

The U.S. Department of Labor Finalizes its Most Recent Definition of an Investment Advice Fiduciary

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On April 25, 2024, the U.S. Department of Labor's Employee Benefits Security Administration (the Department) published the [Retirement Security Rule: Definition of an Investment Advice Fiduciary](#) (the 2024 Fiduciary Rule). The 2024 Fiduciary Rule defines when a person is considered a fiduciary under Title I and Title II of the Employee Retirement Income Security Act of 1974 (ERISA) in connection with providing investment advice or making an investment recommendation to a retirement investor. In addition to the 2024 Fiduciary Rule, the Department also finalized amendments to certain Prohibited Transaction Exemptions (PTEs) to reflect the Department's updated definition of an investment advice fiduciary.

2024 FIDUCIARY RULE

Key provisions and aspects of the 2024 Fiduciary Rule are as follows:

- A person is an investment advice fiduciary under Title I and Title II of ERISA if:
 - the person provides investment advice or makes an investment recommendation to a retirement investor (e.g., a plan, plan fiduciary, plan participant or beneficiary, Individual Retirement Account (IRA), IRA owner, beneficiary, or IRA fiduciary);
 - the advice or recommendation is provided "for a fee or other compensation, direct or indirect," as defined in the 2024 Fiduciary Rule; and
 - the person makes the recommendations in one of the following *two* contexts:
 - The person either directly or indirectly (e.g., 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 a 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
- The person making the recommendation represents or acknowledges that they are acting as a fiduciary under Title I or II of ERISA when making investment recommendations.
- The 2024 Fiduciary Rule eliminates the 1975 rule's "regular basis" requirement that had previously been relied on in determining whether investment advice triggered ERISA fiduciary status. If a financial services provider meets the requirements of the 2024 Fiduciary Rule, they will be considered a fiduciary under Title I and Title II of ERISA with respect to "one-time" advice (for example, one-time rollovers from employer plans into IRAs, or annuity sales). Prior to the 2024 Fiduciary Rule, advice that was provided on a "one-time" basis typically was not treated as fiduciary advice and therefore did not trigger ERISA fiduciary status.
- The 2024 Fiduciary Rule eliminates the "discretionary authority" prong of the 2023 proposed fiduciary rule, as discussed in our prior [Benefits Blast](#) on the 2023 proposed fiduciary rule.
- Investment information or education, without an investment recommendation, will not result in ERISA fiduciary status. Therefore, a person who provides investment education or communication materials without an investment recommendation (such as a human resources department representative) would not be considered a fiduciary under ERISA Title I or Title II.
- A salesperson will not be considered an investment fiduciary under ERISA Title I or Title II if the salesperson recommends a product but does not represent or acknowledge fiduciary status, and a reasonable person would not have cause to believe that the salesperson's recommendation is individualized and based upon the retirement investor's particular circumstances or that it may be relied upon as advancing the retirement investor's best interests.

Given the subjective nature of the above, we can foresee scenarios where individuals could be deemed to be providing investment advice, even if their intention was to educate or share general investment information.

Notable updates to the PTEs include (but are not limited to) the following:

- Expanding the ineligibility provisions under [PTE 2020-02](#) to include an affiliate's conviction or any foreign convictions unless such convictions occurred in jurisdictions on the Department of Commerce's list of foreign adversaries.
- Permitting robo-advisors to use PTE 2020-02, prohibiting conditional fiduciary acknowledgements under PTE 2020-02, and requiring reporting of any non-exempt prohibited transactions to the Internal Revenue Service as part of compliance with PTE 2020-02.
- Narrowing the scope of insurance professionals eligible for exemptive relief under [PTE 84-24](#) to "independent producers" (persons who are licensed under the laws of a state to sell, solicit, or negotiate insurance contracts and that sell to retirement investors products of unaffiliated insurance companies) and limiting covered recommendations to "non-securities" products.

As stated in our prior [Benefits Blast](#) highlighting the provisions of the proposed rule published in October 2023, the Department's past attempts to update the definition of an investment advice fiduciary have been largely unsuccessful. In the release of the 2024 Fiduciary Rule, the Department indicated that it spent considerable time developing this rule after its 2016 update to the definition of investment advice fiduciary (the 2016 Rule) was vacated by the U.S. Court of Appeals for the Fifth Circuit. The Department's release emphasized key differences between the 2024 Fiduciary Rule and the 2016 Rule, including the 2024 Fiduciary Rule's absence of any requirement that advisers and financial institutions give their customers enforceable contract rights for noncompliance. This contractual requirement under the 2016 Rule factored significantly into the Fifth Circuit's conclusion that the 2016 Rule was too broad and exceeded the Department's authority. Also missing is the Department's prior proposal requiring financial institutions, insurers, and others taking advantage of certain ERISA PTEs to disclose their compensation arrangements on a public website. Further, the Department noted that the 2024 Fiduciary Rule broadly mirrors recent updates from the Securities and Exchange Commission and National Association of Insurance

Commissioners intended to heighten the standards of conduct applicable to transactions involving broker-dealers and insurance agents.

Winston Takeaway: The 2024 Fiduciary Rule will generally take effect for investment fiduciaries as of September 23, 2024, with the PTE changes and other exemptions effective in September 2025. We will provide additional information as we monitor further developments and legal challenges.

The following links provide a summary of past Winston & Strawn client communications that provide some historical perspective on the fiduciary rule since 2016:

<https://www.winston.com/en/insights-news/dol-issues-new-fiduciary-rule-under-erisa-and-new-and-amended> (April 2016)

<https://www.winston.com/en/blogs-and-podcasts/benefits-blast/what-is-the-current-state-of-the-u.s.-department-of-labors-erisa-fiduciary-rule#!/en/who-we-are/professionals/schaefer-susan.html?aj=ov&parent=1014135&idx=1> (June 2018)

<https://www.winston.com/en/blogs-and-podcasts/benefits-blast/fifth-circuit-court-of-appeals-vacates-dol-fiduciary-rule> (March 2018)

<https://www.winston.com/en/blogs-and-podcasts/benefits-blast/temporary-non-enforcement-policy-issued-by-the-department-of> (May 2018)

<https://www.winston.com/en/blogs-and-podcasts/benefits-blast/dol-proposes-new-fiduciary-rule> (July 2020)

<https://www.winston.com/en/blogs-and-podcasts/benefits-blast/iras-investment-advice-and-the-department-of-labor-important-takeaways> (February 2023)

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