



Special Edition: Final Fiduciary Advice Regulation

As a follow-up to its proposal from October 31, 2023, the Department of Labor (DOL) announced updates to the investment advice fiduciary regulation (formally known as the Retirement Security Rule) on April 23, 2024. This regulation brings many more financial professionals under the ERISA fiduciary umbrella as it seeks to protect investors and their savings.

Here's What You Really Need to Know:

1. The new fiduciary advice regulation will likely make more financial professionals fiduciaries under ERISA, which will likely result in more activities at both the plan level and participant level being considered fiduciary in nature.
2. The new fiduciary advice regulation is also designed to address transparency and conflicts of interest around distribution, rollover, and investment advice for retirement investors.
3. The new rule and prohibited transaction exemption (PTE) amendments generally take effect on September 23, 2024, although a subsequent one-year phase-in period will delay the effective date of certain conditions to 2025.

Let's Dive In...

Legislative Background

All plans must have at least one fiduciary and most plans have several fiduciaries. ERISA Section 3(21) defines who is a fiduciary. There are three ways one becomes a fiduciary, one of which is based on providing investment advice for a fee. The definition of "investment advice" is based on a five-part test developed in 1975. In 2010, the DOL determined that the test required revisions. The DOL introduced a proposed rule to update the test in 2010, which was eventually finalized in 2016. The test was ultimately vacated by the Fifth Circuit Court of Appeals in 2018 because the DOL went beyond its authority in issuing the updated regulation.

The DOL re-proposed its definition and test for determining what constitutes investment advice on October 31, 2023. The DOL issued its final regulation on April 23, 2024. In all its efforts, the DOL continually sought to expand who was protected by the regulation – meaning that more investors and participants would be protected when served by ERISA fiduciaries – and the DOL continually expanded the assets that would fall under the umbrella of ERISA fiduciary protection (e.g., now health savings accounts and individual retirement accounts). The final regulation is generally effective on September 23, 2024, with a one-year transition period after the effective date for certain conditions in the PTEs.

Final Rule Overview

The definition of investment advice is perhaps the most significant change under the final rule. The five-part test from 1975, used to determine who is a fiduciary, will be replaced by the determination that an investment advice fiduciary provides advice under the following conditions:

- the financial professional makes an investment recommendation to a retirement investor;
- the recommendation is provided for a fee or other compensation, such as commissions; and
- the financial professional holds itself out as a trusted adviser by:
 - specifically stating that it is acting as a fiduciary under Title I or II of ERISA; 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.

For plan sponsors, this means understanding what constitutes advice provided to the plan in the committee room as well as what constitutes advice to participants. Practical examples of how this is applied include:

- A general conversation about retirement planning should not constitute a recommendation, as recommendations are distinguishable from education.
- Examples of education include information about the plan, general financial and investment information, asset allocation models, and interactive investment materials, among other forms of education.
- Explaining that the plan has target date funds is education. However, once it is suggested that based on the participant's risk profile, that individual should invest in the target date funds, then advice is delivered (so long as the other elements of the final rule are met).

The proposal has created concern that the communications of human resources professionals to participants may rise to the level of investment advice. The DOL clarified that for the ordinary communications of a human resources employees, who are not investment professionals, their communications would not be investment advice.

Other Changes in the Final Rule

In addition to the changes in the definition of investment advice, there were other changes made to several PTEs. PTE 2020-02 allows financial professionals to receive compensation that would otherwise not be allowed if the financial professional does not comply with the conditions of the exemption; this exemption will likely be applied when a participant is rolling over their money from the retirement plan to an individual retirement account (IRA). PTE 84-24 is nearly identical to PTE 2020-02 but it is tailored for independent insurance agents. Plan sponsors may get inquiries from participants who are facing more disclosures and forms when rolling assets out of the retirement plan. It is possible (though not necessarily the case) that more money will also remain in the retirement plan as a result of the additional work required for rollovers. PTE 2020-02 and PTE 84-24 apply beyond rollover transactions, but that may be the most common example.

Finally, changes made to an additional group of PTEs are not anticipated to impact plan sponsors.

Action Items for Plan Sponsors

Plan sponsors should consider the following action items related to the final fiduciary advice regulation and work with their knowledgeable advisor or consultant to learn more:

1. Read the [DOL's Fact Sheet](#) for a high-level overview of the final rule; understand the salient points of the final rule that apply to the plan and plan fiduciaries.
2. Ask questions of your team of experts to understand areas of the rule that might be unclear.
3. Identify whether financial professionals interacting with the plan and its participants are serving in a fiduciary or non-fiduciary capacity for certain activities and understand how that might change with the final rule; recognize that these roles should be identified in the 408(b)(2) disclosure from each financial professional.
4. Explore whether to implement a process for monitoring the financial professionals who interact with participants and understand if functions evolve from non-fiduciary to fiduciary with the implementation of the final rule.
5. Monitor future developments and guidance related to the final rule including the potential of interpretive guidance from the DOL.



Christopher D. Cervantes, C(k)P®, CFP®, CIMA®, NQPA®
Founder & Managing Partner
5700 Tennyson Parkway
Suite 250
Plano Texas 75024
214.800.4451

Christopher.Cervantes@valorousadvisors.com
www.valorousadvisors.com