

# Regulatory Alert

## Regulatory Insights

April 2024

### Investment Advice Fiduciary: DOL Final Retirement Security Rule

#### **KPMG Insights:**

- **Updated Definitions:** The final rule modernizes definitions under ERISA, expanding regulatory coverage based on the evolving nature of investment advice, recommendations, and their significance for retirement investors.
- **Expanding Scope:** By widening the scope of who is a fiduciary to not only broker-dealers, but insurance agents and other financial professionals, the rule aims to enhance the protection of retirement investors, ensuring advice on a broad range of investments serves their “best interests”.
- **Alignment:** Aimed to align to the SEC’s Regulation Best Interest (Reg BI).

The Department of Labor issues a [final rule](#) amending the definition of “investment advice fiduciary” under Titles I and II of the Employee Retirement Income Security Act of 1974 (ERISA). The final rule expands upon regulations from 1975 and covers instances where financial services providers (e.g., broker-dealers, insurance agents, and other financial professionals) offer paid investment advice to retirement plan participants, individual retirement account owners, and plan officials who manage plans and their assets. It is intended to adapt to the evolving retirement planning landscape, including 401(K)s and Individual Retirement Accounts (IRAs), and better protect retirement investors from potential conflicts of interest.

Highlights from the final rule are detailed below.

**Definition of Investment Advice Fiduciary.** Under the final rule, a person (i.e., an individual or entity) is deemed an investment advice fiduciary if they provide recommendations “for a fee or other compensation, direct or indirect” (as defined in the rule) in one of the following two contexts:

- Directly or indirectly (e.g., through or together with any affiliate) making investment recommendations

to retirement investors (e.g., participants/beneficiaries in retirement plans, IRA owners/beneficiaries, fiduciaries with authority/control with respect to the plan or IRA) on a regular basis as part of their business, where a reasonable investor would perceive the recommendation as a “call to action” and that the recommendation:

- Is based on review of the retirement investor’s individual needs or specific circumstances,
  - Reflects application of “professional or expert judgment”, and
  - May be relied upon by the retirement investor as intended to advance their best interest.
- Representing or acknowledging that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both.

This definition is intended to be consistent with the Securities and Exchange Commission’s (SEC) framework in Regulation Best Interest (BI) and their determination criteria for whether an investment recommendation has been made.

**Definition of Fees or Other Compensation, Direct or Indirect.** The final rule defines various explicit fee or compensation arrangements in connection with, or as a result of, the recommended purchase, sale, or holding of a security or other investment property or the provision of investment advice, including, though not limited to:

- Commissions, loads, finder’s fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees.
- Mark ups or mark downs, underwriting compensation.
- Payments to brokerage firms in return for shelf space.
- Recruitment compensation paid in connection with transfers of accounts to a registered representative’s new broker-dealer firm.
- Expense reimbursements, gifts and gratuities, or other non-cash compensation.

**Covered Recommendations.** The final rule also provides discussions to clarify different types of recommendations that are covered under the rule, including:

- Securities transaction, other investment transaction, or investment strategy involving securities or other investment property.
- Rollovers, benefits distributions, or transfers from a retirement plan or IRA.

- Management of securities or other investment property, including account types.
- Selection of other persons to provide investment advice or investment management.
- Proxy votes related to ownership of shares of corporate stock.

The final rule did not adopt proposed language around recommendations on the value of securities or other property, or the advisability of investing in, purchasing, or selling securities or other property. Similarly, it clarified that providing investment information or education, without an investment recommendation, is not advice under the final rule.

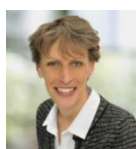
**Prohibited Transaction Exemptions (PTEs).** DOL correspondingly issues three amendments to prohibited transaction exemptions outlining conditions to receive compensation, including conduct standards, mandatory disclosures, established policies and procedures, annual reviews, and eligibility criteria.

- [PTE 2020-02](#), [PTE 84-24](#), and
- [Amendments](#) to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128).

**Effective Date.** The final rule will become effective on September 23, 2024.

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