

Goodbye “Five-Part Test”—DOL Finalizes New Investment Advice Fiduciary Rules

Employee Benefits & Executive Compensation on **April 24, 2024**

On April 23, 2024, the Department of Labor (“DOL”) issued [final rules](#) which expand what it means to provide fiduciary “investment advice” 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”). Though the final rules broaden the definition of “investment advice,” the circumstances under which advice will be covered are narrower than in the proposed rules released last year.

These final rules represent the potential culmination of the DOL’s battle since 2010 to expand the definition of what it means to provide “investment advice” for purposes of determining whether a service provider to an ERISA plan or an individual retirement account (“IRA”) is a “fiduciary” under ERISA and Section 4975 of the Code (as discussed in further detail [here](#), [here](#), [here](#) and [here](#)). In particular, the DOL has long sought to treat advice regarding whether to roll over an account from an employer-sponsored plan (e.g., a 401(k) plan) to an IRA as fiduciary investment advice (notwithstanding prior DOL guidance indicating such advice was not so covered), and the DOL has finally accomplished this goal.

Although we intend to follow up with a more detailed analysis of the final rules, here are a few quick takeaways:

Broader Definition of “Investment Advice”. The narrow “five-part test” under the current rules will be replaced with a new, broader definition of “investment advice.” Under the final rules, which make clear that the test for fiduciary status is objective, “investment advice” includes a recommendation to a retirement investor (i.e., an ERISA plan or a participant, beneficiary or fiduciary thereof, or an IRA or a beneficiary, owner or fiduciary thereof) of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property if the adviser meets one of the following conditions:

- **Professional investment recommendations:** The adviser either directly or indirectly (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:
 - is based on review of the retirement investor's particular needs or individual circumstances,
 - reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and
 - may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; *or*
- **Fiduciary acknowledgment:** The adviser represents or acknowledges that it is acting as a fiduciary under Title I and/or Title II of ERISA with respect to the recommendation.

Sales Recommendations, Investment Information and Investment Education

Not Covered. The final rules specifically provide that sales recommendations that do not meet the above objective test will not be treated as fiduciary investment advice. In this regard, the DOL noted in the preamble that the objective test is aimed at ensuring that the advice goes beyond a mere "sales pitch," and instead reflects the sort of relationship of trust and confidence that should be afforded fiduciary status and protection. The final rules further provide that the mere provision of investment information or education, without an investment recommendation, is not covered.

IRA Rollover Advice and Other One-Time Advice Covered. The final rules specifically cover advice to roll over assets from an employer-sponsored retirement plan into an IRA – in other words, rollover advice would now be ERISA-covered fiduciary "investment advice" regardless of whether the advice is provided on a "regular basis." By eliminating the "regular basis" requirement, other instances of one-time advice that were not previously covered may now be considered fiduciary "investment advice" under the final rules.

Advice Provided by Discretionary Fiduciaries Not Automatically Covered. The proposed rules would have automatically picked up any investment recommendation provided by an adviser to a retirement investor if the adviser either directly or indirectly (through or together with an affiliate) had discretionary authority or control with respect to purchasing or selling securities or other investment property for the retirement investor, even in a context unrelated to the advice. Under the final rules, such advice would need to meet the objective test described above in order to be covered.

In separate (but related) rulemakings, the DOL has finalized amendments to certain prohibited transaction exemptions (including PTEs [2020-02](#) and [84-24](#), [among others](#)) which provide some relief to investment advice fiduciaries for certain compensation arrangements that would otherwise be prohibited, provided the adviser complies with certain “impartial conduct standards” and other exemption conditions.

The final rules and amendments to the PTEs generally take effect 150 days after publication in the federal register, though there is a one-year transition period for certain conditions in the PTEs.

As always, Proskauer is here to help fiduciaries and advice providers determine whether these new rules and exemption amendments apply to them and to assist with compliance with any applicable fiduciary responsibilities and restrictions under ERISA and Section 4975 of the Code.

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