

What is the current ERISA definition of fiduciary investment advice?

The 1975 five-part test has been reinstated. That test requires that the following 5 elements be satisfied in order for a communication to be considered fiduciary investment advice. An investment advice fiduciary is defined as a person who provides investment advice for a fee or other compensation, direct or indirect, with respect to any money or other property of a plan, if the following facts and circumstances apply:

- The person renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property;
- Does so on a regular basis;
- That is individualized based on particular needs of the plan or IRA;
- Pursuant to a mutual understanding or agreement;
- That the advice will serve as a primary basis for investment decisions;

Does the definition of an investment advice fiduciary apply to rollovers?

Yes, the above analysis of facts and circumstances defining an investment advice fiduciary also applies to rollover recommendations. The DOL also stated that future contemplated recommendations (such as an agreement to provide ongoing advice) at the time of the initial rollover recommendation could cause a first-time rollover recommendation to satisfy the regular basis requirement. Generally, it seems that it is the DOL's intention to expand its Rule to include more rollover recommendations as fiduciary advice.

Can you be subject to the “best interest” standard of care under Reg BI and the Model NAIC suitability rule without being an ERISA investment advice fiduciary?

Yes. The definition of a recommendation triggering the NAIC and Reg BI standards is much broader than the current ERISA fiduciary investment advice definition.

If you are in compliance with SEC Regulation Best Interest and/or the NAIC Model Best Interest Rule what else is needed in order to comply with DOL's Prohibited Transaction Exception (PTE) 2020-02?

Summarily, the only additional requirements are the following:

- Fiduciary status must be acknowledged at the outset of the relationship;
- There must be an annual review to check compliance with PTE 2020-02 that is signed off on by a senior officer; and
- The basis for any rollover recommendation must be disclosed to investors, including why the recommendation is in the investor's best interest.

The work that has already been completed in order to achieve compliance with Regulation Best Interest and the Model NAIC Best Interest Rule positions Broker-Dealers well to comply with PTE 2020-02.

Can financial professionals who sell unregistered annuity products (e.g., fixed and fixed indexed annuities) rely on this exemption for rollover and ongoing IRA advice?

Financial professionals may only rely on the exemption if they are affiliated with a broker-dealer, bank, insurance company or registered investment advisor that is willing to acknowledge ERISA fiduciary status for the advice provided and supervise compliance with the exemption. This could be challenging for intermediaries such as independent marketing organizations (IMOs) and brokerage general agents (BGAs).

Are any additional changes on the horizon related to the definition of ERISA fiduciary investment advice?

Yes. DOL has expressed its intention to broaden the definition of fiduciary investment advice and to modify existing investment advice PTEs to incorporate the impartial conduct standards and fiduciary acknowledgement requirements.

What are the impartial conduct standards in PTE 2020-02?

The PTE's Impartial Conduct Standards are defined as:

- Providing investment advice that is in retirement investors' best interest when making covered recommendations and avoid putting the fiduciary advice provider's interest ahead of the investor's interest;
- Charging only reasonable compensation (direct and indirect). Please note that Broker-Dealers may be able to take the position that they are satisfying this requirement already in light of the actions that they have taken in regard to Regulation Best Interest but those actions are a firm by firm and fact specific analysis. Advisors should follow the direction of its Broker-Dealer in this regard;
- Making no materially misleading statements about the investment transaction and other relevant matters; and
- Seeking to obtain the best execution of the investment transaction reasonably available under the circumstances, as required by federal securities laws.