

# Executive Compensation and Benefits Alert

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorney listed or call your regular Skadden contact.

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## DOL Finalizes Investment Advice Fiduciary Rule

On April 23, 2024, the U.S. Department of Labor (DOL) released its final amendments to the regulations under Section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA) defining an “investment advice fiduciary” as well as to certain related prohibited transaction class exemptions (collectively, the Final Regulations).

The DOL proposed amendments (the Proposal) released in the fall of 2023 generated thousands of comments in addition to live hearings in December 2024. (For additional information about the Proposal, see our November 7, 2023, client alert “[DOL Proposes Amendments to Definition of Investment Advice Fiduciary](#).”)

The Final Regulations remain controversial and are expected to be the subject of various legal challenges. They are the latest in over a decade of efforts by the DOL to increase the scope of activities and relationships that make a person a fiduciary under ERISA and Section 4975 of the Internal Revenue Code (Code).

The Final Regulations subject more parties to the stringent fiduciary standards under ERISA with respect to plans subject to ERISA, and to the prohibited transaction rules under ERISA and Section 4975 of the Code, including with respect to the receipt of compensation for providing such advice.

### The Current Five-Part Test

As was the case with the Proposal, the Final Regulations change the currently applicable five-part test for determining who is an investment advice fiduciary.

The current test provides that a person is a fiduciary if: (1) they render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis and (3) pursuant to a mutual agreement, arrangement or understanding with the plan or a plan fiduciary; (4) the advice serves as a primary basis for investment decisions with respect to plan assets; and (5) the advice is individualized based on the particular needs of the plan.

### The New Final Regulations Standard

The Final Regulations make some changes to the definition of investment advice fiduciary under the Proposal. The Final Regulations provide that a person would be an investment advice fiduciary under Title I and Title II of ERISA if they provide investment advice or make an investment recommendation to a “retirement investor” (a plan, plan fiduciary, plan participant or beneficiary; IRA, IRA owner or beneficiary; or IRA fiduciary) for a fee or other compensation, directly or indirectly, and 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:

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- 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
- represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA or both, with respect to the recommendation.

Unlike under the current test, and consistent with the Proposal, the Final Regulations eliminate the existing requirement that advice be provided to the investor "on a regular basis" and pursuant to a mutual agreement, arrangement or understanding that the investment advice will serve as a primary basis for a retirement investor's investment decision.

Instead, as was the case under the Proposal, the Final Regulations focus on whether the adviser is a person who makes investment recommendations to investors on a regular basis as part of their business (*i.e.*, investment professionals). They make some changes to the Proposal aimed at clarifying whether a retirement investor would reasonably expect that the adviser is in a position of "trust and confidence" and working in the investor's best interests based on the investor's particular circumstances.

As was the case under the Proposal, the Final Regulations note that one-time advice could be fiduciary in nature and do not contain specific exclusion transactions involving "sophisticated investors." However, the Final Regulations indicate that "hire me" (sales pitch) type communications without a recommendation are not generally investment advice, and they exclude interactions with other investment advice fiduciaries.

## Definition of 'Recommendation'

Under the Final Regulations, consistent with the Proposal, a "recommendation" is, under the applicable facts and circumstances, a communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action.

The more individually tailored the communication, the greater the likelihood that the communication may be viewed as a recommendation. The Final Regulations define the scope of the phrase "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property" as a recommendation as to:

- The advisability of acquiring, holding, disposing of (or exchanging) securities or other investment property, investment strategy, or how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred or distributed from the plan or IRA.
- The management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.*, account types such as brokerage versus advisory) or voting of proxies appurtenant to securities.
- Rolling over, transferring or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form and the destination of such a rollover, transfer or distribution.

The DOL states that it aims to align the definition of "recommendation" with guidance adopted by the Securities and Exchange Commission (SEC) and other governmental agencies.

The Final Regulations, like the Proposal, provide that advice to a plan participant regarding a decision to roll over assets from the plan would generally be fiduciary advice, regardless of whether the assets are rolled over to an account that the adviser or an affiliate manages, or whether the rollover advice includes any specifics on how to invest such assets.

The preamble to the Final Regulations continues to indicate that providing general investment or educational materials, without a recommendation, is not itself investment advice.

## Amendments to Prohibited Transaction Class Exemptions

The Final Regulations continue to include amendments to certain related prohibited transaction class exemptions (PTCEs) (75-1, 77-4, 80-83, 83-1 and 86-128), generally to eliminate coverage of compensation arising from fiduciary investment advice (as opposed to discretionary actions).

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Investment advice fiduciaries will generally need to rely on PTCE 2020-02 or potentially 84-24 (with respect to “Independent Producers” as described below), both of which are amended under the Final Regulations, for transactions that would result in compensation that is otherwise prohibited due to such status.

**PTCE 2020-02** permits various types of otherwise prohibited variable compensation to be paid to financial institutions and investment professionals as fiduciaries, provided they satisfy certain requirements, including that they:

- Acknowledge their fiduciary status in writing.
- Disclose their services and material conflicts of interest.
- Adhere to certain impartial conduct standards.
- Adopt policies and procedures prudently designed to ensure compliance with the impartial conduct standards.
- Mitigate conflicts of interest.

Among other requirements, the reasons for a rollover recommendation must be specifically documented and disclosed to explain how a recommendation is in the retirement investor’s best interest. Financial institutions are required to conduct an annual retrospective compliance review.

The Final Regulations generally exempt principal transactions, subject to meeting the exemption’s requirements. (The Proposal had provided for a narrower class of principal transactions.) They also make revisions to certain disclosure and review requirements.

**PTCE 84-24** allows fiduciaries to receive compensation when plans and IRAs enter into certain insurance and mutual fund transactions recommended by the fiduciary (or its affiliates) as well as certain related transactions.

The Final Regulations with respect to PTCE 84-24 cover compensation to “Independent Producers” (that sell insurance products of two or more unrelated insurers) selling annuities or other insurance products not regulated by the SEC, if certain conditions are satisfied, including that the Independent Producer acknowledges fiduciary status and meets certain disclosure requirements and conduct standards similar to PTCE 2022-2.

In a departure from the Proposal, the final PTCE 84-24 does not limit covered compensation to insurance sales commissions. The insurer whose policy is sold is required to establish appropriate policies and procedures and meet other criteria also similar to PTCE 2002-2, but will not be required to acknowledge fiduciary status and will not be treated as a fiduciary simply by virtue of such supervisory activities.

## Effective Dates

The Final Regulations are effective September 23, 2024 (150 days following the regulations’ publication in the Federal Register). The amendments to both PTCE 2002-02 and 84-24 are also effective on the same date.

However, required compliance with the amended exemptions is staggered so that initially the exemptions will apply generally if the investment professional or financial institution (the Independent Producer under 84-24) adheres to the impartial conduct rules and acknowledges its fiduciary status.

The other requirements of the exemptions will not be applicable until September 2025 (one year following the regulations’ publication in the Federal Register).