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**MEMORANDUM**

April 25, 2024

FROM: Scott Sinder  
Melanie Nussdorf  
Kate Jensen  
Nick Sutter

RE: Department of Labor Final Retirement Security Rule

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On April 23, 2024, the Department of Labor (the “Department” or “DOL”) [published the final rule](#) expanding the definition of an investment advice fiduciary under section 3(21) of the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code.<sup>1</sup> Along with the expanded fiduciary definition, the Department also released finalized amendments to two current class exemptions, Prohibited Transaction Exemption (“PTE”) 84-24 and PTE 2020-02 (together, the “Final Rule”), intended to allow investment advisors to advise on certain transactions.<sup>2</sup>

The Final Rule will take effect on September 23, 2024, but provides an additional one-year transition period for complying with certain aspects of PTE 84-24 and PTE 2020-02. The two fundamental conditions of both PTEs – the impartial conduct standards and acknowledgement of fiduciary status -- must be met on the effective date.

The Final Rule, as expected and largely consistent with the Proposed Rule,<sup>3</sup> significantly expands the long-standing test to determine who is an investment advice fiduciary. Notably, one-time sales of retirement products can now trigger fiduciary obligations. Investment advice fiduciaries will have to comply with PTE 84-24 or PTE 2020-02 to receive commissions or other variable compensation from a third party.

Below is an overview of key highlights from the Final Rule. A full analysis from Steptoe will follow in the coming days.

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<sup>1</sup> See RIN 1210-AC02 (the “Final Rule”), Retirement Security Rule: Definition of an Investment Advice Fiduciary, <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/erisa/retirement-security/final-rule.pdf>

<sup>2</sup> See ZRIN 1210-ZA32, Amendment to Prohibited Transaction Exemption 2020-02 (“Final PTE 2020-02”), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/erisa/retirement-security/prohibited-transaction-exemption-2020-02.pdf>; ZRIN 1210-ZA33, Amendment to Prohibited Transaction Exemption 84-24 (“Final PTE 84-24”), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/erisa/retirement-security/prohibited-transaction-exemption-84-24.pdf>

<sup>3</sup> 88 Fed. Reg. 75,890 (Nov. 3, 2023).

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## I. Fiduciary Rule

### A. Determining Investment Advice Fiduciary Status

Under the Final Rule, anyone who satisfies the following is an investment advice fiduciary:

- Provides an investment recommendation regarding any securities transaction or other investments or investment strategy;
- To a “Retirement Investor”;
- Related to money or other property of a plan or IRA; and

The person:

- Makes professional investment recommendations “on a regular basis **as part of their business**”; and
- The investment recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor’s particular needs or individual circumstances, reflects the application of 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.<sup>4</sup>

Notably, the emphasized text above preserves the risk that one-time investment advice *can* trigger fiduciary status and related obligations.

Under the Proposed Rule, if a person, or any of its affiliates, had discretionary control over any assets of the retirement investor, that person was automatically an investment advice fiduciary, regardless of whether the person made individualized recommendations. The Final Rule removes this provision.

The Department explains at some length in its discussion of the Final Rule that not every recommendation makes a person an investment advice fiduciary. The Final Rule, for instance, adds the word “professional” to the facts-and-circumstances test to try to make clear that the person making the recommendation must be in the business of making investment recommendations (i.e. not a family member, friend, or a company’s HR staffer). The recommendation also needs to be individualized. The Final Rule indicates that a cold call that is not based on the investor’s individualized circumstances or particular needs is not fiduciary investment advice. Similarly, the Final Rule appears to indicate that a mere list of what might be available in the market or from a particular investment firm would not rise to the level of fiduciary investment advice.

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<sup>4</sup> Final Rule at 459; *see also* § 2510.3-21(c)(1)(i).

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Relatedly, the Department attempted to clarify the “investment advice” definition vis-à-vis the Proposed Rule. The Final rule explicitly states that providing investment information or education, without a recommendation, is not investment advice that imposes fiduciary obligations.<sup>5</sup>

The Final Rule also tightens the fiduciary acknowledgement test – saying one is acting as a trusted advisor is not enough to make a person an investment advice fiduciary. The person would need to acknowledge that they are acting as a fiduciary under Title I or II of ERISA.<sup>6</sup>

**B. Definition of Retirement Investor**

The Final Rule adds a new definition of “retirement investor” to mean “a plan, plan participant or beneficiary, IRA, IRA owner or beneficiary, plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.”<sup>7</sup> The Final Rule clarifies that an IRA fiduciary does not include an IRA owner or beneficiary who is merely receiving investment advice.<sup>8</sup>

Under the Final Rule, an insurer or mutual fund company that discusses with investment advisors information about the products they offer will not be considered a fiduciary because the person does not have the ability to make decisions on behalf of the plan and would not be based on the individual needs or particular circumstances of any plan or IRA.<sup>9</sup>

**C. Definition of Fee**

Fiduciary status applies to a person who provides investment advice for a fee or other compensation. The Final Rule’s definition of fee remains broad and includes:

...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. A fee or compensation is paid “in connection with or as a result of” such transaction or service if the fee or compensation would not have been paid

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<sup>5</sup> Final Rule at 459; *see also* § 2510.3-21(c)(1)(iii).

<sup>6</sup> Final Rule at 459; *see also* § 2510.3-21(c)(1)(ii).

<sup>7</sup> Final Rule at 465; *see also* § 2510.3-21(f)(11).

<sup>8</sup> Final Rule at 464; *see also* § 2510.3-21(f)(5).

<sup>9</sup> *See* Final Rule at 138.

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but for the recommended transaction or the provision of investment advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of investment advice.<sup>10</sup>

**II. PTE 2020-02**

The Final PTE 2020-02, consistent with the Proposed PTE 2020-02, requires parties relying on the exemption to provide a written acknowledgment that they are fiduciaries and tracks closely with the Proposed PTE 2020-02.

The Final PTE 2020-02 narrows the IRA rollover disclosure requirement from the Proposed PTE 2020-02 to now only apply to investment advice from a Plan that is covered under Title I of ERISA to an IRA. However, before advising on a rollover, the Final Rule still requires the investment advisor to consider and provide documentation to the customer of several factors: (a) the alternatives to a rollover, including leaving the money in the Plan, if applicable; (b) the fees and expenses associated with the Plan and the recommended investment or account; (c) whether an employer or other party pays for some or all of the Plan's administrative expenses; and (d) the different levels of services and investments available under the Plan and the recommended investment or account.<sup>11</sup>

**III. PTE 84-24**

The Final PTE 84-24 closely tracks with the Proposed PTE 84-24 and consistent with the earlier proposal, can only be used by Independent Producers. The Final PTE 84-24 makes a significant change to the Proposed PTE 84-24 regarding compensation payments. The Proposed PTE 84-24 would not have allowed Independent Producers to claim revenue sharing payments, administrative fees and marketing payments, and any payments from someone other than the Insurer and its Affiliates.

The Final PTE 84-24 removes this restriction. Under the Final Rule, an Independent Producer can rely on the exemption for the indirect or direct receipt of reasonable compensation. PTE 84-24 is available for (a) the direct or indirect receipt of reasonable compensation by the Independent Producer and (b) the sale of a non-security annuity contract or other insurance product that does not meet the definition of "security" under Federal securities laws.<sup>12</sup>

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<sup>10</sup> Final Rule at 462-63, *see also* § 2510.3-21(e).

<sup>11</sup> Final PTE 2020-02 at 127, *see also* Section II(b)(5).

<sup>12</sup> Final PTE 84-24 at 135, *see also* Section III(g)(1)-(2).

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#### **IV. The Final Rule Will Likely Face Legal Challenges**

The 2016 Fiduciary Rule finalized under the Obama Administration was vacated by the U.S. Court of Appeals for the Fifth Circuit in *Chamber of Commerce of the USA v. U.S. Dep't of Labor* in 2018.<sup>13</sup> The Fifth Circuit found that the Department's definition of fiduciary in the 2016 Fiduciary Rule was inconsistent with the statutory text in both ERISA and the Internal Revenue Code as well as the common-law meaning of fiduciary.

Since the 2016 Fiduciary Rule was vacated by the Fifth Circuit, the Supreme Court has reaffirmed the "major questions doctrine" which requires a federal agency to point to clear statutory authorization to issue regulations with "deep economic and political significance" and is likely to be used to challenge DOL's authority to issue the Final Rule. A similar line of attack is likely to be used to challenge the validity of the Final Rule, particularly as a reviewing court is likely to consider the Fifth Circuit's opinion that already held DOL's 2016 Fiduciary Rule was inconsistent with the statute.

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<sup>13</sup> 885 F. 3d 360 (5<sup>th</sup> Cir. 2018).