

## Executive Compensation, Employment & Benefits

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### **Once Again, DOL Proposes an Expansion of ERISA's Fiduciary Rule; Will It Stick?**

By [Andrew E. Graw](#) and [Megan Monson](#)

*On October 31, 2023, the U.S. Department of Labor (DOL) proposed a new fiduciary rule that would expand the definition of "investment advice fiduciary" under ERISA to cover certain one-off recommendations and expand who is subject to compliance with the impartial conduct standards. The public has until January 2, 2024, to submit comments on the proposal.*

**Current Status.** Per the long-standing "five-part test" under the Employee Retirement Income Security Act of 1974, as amended (ERISA), an advisor is considered a fiduciary if (1) the advisor makes investment recommendations, (2) on a regular basis, (3) pursuant to a mutual understanding with a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions, and (5) the advice will be individualized to the particular needs of the plan. While there have been a few attempts in recent years to revamp this standard, the results were short-lived. In 2016, the DOL first attempted to revise the original 1975 test of who is considered a fiduciary; however, that rule was overturned in a 2018 Fifth Circuit case that held that the rule was too broad and the DOL had overstepped its authority.

**Proposed Rule.** While the proposed rule is generally viewed as less sweeping than the 2016 proposal, it would again scrap the traditional five-part test and significantly expand the scope of advisors who are treated as ERISA fiduciaries. Under the proposed rule, an advisor will be considered an "investment advice fiduciary" under ERISA if:

- The advisor provides investment advice or makes an investment recommendation to a retirement investor;
- The advice or recommendation is provided for a fee or other compensation; and
- The advice or recommendation is made in the context of a professional relationship in which an investor would reasonably expect to receive sound investment advice or recommendations that are in his or her best interest and one of the following is true:
  - The advisor has discretion over investment decisions for the retirement investor;
  - The advisor makes investment recommendations to investors on a regular basis as part of their business, and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied on by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or
  - The advisor states that the advisor is acting as a fiduciary when making investment recommendations.

The existing test for whether a person is considered a fiduciary requires that advice be provided on a "regular basis." The DOL believes that the current definition is underinclusive because it excludes a one-time rollover recommendation by an advisor from being subject to the fiduciary standards. Under the proposed rule, the "regular basis" standard would be determined by reference to whether the advisor provides investment advice as part of the advisor's day-to-day business, rather than whether the advisor provides advice to the particular plan or plan fiduciary on a "regular basis." As a result, an advisor could be considered an ERISA fiduciary by providing a one-time advice recommendation, such as whether to make a rollover into an IRA or an annuity investment.

The proposed rule would also make changes to existing prohibited transaction exemptions (PTEs) that permit investment advisor fiduciaries to receive compensation and engage in certain transactions that would otherwise be prohibited, subject to satisfying certain conditions. Under the proposal, PTE 84-24 (which relates to the purchase of insurance, annuities and investment company securities) would, among other things, be limited to independent insurance agents and incorporate many aspects of PTE 2020-02, which includes a requirement that any investment recommendation comply with impartial conduct standards, as described in "[Fiduciary Rule Prohibited Transaction Class Exemption Released by the DOL](#)." The proposal also

clarifies the conditions for relying on PTE 2020-02 and expands the requirements that must be satisfied for reliance on PTE 2020-02, including a new requirement that the investment professional provide a retirement investor with a written statement of the best interest standard of care that is owed to such investor.

In addition to the above, the proposal includes amendments to other PTEs that currently provide relief for certain transactions involving investment advice. The proposal would narrow the scope of the impacted PTEs such that investment advice fiduciaries may no longer be able to rely on those exemptions and will have to look to other exemptions, such as PTE 2020-02, in order to avoid a prohibited transaction.

Conclusion. The DOL anticipates holding a public hearing within 45 days of publication and will accept comments on the proposed rule until January 2, 2024. Our ERISA and Investment Management teams will continue to monitor and report on developments.

## Contacts

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