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SUMMARY

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Following the enactment of the Employee Retirement Income Security Act of 1974 (ERISA; P.L. 93-406), regulations issued in 1975 ("the 1975 rule") defined *investment advice* using a five-part test. To be held to ERISA's fiduciary standard with respect to providing advice, an individual has to (1) make recommendations on investing in, purchasing, or selling securities or other property or give advice as to the value (2) on a regular basis (3) pursuant to a mutual understanding with the plan or the plan fiduciary (4) that the advice will serve as a primary basis for investment decisions, and (5) will be individualized to the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

On November 3, 2023, the Department of Labor (DOL) issued a proposed regulation that would redefine the term *investment advice* within private sector pension and retirement plans and replace the five-part test of the 1975 rule with an updated definition. Under ERISA, a person who provides investment advice is a fiduciary. Redefining the term *investment advice* could affect who is subject to this fiduciary standard. For example, under the five-part test, an individual has to provide advice on a regular basis to be a fiduciary, which generally would not have included one-time recommendations such as an employer seeking recommendations as to which options to include in its 401(k) plan investment menu. The proposed change in definition would replace the requirement that advice be given on a regular basis with a requirement that would make fiduciaries of financial professionals who, among other conditions, provide investment recommendations as a regular part of their business. The 2023 proposed rule is accompanied by proposed amendments to a number of prohibited transaction exemptions (PTEs). PTEs allow fiduciaries to engage in transactions that might otherwise be deemed to injure plans or plan participants (such as charging commissions for products fiduciaries recommend).

Under the current regulation, financial professionals who provide services to retirement investors and retirement plans and whose actions do not meet the five-part test are not fiduciaries and, thus, do not have to meet a fiduciary standard. However, their recommendations may be subject to other standards. For example, securities brokers and dealers must meet a best interest standard, as found in the Securities and Exchange Commission's (SEC's) Regulation Best Interest. Insurance agents who sell annuities regulated by the states are subject to state standards of conduct. Most states have adopted the National Association of Insurance Commissioners Model Regulation. Under DOL's proposed regulation, brokers, dealers, and insurance agents would generally be considered fiduciaries when they provide recommendations that meet the definition of *investment advice* in certain specified contexts involving a relationship of trust and confidence between the financial professionals and retirement investors.

DOL first proposed broadening the definition of *investment advice* in October 2010. The proposed regulation generated much controversy and, in September 2011, DOL announced that it would withdraw the proposed rule. DOL issued a revised proposal in April 2015 that also generated considerable controversy. DOL issued a final rule on April 8, 2016, with an effective date of June 7, 2016, and an applicability date of April 10, 2017. With the 2016 rule, DOL broadened the term's definition to capture activities that currently occur within pension and retirement plans but did not meet the 1975 definition of *investment advice*. In March 2018, the U.S. Court of Appeals for the Fifth Circuit vacated the 2016 rule. The vacatur had the effect of reinstating the five-part test. In July 2020, DOL implemented the vacatur of the 2016 rule. DOL stated that the 2023 proposal is "much more narrowly tailored than the 2016 final rule."

In October 2020, DOL issued PTE 2020-02 which, as with previous PTEs, allows fiduciaries to conduct transactions that would otherwise be prohibited. Investment advice fiduciaries who rely on PTE 2020-02 must comply with Impartial Conduct Standards, which require them to provide advice that is in the best interest of retirement investors, charge no more than reasonable compensation, and make no misleading statements about investment transactions. In addition, PTE 2020-02 noted that rollover recommendations from an employer plan to an IRA could be considered investment advice if specified conditions are met—for example, if the investment recommendation were expected to be part of an ongoing relationship. On February 13, 2023, a federal district court struck down the portion of PTE 2020-02 related to the rollover recommendations, and on June 30, 2023, a different federal district court recommended that the guidance related to rollover advice be vacated.

Following the release of the 2023 proposal, DOL received more than 20,000 comments in the 60-day comment period. DOL held two days of public hearings on December 12 and December 13, 2023. On March 8, 2024, DOL submitted the final version of the rule to the Office of Management and Budget for review and approval.

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Overview

On November 3, 2023, the Department of Labor (DOL) issued a proposed rule (2023 proposed rule) that would update the definition of *investment advice* within employer-sponsored private sector pension plans and individual retirement accounts (IRAs).[1] Individuals who provide recommendations that meet the definition of *investment advice* to plans (and their participants) that are covered by pensions law as found in Title 29 of the *U.S. Code* (often called the Labor Code) are held to a *fiduciary standard*. The fiduciary standard is a higher standard of conduct than that for individuals who provide recommendations that do not meet the definition. Individuals who are held to the fiduciary standard are required to act solely in the interests of plan participants and beneficiaries. Therefore, updating the definition of *investment advice* to include recommendations that are not currently considered investment advice might increase the number of individuals held to this higher standard.

Background on Pensions and IRAs

Although most workers can expect to become eligible to receive Social Security benefits after the age of 62, a number of tax-advantaged methods of preparing for retirement might also be available to them.[2] For example, their employers might sponsor pension plans, or the workers might establish and contribute to IRAs to use as sources of income in retirement.

Pension plans can be classified along several dimensions. In defined benefit (DB) plans (sometimes referred to as traditional pension plans), participants typically receive monthly payments in retirement based on a formula that uses either (1) a combination of length of service, accrual rate, and average of final years' salary or (2) a flat dollar amount times the number of months or years in the plan. Some plans offer participants the option to receive their benefits as lump-sum amounts.

In defined contribution (DC) plans, workers are provided individual accounts funded by their own contributions, contributions from their employers, or both. The funds in the account may accrue investment earnings, which can then be used as a source of income in retirement. The type of DC plan that an employer may offer depends on the type of employer (for example, the types of plans offered by public sector employers are typically different from those offered by private sector employers), as well as the employer's choices regarding plan features (for example, private sector employers have a number of types of DC plans they can offer). Examples of DC plans include profit-sharing plans, money purchase plans, 401(k) plans, 403(b) plans, and employee stock ownership plans (ESOPs).

IRAs are tax-advantaged accounts that allow individuals to save for retirement outside of employer-sponsored plans or to roll over savings from employer-sponsored plans.[3] Often

[1] See DOL, Employee Benefits Security Administration (EBSA), "Retirement Security Rule: Definition of an Investment Advice Fiduciary," 88 *Federal Register* 75890-75979, November 3, 2023, https://www.federalregister.gov/documents/2023/11/03/2023-23779/retirement-security-rule-definition-of-an-investment-advice-fiduciary.

[2] For more information on Social Security, see CRS Report R42035, *Social Security Primer*, and for more information on the tax treatment of retirement savings, see U.S. Congress, Joint Committee on Taxation, *Present Law and Background Relating to the Tax Treatment of Retirement Savings*, 112th Cong., 2nd sess., JCX-32-12, April 13, 2012.

[3] For background on IRAs, see CRS Report R46635, *Individual Retirement Account (IRA) Ownership: Data and Policy Issues*; and CRS Report RL34397, *Traditional and Roth Individual Retirement Accounts (IRAs): A Primer*.

individuals with savings in DC plans, or with lump sum payments from DB plans, roll over their savings to IRAs at job change or retirement.[4]

Federal Law for Private Sector Pension Plans and IRAs

To protect the interests of private sector pension plan participants and beneficiaries, Congress passed the Employee Retirement Income Security Act of 1974 (ERISA; P.L. 93-406). ERISA is included in the *U.S. Code* in both Title 26 (the Internal Revenue Code, or IRC) and in Title 29 (often called the Labor Code). ERISA sets standards that pension plans must follow with regard to plan participation (who must be covered); minimum vesting requirements (how long a person must work for an employer to acquire a non-forfeitable right to the benefit earned); plan funding (how much must be set aside to pay for future benefits); and fiduciary duties (standards of conduct for certain individuals who have discretion over plan operations or who provide investment advice to plans or plan participants). ERISA covers only private sector pension plans and exempts pension plans established by federal, state, and local governments and by churches. The fiduciary duty requires that individuals—such as plan sponsors, administrators, and others who oversee pension plans—operate these plans prudently and in the sole interests of plan participants.

The 2023 proposed rule on investment advice concerns two of ERISA's four titles: Title I and Title II. Title I covers most private sector pension plans and is administered by DOL's Employee Benefits Security Administration (EBSA). Title I imposes duties and restrictions on fiduciaries with respect to Title I plans.[5] Title II specifies the requirements for plan qualifications under the IRC. While Title II is generally administered by the Treasury Department, the Reorganization Plan No. 4 of 1978 transferred much of Treasury's interpretive and exemptive authority over the IRC's prohibited transaction rules (including those relating to the provision of investment advice) to DOL.[6]

IRAs were first authorized by ERISA. Provisions that affect IRAs are found only in Title II of ERISA, which is codified in the IRC. Title 29 does not have any IRA provisions.[7]

Prohibited Transaction Exemptions (PTEs)

ERISA prohibits certain transactions between a plan and individuals who are fiduciaries. Fiduciaries may not:

- deal with the assets of the plan in their own interests or for their own accounts;

[4] In addition, Congress has authorized several types of IRA-based retirement plans that employers can offer, such as SIMPLE IRAs and SEP-IRAs (described below). In IRA-based plans, employers establish IRAs for employees at financial institutions. Employers may also offer payroll deduction IRAs, which are available to employers who want to provide their employees a retirement savings option while limiting employer involvement. In addition, some states have established state-facilitated retirement savings programs, often IRA-based, for private sector employees.

[5] Title III assigns responsibilities for administration and enforcement to DOL and the Treasury Department. Title IV of ERISA established the Pension Benefit Guaranty Corporation, an independent federal agency that insures DB pension plans covered by ERISA.

[6] See DOL, Reorganization Plan No. 4 of 1978, https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/executive-orders/4.

[7] However, DOL does oversee employer-sponsored IRA plans such as Savings Incentive Match Plan for Employees (SIMPLE) and Simplified Employee Pension (SEP) IRAs. SIMPLE and SEP retirement plans are designed for small businesses. More information is available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/choosing-a-retirement-solution-for-your-small-business.pdf.

- act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries; or
- receive any consideration for their own personal accounts from any party dealing with such plan in connection with a transaction involving the assets of the plan.

ERISA allows DOL to issue exemptions to prohibited transactions that allow an individual, a plan, or a group of individuals or plans (i.e., a class) to engage in transactions that would otherwise violate ERISA. These exemptions are referred to as prohibited transaction exemptions (PTEs).[8]

Role of DOL and the Department of the Treasury

Both DOL and Treasury oversee private sector pension plans and IRAs.[9] In general, DOL oversees issues concerning the protection of pension plan participants, and the Internal Revenue Service (IRS), under the Treasury, oversees issues related to contributions to pension plans and taxes. Because IRA provisions are found only in the IRC, the Treasury oversees most issues regarding IRAs. However, a 1978 executive order—subsequently ratified in P.L. 98-532—among other things, transferred regulatory authority with respect to fiduciary duty in Title II plans from the Secretary of the Treasury to the Secretary of Labor.[10]

Standards in Pension Plans

Retirement plans are complex, and employers and participants often rely on financial services professionals to assist them with their decision-making. For example, an employer might seek out assistance in determining what investments to offer in a 401(k) plan it has established, participants in a 401(k) plan might seek assistance in choosing their investments from among the options offered by the plan, or a worker who participates in an employer-sponsored 401(k) plan might seek assistance on whether to leave his or her 401(k) account balance in the plan or roll it over into an IRA or into another employer's DC plan either upon job change or at retirement.

The way in which some financial services professionals are compensated may give rise to conflicts of interest if these professionals' recommendations result in larger commissions or otherwise benefit them. These potential conflicts could lead to the professionals making recommendations that are not in the interests of their clients. By contrast, some financial services professionals have compensation structures that do not vary based on which products clients choose. This type of compensation structure could mitigate any conflicts of interest.

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[8] The procedures governing the filing and processing of PTEs are at Title 29, Sections 2570.30-2570.52, of the *Code of Federal Regulations*.

[9] The 2023 proposed regulation on investment advice applies to private sector pension plans. It would not apply to the pension plans of state and local governments, the federal government, and plans operated by churches.

[10] See DOL, Reorganization Plan No. 4 of 1978. ERISA, as originally enacted, provided for both DOL and Treasury to issue PTEs. The Reorganization Plan No. 4 of 1978 transferred much of Treasury's interpretive and exemptive authority over the IRC's prohibited transaction rules to DOL. Currently, DOL evaluates virtually all of the applications for administrative exemptions. DOL's FAQs regarding PTE 2020-02 explained how DOL enforces compliance with PTEs with regard to Title II plans (such as IRAs). See FAQ 21 of DOL, *New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers and Retirees Frequently Asked Questions*, April 2021, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf. The FAQ states, "For IRAs and other non-Title I plans, the Department has interpretive authority to determine whether the exemption conditions have been satisfied and transmits information to the IRS for enforcement of the excise tax."

Individuals who transact with a pension plan may be required to meet certain standards. The standard that applies depends on the individuals' roles and the actions they are taking. For example, a financial professional providing investment advice is subject to the fiduciary standard, whereas an individual who is only executing a transaction at the direction of a plan participant would not be an investment advice fiduciary.

Fiduciary Duty

ERISA Section 3(21)(A)[11] provides that a person is a fiduciary to the extent that the person:

- exercises any discretionary authority or control with respect to the management of the plan or exercises any authority with respect to the management or disposition of plan assets,
- renders investment advice for a fee or other compensation with respect to any plan asset or has any authority or responsibility to do so, or
- has any discretionary responsibility in the administration of the plan.[12]

An individual who is a Title I fiduciary is required, among other duties, to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[13] ERISA identifies four standards of conduct: (1) a duty of loyalty, (2) a duty of prudence, (3) a duty to diversify investments, and (4) a duty to follow plan documents to the extent that they comply with ERISA.[14]

Investment Advice

As noted above, ERISA Section 3(21)(a) established situations in which a person qualifies as a fiduciary. One of these situations, in which an individual renders investment advice for a fee or other compensation, is the subject of the proposed rule that DOL published in the *Federal Register* on November 3, 2023.[15] The rule is intended to replace a rule that was promulgated in 1975.

1975 Rule

In 1975, DOL addressed the second of the three actions that render an individual a fiduciary. DOL issued regulations that created a five-part test to determine whether an individual provided investment advice and thus was subject to the fiduciary standard.[16]

To be held to the 1975 fiduciary standard with respect to his or her investment advice, an individual must (1) make recommendations on investing in, purchasing, or selling securities or other property or give advice as to the value (2) on a regular basis, (3) pursuant to a mutual understanding with the plan or plan fiduciary (4) that the advice serves as a primary basis for investment decisions and (5) is individualized to the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or

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11 See also IRC §4975(e)(3)(B).

12 See ERISA §3(21)(A).

13 See ERISA §404(a).

14 See ERISA §404(a)(1)(A)-404(a)(1)(D).

15 DOL, "Retirement Security Rule," 75890.

16 DOL, "Definition of Fiduciary," 40 *Federal Register* 50840-50850, October 31, 1975, https://www.govinfo.gov/content/pkg/FR-1975-10-31/pdf/FR-1975-10-31.pdf#page=150.

diversification of plan investments. An investment adviser is not treated as a fiduciary unless each of the five elements of the test is satisfied for each instance of advice.

Individuals who provide investment services to retirement investors or plans may also be subject to other regulatory structures. For example, broker-dealers are subject to the Financial Industry Regulatory Authority (FINRA) regulations.[17] Individuals, such as broker-dealers, who provide investment recommendations but whose actions do not meet ERISA's five-part test may be subject to other regulatory standards, such as Securities and Exchange Commission's (SEC's) Regulation Best Interest (Reg BI) or state securities or insurance law.[18] Investment advisers who are compensated for advising about securities investments may have to register with the SEC and conform to conduct standards in the Investment Advisers Act of 1940 (P.L. 76-768).[19]

Investment Education

Not all information that retirement investors receive meets the definition of *investment advice*. For example, providing materials of a general nature designed to encourage participants to make informed decisions in their 401(k) plans would not necessarily meet all parts of the five-part test. To assist plan sponsors to develop education materials, DOL issued guidance—Interpretive Bulletin 96-1—that provides examples of materials furnished to participants that would not, in DOL's view, be considered investment advice.[20] Such materials include general information about a plan; details of a plan's investment options; general financial and investment information; information that describes how investors might allocate their investments based on hypothetical characteristics; and interactive investment materials such as questionnaires, worksheets, or software that help participants understand future retirement income and needs.

Recent Regulatory Actions

In October 2010, DOL proposed (and subsequently in September 2011, announced that it would withdraw) a rule that would have expanded the definition of *fiduciary advice* that would have made more individuals and their actions subject to the fiduciary advice regulation.[21] In April 2015, DOL issued a revised proposal to broaden the definition of *investment advice*[22] and, in April 2016, issued a final rule and new and amended PTEs.[23]

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[17] See FINRA, https://www.finra.org/#/.

[18] For more information on Reg BI, see CRS Report R46115, *Regulation Best Interest (Reg BI): The SEC's Rule for Broker-Dealers*; and CRS Report R47431, *Capital Markets: Overview and Selected Policy Issues in the 118th Congress*. Fixed annuities are insurance products, and individuals who sell them are subject to state insurance law. Most states follow model regulations issued by the National Association of Insurance Commissioners (NAIC). See NAIC, "Suitability in Annuity Transactions Model Regulation," 2020, https://content.naic.org/sites/default/files/model-law-275.pdf. Because variable annuities and some indexed annuities are securities, individuals who sell them may also be subject to Reg BI.

[19] See SEC, Laws and Rules, https://www.sec.gov/investment/laws-and-rules.

[20] See DOL, "61," 29586 *Federal Register* 29590, July 11, 1996, https://www.govinfo.gov/content/pkg/FR-1996-06-11/pdf/96-14093.pdf.

[21] See DOL, "Definition of the Term 'Fiduciary,'" 75 *Federal Register* 65263, October 22, 2010, https://www.federalregister.gov/documents/2010/10/22/2010-26236/definition-of-the-term-fiduciary.

[22] See DOL, "Definition of the Term 'Fiduciary;' Conflict of Interest Rule-Retirement Investment Advice," 80 *Federal Register* 21928, April 20, 2015, https://www.federalregister.gov/documents/2015/04/20/2015-08831/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice.

[23] See DOL, "Definition of the Term 'Fiduciary;' Conflict of Interest Rule-Retirement Investment Advice," 81 *Federal Register* 20946, April 8, 2016, https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice/.

Under the 2016 rule, the types of activities that would have constituted investment advice—if they were done for a fee or other compensation—were recommendations pertaining to the advisability of buying, selling, holding, or exchanging investments; how investments should have been invested after being rolled over, transferred, or distributed from an IRA; the management of investments; or IRAs, including whether, in what form, in what amount, and to what destination rollovers, distributions from IRAs, and transfers from IRAs should have been made. The rule also described certain activities that would *not* have constituted investment advice (e.g., marketing by platform providers, providing general investment education, and executing securities transactions).

Among the new and amended PTEs accompanying the final rule were the Best Interest Contract Exemption, Principal Transactions Exemption, and an amended PTE 84-24, which affects the sale of annuity products. For more information on the 2016 proposed and final rule and PTEs, see CRS Report R44884, *Department of Labor's 2016 Fiduciary Rule: Background and Issues*.

Actions Under the Trump Administration

In March 2017, DOL issued a Temporary Enforcement Policy that indicated it would not initiate enforcement actions against financial advisers or financial institutions that failed to satisfy the conditions of the 2016 regulation or the PTE.[24] In March 2018, the U.S. Court of Appeals for the Fifth Circuit vacated the 2016 rule.[25] The vacatur had the effect of reinstating the five-part test. In July 2020, DOL implemented the vacatur of the 2016 rule.[26]

On December 18, 2020, DOL issued PTE 2020-02, which, as with previous PTEs, allows fiduciaries to conduct transactions that are otherwise prohibited.[27] Investment advice fiduciaries who rely on PTE 2020-02 must comply with *Impartial Conduct Standards*, which require them to provide advice that is in the best interest of retirement investors, charge no more than reasonable compensation, and make no misleading statements about investment transactions.

In addition, PTE 2020-02 and a subsequent FAQ noted that rollover recommendations from an employer plan to an IRA[28] *could* be considered investment advice if specified conditions are met—for example, as FAQ 7 noted, if the investment recommendation was given as "part of an ongoing relationship or as the beginning of an intended future ongoing relationship."[29] On February 13, 2023, a federal district court issued an opinion vacating the policy referenced in FAQ 7 and remanded it to DOL for future proceedings.[30] On June 30, 2023, a magistrate judge in a different federal district court filed a report with the judge's recommendations, including that

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[24] See DOL, *Temporary Enforcement Policy on Fiduciary Duty Rule*, Field Assistance Bulletin 2017-01, March 10, 2017, https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-01.pdf.

[25] See, *Chamber of Commerce v. United State Department of Labor*, 885 F.3d.360 (5th Cir. 2018).

[26] See 85 *Federal Register* 40589 (July 7, 2020).

[27] See DOL, "Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers and Retirees," 85 *Federal Register* 82798-82866, December 18, 2020, https://www.federalregister.gov/documents/2020/12/18/2020-27825/prohibited-transaction-exemption-2020-02-improving-investment-advice-for-workers-and-retirees.

[28] PTE 2020-02 also provided relief for an investment advice fiduciary to receive compensation for advice to roll plan assets to another plan, to roll IRA assets to another IRA or to a plan, and to transfer assets from one type of account to another.

[29] See FAQ 7 of DOL, *New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions*.

[30] See Noah Zuss, "Federal Judge Strikes Down DOL Rollover Advice Guidance," *Plan Sponsor*, February 14, 2023, https://www.plansponsor.com/federal-judge-strikes-down-dol-rollover-advice-guidance/.

the court should vacate portions of PTE 2020-02 related to investment advice relationships in IRAs.[31]

Actions Under the Biden Administration

On November 3, 2023, DOL published in the *Federal Register* its "Retirement Security Rule: Definition of an Investment Advice Fiduciary," which contains proposed amendments to the definition of *investment advice* and related PTEs (PTE 2020-02; PTE 84-24; and PTEs 75-1, 77-4, 80-83, 83-1, and 86-128). A 60-day period for public comments followed the release of the rule (which closed on January 2, 2024). In addition, DOL held two days of public hearings on the proposals on December 12 and 13, 2023.[32] On March 8, 2024, DOL submitted the final version of the rule to the Office of Management and Budget for review.[33]

Overview of the Proposal

The proposal consists of a revision to the definition of *investment advice* found in regulations and amendments to PTE 2020-02; PTE 84-24; and PTEs 75-1, 77-4, 80-83, 83-1, and 86-128.

2023 Proposed Rule

ERISA 3(21)(A)(ii) states that a person is a fiduciary if the person "renders investment advice for a fee or other compensation." The proposed rule would replace the current five-part test with an updated definition of when recommendations would be considered investment advice. Under the updated definition, a broader range of recipients would receive advice that would be required to meet fiduciary standards under ERISA.

The proposal says that a person would be rendering investment advice if he or she were to make a *recommendation* of any securities or investment transaction to a plan, plan fiduciary, plan participant or beneficiary, or IRA owner or beneficiary.

The person making the recommendation would additionally have to do one of the following:

- Have discretionary authority or control with respect to purchasing or selling investments for the retirement investor.
- Make investment recommendations as a regular part of his or her business. The recommendation would be based on the needs or circumstances of the retirement

[31] See Findings, Conclusions, and Recommendations of the United States Magistrate Judge, Fed'n of Ams. for Consumer Choice v. U.S. Dep't of Labor, No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *27–29 (N.D. Tex. June 30, 2023). The 2023 proposed rule included a footnote that "[a]s of the date of this proposal, the district court judge has not yet taken action regarding the magistrate judge's report and recommendations" (see 88 *Federal Register* 75896).

[32] See EBSA, "Retirement Security Rule: Definition of an Investment Advice Fiduciary and Related Exemptions Public Hearing," https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02-hearing.

[33] See Office of Information and Regulatory Affairs, Office of Management and Budget, "Pending EO 12866 Regulatory Review," https://www.reginfo.gov/public/do/eoDetails?rrid=441663. DOL has not indicated when it would issue the final regulation. A K&L Gates articles notes that it is possible that "the Biden Administration is likely seeking to finalize the rule during the second quarter of 2024 in order to preempt the rule being overturned through the Congressional Review Act by the 119th Congress in 2025. The Congressional Review Act allows Congress to review and overturn certain rules finalized within 60 legislative days." See Kristina M. Zanotti et al., "Here We Go Again: DOL Proposes New Fiduciary Rule," *K&L Gates*, November 8, 2023, https://www.klgates.com/Here-We-Go-Again-DOL-Proposes-New-Fiduciary-Rule-11-8-2023.

investor and would be relied upon by the retirement investor as a basis for investment decisions that would be in the retirement investor's best interest.

- Acknowledge or represent that he or she is a fiduciary.

In addition, a written statement that a person is not a fiduciary would not have an effect on determining fiduciary status if the statement is inconsistent with the person's actions, according to the proposed rule.

A person would not be a fiduciary (1) with respect to assets or investments over which the person did not have discretionary authority or provide investment advice or (2) solely because the person executed securities transactions on the instructions of the retirement investor.

A *recommendation*, according to the proposal, would be one regarding the:

- advisability of acquiring, holding, disposing, or exchanging securities or other investment property as an investment strategy or how it should be invested after a rollover;
- management of investments such as recommendations on investment strategies, portfolio composition, selection of persons to provide investment advice or management services, account arrangements (i.e., brokerage versus advisory), or the voting of proxies;
- rolling over, transferring, or distributing assets from a plan or an IRA.

The proposed rule makes clear that one-time instances of advice regarding the rolling over of assets from a workplace retirement plan to an IRA, "as well as recommendations to roll over, transfer, or distribute assets from a plan or IRA," would be considered fiduciary investment advice.

PTE 2020-02

ERISA prohibits fiduciaries from engaging in improper transactions. These *prohibited transactions* include, for example, (1) "engaging in self-dealing and receiving compensation from third parties in connection with transactions" involving retirement plans and IRAs and (2) acting on behalf of their own accounts (i.e., principal transactions).[34]

PTE 2020-02, which was published in the *Federal Register* on December 18, 2020 (under the Trump Administration), provides an exemption to these prohibited transactions so that investment advice fiduciaries can receive compensation[35] and engage in principal transactions, provided they follow the conditions outlined in the PTE. Without this exemption, many common transactions in retirement plans would be prohibited because they would violate ERISA, and this would disrupt the retirement marketplace.

[34] Principal transactions occur when investment advice fiduciaries sell or purchase certain investments out of their own inventories to or from plans or IRAs.

[35] Compensation can include commissions, 12b-1 fees, trailing commissions, sales loads, mark-ups and mark-downs, and revenue sharing payments from investment providers or third parties.

Under the exemption, financial institutions and investment professionals[36] who provide specified fiduciary investment advice to retirement investors[37] can receive a wide variety of payments that would otherwise be prohibited. PTE 2020-02 covers investment advice (1) to hold, dispose of, or exchange securities and other investments; (2) to take a distribution from a plan or to roll over the assets to an IRA; or (3) to engage (or not engage) in other transactions such as plan-to-plan rollovers, IRA-to-IRA rollovers, or rollovers from one type of account to another type of account (e.g., commission-based accounts, fee-based accounts). To comply with the exemption, these investment advice fiduciaries must:

- provide advice meeting the Impartial Conduct Standards, which include a best interest standard,[38] a reasonable compensation standard, and a requirement to make no misleading statements about investment transactions;
- acknowledge in writing their fiduciary status when providing investment advice, the services to be provided, and their material conflicts of interest;
- document the reasons that a rollover recommendation is in the best interest of the retirement investor;
- adopt policies and procedures designed to ensure compliance with the Impartial Conduct Standards; and
- conduct a retrospective review of compliance.

The exemption also allows a financial institution to engage in transactions in which the institution purchases or sells certain investments from its own account and receives a mark-up or mark-down or similar payment on the transaction, referred to as a *principal transaction*.[39]

The exemption specifies that financial institutions and investment professionals will be ineligible to rely on the PTE if, within the previous 10 years, they were convicted of certain crimes related to their provision of investment advice, or they engaged in systemic or intentional violation of the exemption's conditions or provided materially misleading information to DOL.

Proposed Amendment to PTE 2020-02

The 2023 proposed rule was accompanied by proposed amendments to several PTEs, including PTE 2020-02.[40] DOL noted that because of the proposed change to the definition of *investment advice* in the 2023 proposed rule, more parties would need to rely on the proposed amended PTE 2020-02.

DOL stated that the proposed amendment would maintain the core protections in PTE 2020-02 (e.g., the Impartial Conduct Standards) and would not change the transactions covered by the

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[36] *Financial institutions* refers to SEC- and state-registered investment advisers, broker-dealers, banks, and insurance companies. *Investment professionals* refers to the individual employees, agents, and representatives who work for these financial institutions.

[37] *Retirement investors* includes retirement plan participants and beneficiaries, IRA owners, and plan and IRA fiduciaries.

[38] In PTE 2020-02, DOL notes that the best interest standard is broadly aligned with the SEC's Reg BI and the standard included in NAIC's Suitability in Annuity Transactions Model Regulation.

[39] Principal transactions include a *riskless principal transaction* (in which a financial institution purchases or sells the same investment product for the financial institution's own account to offset the transaction with a retirement investor) and covered principal transactions (which are non-riskless and limited to specific investment products).

[40] EBSA, "Proposed Amendment to Prohibited Transaction Exemption 2020-02," 88 *Federal Register* 75979-76003, November 3, 2023, https://www.federalregister.gov/documents/2023/11/03/2023-23780/proposed-amendment-to-prohibited-transaction-exemption-2020-02.

exemption. In addition to what DOL called "minor changes" to definitions and adding clarification text in multiple places, the proposed amendment would make several changes, as described below. The list of changes described below is not exhaustive of those included in the proposed amendment.

Changes to Disclosures. In the pre-transaction disclosure to retirement investors, the proposed amendment would:

- clarify the fiduciary acknowledgment requirement;
- require financial institutions to include written statements of the best interest standard of care;
- clarify that a description of the services to be provided would include the amount to be paid by the retirement investor and the amounts that the financial institution or investment professional would receive as a result of the services; and
- add a section that would require financial institutions to inform retirement investors of their right to obtain specific information regarding costs, fees, and compensation and how they can receive this information free of charge.

In the rollover disclosure, the proposed amendment would require financial institutions and investment professionals to document conclusions about whether a rollover is in the retirement investor's best interest, based on relevant factors and after efforts to obtain relevant information about the plan (e.g., fees, expenses, investment options). This documentation would be provided to the retirement investor. This disclosure requirement would extend to recommended plan-to-plan, plan-to-IRA, IRA-to-plan, and IRA-to-IRA rollovers, as well as rollovers from one type of account to another (e.g., commission-based account to a fee-based account).

In addition, DOL sought comment on whether it should require financial institutions to maintain public websites containing various disclosures.

Changes to Policies and Procedures. The proposed amendment would provide more guidance for financial institutions and investment professionals when implementing policies and procedures to comply with the Impartial Conduct Standards. It would also require that the policies and procedures mitigate conflicts of interest. Financial institutions "may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that that a reasonable person would conclude are likely, to encourage Investment Professionals to make recommendations that are not in Retirement Investors' Best Interest."[41] In addition, the proposal states that financial institutions must not "offer incentive vacations, or even paid trips to educational conferences, if the desirability of the destination is based on sales volume and satisfaction of sales quotas."[42]

Changes to Retrospective Review. The proposed amendment would require financial institutions, as part of their retrospective reviews, to report non-exempt prohibited transactions associated with fiduciary investment advice and pay any resulting excise taxes.[43]

Changes to Circumstances Under Which a Financial Institution or investment Professional Becomes Ineligible to Rely on the Exemption. The proposed amendment would expand ineligibility to include financial institutions that are affiliates, rather than the more limited

[41] See 88 *Federal Register* 75987.

[42] Ibid.

[43] The proposal would also add failure to do so to the list of behaviors that could make a financial institution ineligible to rely on the PTE for 10 years.

definition of "controlled group."[44] It would also set forth a list of specific crimes (including foreign crimes) that could cause ineligibility to rely on the exemption for 10 years.[45] A financial institution or investment professional convicted of a crime by a U.S. federal or state court of competent jurisdiction would not have an opportunity to be heard by DOL. If the conviction is by a foreign court, the financial institution or investment professional may submit a petition to seek DOL's determination to continue to rely on the exemption. Following receipt of the petition, DOL would provide the financial institution or investment professional with an opportunity for a hearing and then issue a written determination regarding the financial institution or investment professional's ability to rely on the PTE. The proposed amendment would change the "winding down" time period before ineligibility from a variety of time periods to a uniform six-month time period after the date of the conviction, DOL's written determination regarding a foreign conviction, or DOL's written ineligibility notice regarding other misconduct.

Changes to the Exemption's Scope. The proposed amendment would expand the exemption to cover investment advice provided by:

- pooled plan providers (PPP), which DOL says would allow pooled employer plans (PEPs, which were authorized in the Setting Every Community Up for Retirement Enhancement Act of 2019 [SECURE Act; enacted as Division O of P.L. 116-94]) to receive investment advice in the same manner as other retirement plans; and
- financial institutions, which provide advice through computer models ("robo advice").

PTE 84-24

Currently, PTE 84-24 covers transactions in connection with the purchase of insurance and annuity products and other investment securities that would otherwise be prohibited by ERISA.[46] Insurance companies offer three common types of annuities: fixed annuities, indexed annuities, and variable annuities. A fixed annuity provides the investor with specified payouts in the decumulation phase. An indexed annuity provides the investor with payouts that are based on the performance of a market index, such as the S&P 500 index. A variable annuity is invested in options chosen by the investor (typically mutual funds), and payouts are based on the performance of the underlying investments.[47]

Insurance companies that sell fixed annuities likely do not have to make use of the current PTEs for fiduciary investment advice, because their activities do not meet the definitions in the current five-part test.[48] When DOL finalized PTE 2020-02 on December 18, 2020, it indicated that insurance companies could rely on either the finalized PTE 2020-02 or PTE 84-24 as it existed at the time. Generally, insurance agents are one of two types: (1) A captive agent works for and sells the products of a single insurance company, and (2) an independent agent does not work for a particular insurance company and sells the products of more than one insurance company. Under

[44] PTE 2020-02 stated that a "Financial Institution is in the same Controlled Group with another Financial Institution if it would be considered in the same 'controlled group of corporations' or 'under common control' with the Financial Institution, as those terms are defined in Code section 414(b) and (c), in each case including the accompanying regulations." See 85 *Federal Register* 82843.

[45] Under the current PTE 2020-02, ineligibility results from conviction of "crimes arising out of such person's provision of investment advice to Retirement Investors."

[46] PTE 84-24 was originally granted in 1977 (as PTE 77-9) and has since been amended several times. See 42 *Federal Register* 32395 (June 24, 1977) and 49 *Federal Register* 13208 (April 3, 1984).

[47] For more discussion of the different types of annuity products, see 88 *Federal Register* 75928.

[48] They may have to rely on other PTEs based on their interactions with retirement plans and retirement investors.

the proposed updated definition of *investment advice*, it is likely that most actions by insurance agents—whether captive or independent—to retirement plans or investors would be considered investment advice.

One of the compliance challenges regarding the selling of insurance products to retirement plans and retirement investors is that an insurance company may not have much authority or control over independent agents. This would be problematic if insurance companies were fiduciaries regarding their products sold by independent agents.

Proposed Amendment to PTE 84-24

DOL's proposed amendments to PTE 84-24 would limit the exemption to independent agents, who would be required to make fiduciary acknowledgements.[49] Insurance companies would generally not be fiduciaries when independent agents sell their products. However, insurance companies would be required to supervise the selling of their products by independent agents.

PTE 84-24, as modified by the proposed amendment, would be available to independent agents who sell annuities from two or more insurers to retirement plans and retirement investors. It would not be available to agents who also sell annuities regulated by the SEC (such as variable annuities) or other non-insurance products. These agents would have to rely on PTE 2020-02.

Insurance agents who rely on PTE 84-24, as modified by the proposed amendment, would be required to meet certain conditions, including adhering to Impartial Conduct Standards, limiting the types of compensation agents could receive, maintaining proper records, and providing disclosures to IRA owners. Insurance companies would be required to establish, maintain, enforce, and retrospectively review policies and procedures to ensure agents' compliance with the Impartial Conduct Standards and other conditions of the proposed amendment to PTE 84-24, though the proposal specifically noted that an insurer would not be required to supervise an agent's recommendations of products other than the annuities offered by the insurer. Similar to the proposed amendment to PTE 2020-02, independent agents and insurers could lose their eligibility to rely on PTE 84-24, as modified by the proposed amendment, for convictions of felony financial crimes by U.S. federal or state courts or by foreign courts.[50]

PTEs 75-1, 77-4, 80-83, 83-1, and 86-128

The 2023 proposed rule was accompanied by proposed amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128.[51] These PTEs currently provide relief to investment advice fiduciaries for the following investment advice transactions:

- PTE 75-1 provides an exemption for broker-dealers, reporting dealers, and banks to engage in certain classes of transactions with plans and IRAs.[52]

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[49] See EBSA, "Proposed Amendment to Prohibited Transaction Exemption 84-24," 88 *Federal Register* 76004-76032, November 3, 2023, https://www.federalregister.gov/documents/2023/11/03/2023-23781/proposed-amendment-to-prohibited-transaction-exemption-84-24.

[50] The crimes include, for example, those that involve an employee benefit plan, financial fraud, or securities violations. See 88 *Federal Register* 76029.

[51] See EBSA, "Proposed Amendment to Prohibited Transaction Exemption 75-1, 77-4, 80-83, 83-1, and 86-128," 88 *Federal Register* 76032-76045, November 3, 2023, https://www.federalregister.gov/documents/2023/11/03/2023-23782/proposed-amendment-to-prohibited-transaction-exemptions-75-1-77-4-80-83-83-1-and-86-128.

[52] "Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks," 40 *Federal Register* 50845, October 31, 1975, as amended at 71 *Federal Register* 5883, February 3, 2006.

- PTE 77-4 provides relief for a plan or IRA's purchase or sale of open-end investment company shares[53] (i.e., mutual fund shares) where the investment adviser for the investment company is also a fiduciary to the plan or IRA.[54]
- PTE 80-83 provides relief for a fiduciary causing a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary or an affiliate.[55]
- PTE 83-1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets investment in such certificates.[56]
- PTE 86-128 provides an exemption for certain types of fiduciaries to use their authority to cause a plan or IRA to pay a fee to the fiduciary, or its affiliate, for effecting or executing securities transactions as an agent for the plan.[57]

Proposed Amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128

The proposed amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 would remove the exemptive relief for the transactions and make these investment advice fiduciaries instead rely on the relief provided in the amended PTE 2020-02.[58] DOL states that this change would provide for a single standard of care that would apply to all fiduciary investment advice.

The proposed amendments also include administrative amendments, such as revoking certain parts of some of the PTEs and adding disclosure requirements for some transactions.

DOL's Rationale for the Proposal

The Administration's rationale for updating the current definition of *investment advice* includes the following: inadequacy of the current five-part test, gaps in the current rule, a desire for a uniform standard of advice, and expectations held by retirement investors.

DOL stated that the rule is "intended to be responsive to the Fifth Circuit's emphasis on relationships of trust and confidence," noting that the 2023 proposed rule is more "narrowly tailored" than the 2016 rule by providing that "fiduciary status would attach only if compensated recommendations are made in certain specified contexts, each of which describes circumstances in which the retirement investor can reasonably place their trust and confidence in the advice provider."[59]

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[53] See SEC, "Mutual Funds," https://www.investor.gov/introduction-investing/investing-basics/glossary/mutual-funds.

[54] "Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans," 42 *Federal Register* 18732, April 8, 1977.

[55] "Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties in Interest," 45 *Federal Register* 73189, November 4, 1980, as amended at 67 *Federal Register* 9483, March 1, 2002.

[56] "Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts," 48 *Federal Register* 895, January 7, 1984, as amended at 67 *Federal Register* 9483, March 1, 2002.

[57] "Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers," 51 *Federal Register* 41686, November 18, 1986, as amended at 67 *Federal Register* 64137, October 17, 2002.

[58] For PTE 75-1, the proposed amendment would remove the exemptive relief for Parts III and IV.

[59] See 88 *Federal Register* 75901 and comment letter from the ERISA Industry Committee at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00298.pdf.

For evidence of the harm under the current rule, the proposal points to discussions in the 2016 final rule's Regulatory Impact Analysis (RIA), which it says provides evidence that retirement investors, who may have inadequate financial literacy, are harmed by financial professionals' conflicts of interest. DOL said that a review of the data "suggests that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 50 to 100 basis points per year over the next 20 years … [which] could cost IRA investors between $95 billion and $189 billion over the next 10 years."[60]

Some of the rationale is based on the changes to the private sector pension system since the 1975 rule was issued. In 1975, most workers who had retirement plans at work were in DB plans (70.8% of the 38.4 million active private sector plan participants). While DC plans existed, Congress had not yet authorized 401(k) plans, which have since become the predominant type of retirement plan.[61] By 1984, a majority of active private sector plan participants were in DC plans, and in 2021 (the most recent year for which data is available), 88.3% of participants were in DC plans.[62]

DOL's Concerns Regarding the Adequacy of the Five-Part Test

DOL noted in the preamble to the proposed regulation that because all five prongs of the five-part test must be met, not all recommendations are fiduciary investment advice. Examples of situations in which not all recommendations meet each part of the five-part test include:

- **Regular basis prong.** One of DOL's concerns is that under the current rules, one-time recommendations generally do not meet the *regular basis* prong of the five-part test. For example, an individual considering rolling over DC plan assets or an IRA might contact a financial professional. The financial professional's recommendation might not be considered investment advice if it is provided once but not on a regular basis. The proposal addresses this scenario by making fiduciaries of financial professionals who provide investment recommendations as a regular part of their business, among other conditions, regardless of whether the retirement investor receives the recommendations one time or as part of an ongoing relationship.
- **Mutual understanding prong.** DOL said that firms may have lines in their contracts that disclaim that they are fiduciaries (and therefore the mutual understanding prong does not apply) or that tell investors to get other opinions (thereby avoiding the primary basis prong). The proposal would rely on the circumstances surrounding the recommendation—including how investment professionals hold themselves out to retirement investors and describe the services offered—and would replace "primary basis" with "may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest." A written statement that a

[60] For example, see DOL, *Regulating Advice Markets: Definition of the Term "Fiduciary" Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, April 2016, p. 9, https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[61] The Revenue Act of 1978 (P.L. 95-600) authorized 401(k) plans, which started to become more widespread after the IRS issued regulations in 1981. See IRS, "Cash or Deferred Arrangements Under Employee Plans," 46 *Federal Register* 55544-55549, November 10, 1981, https://www.govinfo.gov/content/pkg/FR-1981-11-10/pdf/FR-1981-11-10.pdf#page=50.

[62] See CRS In Focus IF12007, *A Visual Depiction of the Shift from Defined Benefit (DB) to Defined Contribution (DC) Pension Plans in the Private Sector*; and EBSA, *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2021*, September 2023, Table E7, https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.

person is not a fiduciary would not have an effect on determining fiduciary status if the statement is inconsistent with the person's actions.

- **Primary basis prong.** DOL noted that some financial professionals may skirt this prong by telling clients to not rely solely on their recommendations and to seek other opinions. By doing so, the recommendations would not meet this prong of the five-part test.

Rollover Recommendations

The updated definition of *investment advice* would include recommendations on rollovers. DOL stated that the decision to take a benefit distribution or engage in a rollover are among the most important financial decisions that a plan participant or IRA owner can make. DOL noted that when retirement assets are held within ERISA plans, plan sponsors have the fiduciary duty to facilitate sound investment options, whereas retirement assets held in IRAs "often operate under conflicts of interest" by investment advice providers. Furthermore, an investment advice provider may have incentives to recommend rollovers from a workplace plan to an IRA held by his or her financial institution. PTE 2020-02 noted that when recommending a rollover, a firm "can generally expect to earn transaction-based compensation such as commissions or an ongoing advisory fee, from the IRA, but may or may not earn compensation if the assets remain in the Title I plan."[63]

Current Regulatory Gaps

The proposal would address what DOL calls *gaps* in the current regulatory structure. For example, Reg BI covers recommendations of securities to retail investors. Reg BI does not apply to (1) recommendations of non-securities (such as commodities, fixed indexed annuities, and real estate) to retail investors[64] and (2) recommendations to plan sponsors (because they are not retail investors). By updating the definition of *investment advice*, the proposal would cover these two situations.

DOL "expects that participants in general would benefit from the stronger, uniform standards imposed by the proposed amendments to the rule and PTEs."[65] For example, recommendations from broker-dealers might be subject to Reg BI, whereas recommendations from insurance agents might be subject to state regulations.

The sales of insurance products are generally regulated at the state level.[66] Most states have adopted NAIC's Suitability in Annuity Transactions Model Regulation (#275), which sets standards for the recommendation of annuity products. In the proposed rule, DOL noted what it considered to be potential issues with the NAIC model regulation—for instance, that the term *material conflict of interest* does not include cash compensation or non-cash compensation and that it does not cover transactions involving ERISA plans.[67]

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[63] See 85 *Federal Register* 82802.

[64] Other types of annuities, such as variable annuities, are considered securities and subject to Reg BI.

[65] See 88 *Federal Register* 75930.

[66] The proposed rule states that, "while all annuity products are subject to state regulation, variable annuities and some indexed annuities are considered securities, and therefore are also subject to SEC and FINRA regulations." See 88 *Federal Register* 75928.

[67] See NAIC, "Suitability in Annuity Transactions Model Regulation." See also NAIC, "Additional Proposed Conflict of Interest FAQ Question and Answer," https://content.naic.org/sites/default/files/call_materials/Conflict%20of%20Interest%20FAQ%20Proposed%20Q%26A%20clean.pdf.

Congressional Responses

As of the date of this report, congressional responses include:

- separate letters opposing the proposed regulation from Representative Virginia Foxx (the chairwoman) and 10 members of the House Education and Workforce Committee;[68] a group of 50 members of the House of Representatives; Representative Roger Williams (the chairman) and three members of the House Committee on Small Business;[69] and Senator Roger Marshall and 10 other Senators;[70]
- a letter supporting the proposed regulation from Senator Bernie Sanders, chair of the Senate Committee on Health, Education, Labor, and Pensions; and Representative Bobby Scott, ranking member of the House Education and Workforce Committee;[71]
- press releases opposing the proposed regulation from Ann Wagner, chair of the House Financial Services Subcommittee on Capital Markets, and supporting the proposed regulation from Representatives Scott, ranking member of the House Committee on Education and the Workforce, and Representative Maxine Waters, ranking member of the House Financial Services Committee;[72]
- a hearing from the House Financial Services committee on January 10, 2024, entitled *Examining the DOL Fiduciary Rule: Implications for Retirement Savings and Access*;[73]
- a hearing from the Subcommittee on Health, Employment, Labor, and Pensions subcommittee of the House Education and Workforce committee on February 15, 2024, entitled *Protecting American Savers and Retirees from DOL's Regulatory Overreach*.[74]

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[68] See letter from Reps. Foxx, Good, Walberg, Grothman, Stefanik, Allen, Banks, Smucker, McClain, Bean, and Houchin to Acting Secretary Su, December 21, 2023, https://edworkforce.house.gov/uploadedfiles/12.21.23_final_comment_ltr_house_committee_on_education_and_the_workforce.pdf.

[69] See letter from Senators Marshall, Barrasso, Braun, Collins, Cornyn, Ernst, Grassley, Hagerty, Hyde-Smith, Rounds, and Thune to Acting Secretary Su, December 18, 2023, https://www.marshall.senate.gov/wp-content/uploads/Letter-to-DOL-Fiduciary-Rule-12.18.23.pdf.

[70] See letter from multiple Members of Congress to Acting Secretary Su and Assistant Secretary Gomez, January 8, 2024, https://si-interactive.s3.amazonaws.com/prod/planadviser-com/wp-content/uploads/2024/01/08165414/2024.1.8_Bipartisan_Hill_DScott_DOL_Retirement_Security_Proposed_Rule_Comment_Letter-FINAL-SIGNED.pdf.

[71] See letter from Senator Sanders and Representative Scott to Acting Secretary Su, January 2, 2024, https://democrats-edworkforce.house.gov/imo/media/doc/scott_sanders_comment_letter_to_dol_re_retirement_security_rule.pdf.

[72] See Office of Rep. Ann Wagner, "Wagner Blasts Misguided, Irresponsible Fiduciary Rule," press release, October 31, 2023, https://wagner.house.gov/media-center/press-releases/wagner-blasts-misguided-irresponsible-fiduciary-rule; Office of Rep. Bobby Scott, "Scott Applauds Proposed Rule to Strengthen America's Retirement Security," press release, October 31, 2023, https://bobbyscott.house.gov/media-center/press-releases/scott-applauds-proposed-rule-strengthen-americas-retirement-security; and Office of Rep. Maxine Waters, "Ranking Member Maxine Waters Applauds Biden Administration's 'Retirement Security' Rule Proposal," press release, October 31, 2023, https://democrats-financialservices.house.gov/news/documentsingle.aspx?DocumentID=410916.

[73] See Financial Services, Subcommittee on Capital Markets, *Examining the DOL Fiduciary Rule: Implications for Retirement Savings and Access*, https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=409088.

[74] See U.S. Congress, House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor, and Pensions, *Protecting American Savers and Retirees from DOL's Regulatory Overreach*, https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=410108.

Stakeholder Reactions

The 2023 proposed rule received over 20,000 comments.[75] Stakeholders had varying opinions, ranging from requests to withdraw the proposal to suggesting changes to endorsing the proposal. This section includes a selection of stakeholder viewpoints regarding aspects of the proposal.[76]

Updated Definition of *Investment Advice*

Some stakeholders believe that the proposal's definition of *investment advice* is "overly broad."[77] The proposal's updated definition would capture interactions between financial professionals and retirement investors that some stakeholders think are not fiduciary investment advice. For example, some stakeholders stated that a fiduciary advice relationship is one built on trust and confidence, which would not be expected to be present for many of the interactions that would be captured by the proposal, such as a one-time instance of a recommendation (for example, whether a retirement investor should roll over 401(k) assets into an IRA).[78] Some stakeholders referenced the 5th Circuit's reasoning that vacated the 2016 rule, indicating they think it applies to parts of the current proposal. For example, one comment letter noted that "the Proposed Rule's interpretation of investment advice fiduciary again lacks any requirement of a special relationship of 'trust and confidence.'"[79]

Other stakeholders support the updated definition of *investment advice*, noting that they believe that financial professionals hold themselves out as acting in positions of trust by, as one comment letter noted, "the use by advisers of titles used to engender a sense of trust and confidence among clients."[80] Another comment letter noted that "any reasonable investor would view these relationships as trusted advice relationships and expect to receive retirement investment advice that is in their best interest."[81]

Other stakeholders supported the updated definition of *investment advice* because recommendations to plan sponsors are *not* covered by Reg BI and the NAIC model regulation.[82] One comment letter noted that this could be of particular concern for small employers who might not have the same level of financial sophistication or knowledge as large employers do. The

[75] This report provides a brief overview of selected comment letters, not a comprehensive summary of each letter. Many of the letters address a variety of aspects of the proposed rule, and summarizing all of them is beyond the scope of this report.

[76] CRS identified topics that were discussed across many different letters and/or mentioned during DOL's two days of public hearings on the proposed rule. CRS incorporated a range of viewpoints from different stakeholders regarding each topic.

[77] See, for example, comment letter from the American Investment Council at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00362.pdf.

[78] See, for example, comment letter from T Rowe Price at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00363.pdf.

[79] See, for example, comment letter from the National Association of Insurance and Financial Advisors at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA33/00018.pdf.

[80] See comment letter from Better Markets at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00374.pdf.

[81] See, for example, comment letter from the Consumer Federation of America at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00336.pdf.

[82] RegBI applies only to retail customers, which plan sponsor are not. See SEC, "Frequently Asked Questions on Regulation Best Interest," https://www.sec.gov/tm/faq-regulation-best-interest. The NAIC model regulation does not apply to contracts used to fund ERISA plans. See NAIC, "Suitability in Annuity Transactions Model Regulation."

comment letter noted that "under the current federal and state regulatory framework, small business owners establishing a retirement plan for their employees are often provided zero regulatory protection with respect to the advice given to them regarding plan investment options."[83]

Some stakeholders argue that the existing regulatory framework for brokers/dealers and insurance professionals adequately protect retirement investors. For example, NAIC indicated that it "fundamentally disagree[d] with, the Administration's characterization of state consumer protections around annuity sales as 'inadequate' and providing 'misaligned incentives.'"[84]

Investment Advice Relationships for IRAs

The proposed rule makes clear that recommendations of any securities or investment transactions to IRA owners or beneficiaries would be fiduciary investment advice. Some stakeholders disagree with DOL's position that ERISA's fiduciary standards should apply to advice to IRA owners through the PTEs. One comment letter stated, "The fact that the prohibited transaction rules in Sec. 4975 of the Code apply to IRAs do not confer on the Department the authority to regulate the conduct of financial professionals making recommendations to IRAs."[85]

"Hire Me" Conversations

Some stakeholders have expressed concerns that interactions where financial professionals bid for client services (what are referred to as "hire me" conversations) could be considered fiduciary advice. While DOL said it "does not intend to suggest, however, that a person could become a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner," one comment letter noted that, "like other market participants, banks found the 'hire me' exception difficult to employ when the 2016 Rule was in effect, due to uncertainty regarding its parameters."[86]

Call Centers

Some stakeholders have expressed concerns that resources that investors regularly engage with, such as call centers, could be considered sources of fiduciary advice. One comment letter noted that call center representatives "would need to follow tightly controlled scripts…. The true impact of the Proposal would be reducing these interactions to an exercise of sharing factual, bare minimum and one-dimensional information resulting in the retirement investor being left to either fend for themselves or take on additional cost to hire an investment advice provider for further assistance."[87]

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[83] See comment from the American Retirement Association at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA32/00068.pdf.

[84] See comment letter from NAIC at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00165.pdf.

[85] See comment letter from Allianz Life Insurance Company of North America at https://www.regulations.gov/comment/EBSA-2023-0014-0428.

[86] See page 75906 of the proposed rule and comment from American Bankers Association, p. 15, at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00296.pdf.

[87] See comment letter from John L Carter, president and chief operating officer of Nationwide Financial Services, at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00292.pdf.

Lifetime Income

Some policymakers have a long-standing interest in ensuring that individuals receive regular income throughout their retirement—what is referred to as *lifetime income*. The decline in the number of private sector employers offering DB plans has raised concerns about participants possibly outliving their DC retirement assets. Purchasing annuities, either within participants' DB plans or in IRAs after rolling over DC assets, is the primary means by which individuals can ensure regular income throughout retirement. Some insurance companies have noted that as a result of changes they foresee to the annuity marketplace, the proposal would make "it more difficult and expensive for plans to offer lifetime income" and that "efforts that would restrict or nearly eliminate the use of such products in defined contribution plans are contrary to Congressional intent."[88]

Changes to Ineligibility to Rely on PTE 2020-02

Some stakeholders disagree with DOL's proposed changes to the ineligibility provisions, which would be expanded to include convictions of an affiliate rather than a "controlled group" and set forth a list of specific crimes (including foreign crimes) that could make the financial institution or investment professional ineligible to rely on the exemption for 10 years. One comment letter noted that "a conviction of an affiliate does not reflect in any way on the policies, procedures, or compliance of the affiliated investment advisory firm."[89] Another noted that the proposed expansion of the definition of *controlled group* to include affiliates "can lead to the anomalous result of a fiduciary's ineligibility resulting from the criminal conduct of a foreign affiliate that has no contact or relationship with the fiduciary and which may be engaged in activities that are wholly unrelated to the investment management of retirement assets (e.g., foreign real estate brokerage, human resources support)."[90]

Compliance Concerns

The proposed amendment to PTE 2020-02 includes additional disclosures and modifications to existing disclosures. Some stakeholders expressed concern with the compliance costs that would be associated with these changes to disclosures. The proposed amendment to PTE 2020-02 includes time and cost estimations for the changes included in the proposal, but one comment letter noted that "these exemption changes would impose significant costs on the retirement industry that far exceed the Department's estimates, with no clear evaluation of the need for changes and no demonstrable benefit to investors,"[91] and that "many small entities are likely to face significant compliance costs associated with the proposed rule."[92] Some stated that the proposed changes to amended PTE 2020-02 would make it harder for service providers to comply and that "their natural reaction will be to either cease providing information, advice, and

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[88] See comment letter from Mindset at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00366.pdf.

[89] See, for example, comment letter from the Securities Industry and Financial Markets Association (SIFMA) and SIFMA Asset Management Group at https://www.regulations.gov/comment/EBSA-2023-0014-0377.

[90] See, for example, comment letter from the American Bankers Association at https://www.regulations.gov/comment/EBSA-2023-0014-0345.

[91] See comment letter from the Investment Company Institute at https://www.regulations.gov/comment/EBSA-2023-0014-0444.

[92] See comment letter from the U.S. Small Business Administration Office of Advocacy at https://www.regulations.gov/comment/EBSA-2023-0014-0355.

investment products to retirement investors or redouble their efforts to avoid classification as investment advice fiduciaries."[93]

Changes to Incentives

Some stakeholders do not agree with DOL's proposed prohibition of certain types of compensation, such as paid trips to educational conferences, noting that DOL's "restrictive approach to the types of compensation that Investment Professionals are entitled to is at direct odds with Regulation BI and FINRA."[94] Others describe the prohibition of the various types of compensation as "completely arbitrary" and "speculative, subjective and capable of being violated in every single employee's compensation setting."[95]

Other stakeholders support the proposed changes, noting that "these types of incentives would encourage investment professionals to violate their best interest obligation."[96]

Efficiency Changes Resulting from Proposed Amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128

Some stakeholders disagree with the proposed change to remove existing exemptive relief for certain transactions covered by PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 (so that amended PTE 2020-02 would be used instead). One comment letter noted that "the efficiencies associated with the current more tailored exemptions the Department proposes to amend would be lost, resulting in higher costs and fewer benefits to investors."[97]

Investment Education

Some interactions with retirement plan participants and plan sponsors, such as communications of a general nature, do not meet the definition of *investment advice*. For example, communications that describe the features of a participant's 401(k) plan are considered investment education. DOL's Interpretive Bulletin 96-1 (IB 96-1) describes the circumstances under which communications are considered investment education and therefore would not constitute investment advice.[98] While DOL stated that it "believes that the IB would continue to provide accurate guidance under the proposed regulation," some stakeholders have expressed concerns that about whether "routine interactions and investment education would newly trigger fiduciary status" and that "further clarity is needed."[99]

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[93] See comment letter from Cetera Financial Group at https://www.regulations.gov/comment/EBSA-2023-0014-0422.

[94] See comment letter from the Financial Services Institute at https://www.regulations.gov/comment/EBSA-2023-0014-0391.

[95] See, for example, comment letters from SIFMA at https://www.regulations.gov/comment/EBSA-2023-0014-0377 and Davis and Harman LLP at https://www.regulations.gov/comment/EBSA-2023-0014-0138.

[96] See comment letter from the Consumer Federation of America at https://www.regulations.gov/comment/EBSA-2023-0014-0385.

[97] See comment letter from the Investment Company Institute at https://www.regulations.gov/comment/EBSA-2023-0014-0444.

[98] See DOL, "Interpretive Bulletin 96-1; Participant Investment Education," 61 *Federal Register* 29586-29590, June 11, 1996, https://www.govinfo.gov/content/pkg/FR-1996-06-11/pdf/96-14093.pdf. The categories in IB 96-1 are plan information, general financial and investment information, asset allocation models, and interactive investment materials.

[99] See 88 Federal Register 75911 and comment letter from the ERISA Industry Committee.

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