 Fed. Reg. 76,004 (proposed Nov. 3) (to be codified at 29 C.F.R. 2550); and [Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1 and 86-128](#), 88 Fed. Reg. 76,032 (proposed Nov. 3) (to be codified at 29 C.F.R. 2550).

<sup>3</sup> Comment letters can be submitted electronically: [PTE 2020-02](#); [PTE 84-24](#); and [PTEs 75-1, 77-4, 80-83, 83-1 and 86-128](#).

For more information or to discuss the rulemaking package, please contact:



[Katrina Berishaj](#)  
202.507.5179  
[kberishaj@stradley.com](mailto:kberishaj@stradley.com)



[Lawrence P. Stadulis](#)  
202.419.8407  
[lstadulis@stradley.com](mailto:lstadulis@stradley.com)



[Katie Gallop](#)  
202.507.5161  
[kgallop@stradley.com](mailto:kgallop@stradley.com)