

## Publications

# DOL Amends Fiduciary Advice Definition Regulation

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On April 23, 2024, the U.S. Department of Labor (“DOL” or “Department”) issued a final regulatory package amending its fiduciary investment advice regulation and revising numerous existing prohibited transaction exemptions used by investment advice fiduciaries. The regulatory package represents the latest development in DOL’s years-long effort to expand the circumstances under which a person will be considered an investment advice fiduciary for purposes of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and the Internal Revenue Code of 1986, as amended (“Code”) while at the same time narrowing the prohibited transaction exemptions available to investment advice fiduciaries. Overall, the final regulatory package includes a number of helpful changes from the proposals. That said, the package will require significant compliance efforts from financial services firms within a relatively short period of time and is certain to be challenged in court as exceeding DOL’s statutory authority.

The materials published by DOL include:

- A final regulation defining who is a “fiduciary” by reason of providing investment advice to a plan or an IRA (the “Final Advice Regulation”);
- Final amendments to Prohibited Transaction Exemption 2020-02 (“PTE 2020-02”), which provides exemptive relief for eligible investment advice fiduciaries, if certain conditions are met;
- Final amendments to PTE 84-24, currently the primary source of prohibited transaction exemptive relief for the sale of insurance and annuity products to ERISA plans and IRAs; and
- Final amendments to PTEs 77-4, 75-1, 80-83, 83-1 and 86-128 that would eliminate the ability of investment advice fiduciaries to rely on the exemptions and would make other changes to PTEs 75-1 and 86-128.

Groom Law Group has prepared summaries of each of these amendments, including our initial observations on their impact and scope. In 2023 when the Department issued its proposed “investment advice” regulation, we also prepared a summary of court decisions related to prior DOL action in this area which you can access [here](#).

This client alert provides an overview of the Final Advice Regulation. All of the summaries are available on Groom’s [investment advice resource hub](#) and are linked here: [DOL Finalizes PTE 2020-02 Amendments](#); [DOL Finalizes PTE 84-24 Amendments](#); [DOL Finalizes Changes to Other Exemptions Through Mass Amendment](#)

## I. Executive Summary

Under ERISA and the Internal Revenue Code, a person is an investment advice fiduciary to the extent that they render investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of a plan, or have authority or responsibility to do so. A 1975 DOL regulation interpreting the investment advice definition established a five-part test under which a person is an “investment advice” fiduciary if, for a fee, they: (1) render advice to a plan 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; (2) on a regular basis; (3) pursuant to a mutual understanding; (4) that such advice will be a primary basis for investment decisions; and (5) that the advice will be individualized to the needs of the plan.

The Final Advice Regulation replaces this five-part test with a new definition under which a person is an investment advice fiduciary if, for a fee or other compensation, they:

- (1) Make a recommendation;
- (2) Of any securities transaction, any other investment transaction or any investment strategy involving securities or other investment property;
- (3) To a Retirement Investor; and
- (4) The person making the recommendation either:
  - i. Makes professional investment recommendations to investors as a regular part of their business; under circumstances that a reasonable investor would view as indicating the recommendation is based on a review of, and reflects the application of professional judgment to, the investor’s particular needs or individual circumstances and which may be relied upon as intended to advance the Retirement Investor’s best interest;

Or

- ii. Acknowledges or represents that they are acting as a fiduciary under ERISA or the Code with respect to the recommendation.

The Department intends that the Final Advice Regulation apply to a large number of financial institutions and financial professionals in the business of providing investment advice to retirement investors including, but not limited to, discretionary asset managers (institutional and retail), banks (including institutional, retail, and private banking), insurance companies and their employee and statutory employee agents, independent insurance agents, broker-dealers and their representatives, state and federally registered investment advisers and their representatives, and solicitors.

Below, we discuss each element of the Final Advice Regulation and our observations related to implementation. We include a chart later in this alert summarizing the key differences between the 2023 proposed regulation and the Final Advice Regulation.

## II. Final Advice Regulation – Discussion and Observations

### A. Fee or Compensation Broadly Defined

Consistent with DOL’s long-standing view, virtually any payment or consideration which is either explicitly received for the advice or would not have been received but for the advice or the recommended transaction will be considered a “fee or other compensation, direct or indirect” for purposes of the Final Advice Regulation. The regulatory definition specifically identifies covered compensation to include (but not be limited to) commissions, loads, finder’s fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, shelf-space payments to brokerage firms, recruitment compensation, expense reimbursements, gifts, gratuities or other non-cash compensation. Additionally, the compensation need not be

paid to the party providing advice. The payment of compensation to the advice provider's affiliate will result in the provision of investment advice if the other definitional requirements are met.

Given the broad definition of "compensation" including the "direct or indirect" language, it will be very difficult for financial institutions and financial professionals to take the position that they are not paid for the investment advice, but are instead paid for managing assets or for the sale of an investment product. For example, in the DOL's view, a person making a rollover recommendation to a plan participant will not be able to successfully argue that being paid to manage the IRA after the rollover is not compensation they are for the rollover advice because but for the rollover recommendation the person would not be paid for managing the IRA.

## B. Look to Facts and Circumstances to Define "Recommendation"

While the Final Advice Regulation does not define when a person makes a "recommendation," DOL characterized a recommendation as a "call to action" and indicated that it intends to the term to have a meaning consistent with the SEC's interpretation of the term as used in Regulation Best Interest. Notably, in its Regulation Best Interest adopting release, the SEC referenced DOL guidance, including IB 96-1, in describing educational activities that do not involve a recommendation. DOL reiterated that whether a communication is a recommendation will depend on the specific facts of the interaction and noted that the more individualized a communication, the greater the likelihood that it will rise to the level of a recommendation.

Observations: Those looking to avoid fiduciary status under the Final Advice Regulation will want to carefully consider whether it is practical to avoid making a recommendation. A few different approaches may be available, depending on the circumstances.

### 1. Disclaimers

The Final Advice Regulation specifies that a disclaimer of fiduciary status, or of the elements of the regulation will not relieve a person of fiduciary status if the disclaimer is inconsistent with the person's oral or other written communications, marketing materials, applicable state or Federal law or other interactions with a Retirement Investor. While the preamble doesn't address disclaimers in the context of whether a particular communication should be viewed as a "recommendation," the DOL generally expressed support for the idea that parties can agree on the nature of their relationship, provided the agreement is not inconsistent with their interactions. In this regard, there may be circumstances in which an entity providing education or engaging in a sales interaction with a Retirement Investor will want to reiterate that it is not intending to provide a "call to action" or to influence the investor's behavior.

### 2. Education

Under Interpretive Bulletin 96-1 ("IB 96-1"), investment education in the form of plan information, general financial information, asset allocation models and interactive investment materials described in the IB will not constitute a "recommendation" under the five-part test. [61 Fed. Reg. 29586 (Jun 11, 1996).] DOL's 2016 fiduciary rule effectively expanded IB 96-1 to include, for example, information related to retirement income needs, forms of distributions, annuitization and other forms of lifetime income payment options, advantages, disadvantages and risks of different forms of distributions, information regarding the effect of fees and expenses on rates of return, retirement-related risks, such as longevity risks, inflation, health care and other expenses.

Section (c)(1)(iii) of the Final Advice Regulation, which was not included in the proposal provides in part that "the mere provision of investment information or education, without an investment recommendation, is not advice within the meaning of this rule." Likewise, the preamble to the Final Advice Regulation "confirms" that for purposes of the Final Advice Regulation, information described in IB 96-1, as expanded in 2016, and information contained in the model Code section 402(f) safe harbor notice "will not result in the provision of fiduciary investment advice as defined in the final rule *absent a recommendation*." [32167 (emphasis supplied)]. While preserving investment education opportunities is helpful, these statements are somewhat confusing as the premise of IB 96-1 is that it describes information that does not give rise to a recommendation. One reading is that DOL is simply noting that a person could become a fiduciary by providing a bona fide recommendation along with IB 96-1 investment education.

This reading would be consistent with preamble statements that DOL believes plan sponsors and providers have "significant flexibility" to provide participants with non-fiduciary educational materials, including related to distributions and rollovers, but that education should not be used as a "guise" for a call to action.

### 3. Sales

While the Final Advice Regulation and the preamble address the extent to which a person may engage in sales activities without providing investment advice, these provisions do not relate to the circumstances under which sales activity will or will not give rise to a recommendation. Nevertheless, it may be helpful to consider clarifying that certain types of communications are not intended as a "call to action" but rather are intended as a "sales" conversation. To the extent that whether a recommendation has been made turns on

a facts and circumstances analysis of how a reasonable investor would perceive the interaction, this type of up-front discussion could be helpful in establishing that a reasonable investor would not perceive a sales presentation as a recommendation. Of course, this approach would likely not be successful where such a discussion is inconsistent with other statements or materials provided to a Retirement Investor.

#### 4. Information Not Individualized

The preamble discussion also indicates that the less individualized a communication is, the less likely it will be viewed as a recommendation. In this regard, it may be helpful in some cases to ensure that written materials such as slide decks used in sales presentations or marketing materials provided to investors are confined to high level information that is not individualized to the particular investor. Throughout the preamble, the Department regularly points out that fiduciary status will not attach to a firm or individual in the absence of an individualized recommendation.

#### 5. Investment Platforms and Pooled Employer Plans

The Department's views in the preamble to the Final Advice Regulation with regard to platform providers and pooled employer plans are unchanged from its views in its proposal. Therefore, it restated its view that merely making available a platform of investment options to ERISA-covered plans and IRAs is not "investment advice" because such platforms of investments are not typically "individually tailored." However, the DOL noted that the facts and circumstances under which the platform is presented and discussed is important. If the platform provider presents the investments on the platform as having been selected for and appropriate for the investor (i.e., the plan and its participants and beneficiaries), that will more likely be investment advice. On the other hand, a platform provider that merely identifies investment alternatives using objective third-party criteria provided by the investor (e.g., expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives would likely not provide investment advice.

The Department stated that a similar analysis would apply under a PEP, i.e., the mere making available a platform of investments under the PEP is likely not advice if the PEP provider only provides objective information about the investment options. However, a person would likely provide investment advice by presenting the investments as selected for, and appropriate for, the plan, its participants, or its beneficiaries.

#### 6. Requests for Proposal

In the view of the Department, a financial institution can often provide a response to a request for proposal ("RFP") without providing investment advice. It noted that information such as "industry trends," "performance history," "quality of services," and a "detailed description of services" would not "appear, without more, to rise to the level of a recommendation." Additionally, the financial institution "can also provide other generalized information, including information on investment strategies, including, for example, portfolio construction views, that are not based on the particular needs or individual circumstances of the plan, without ERISA fiduciary status attaching..." A disclaimer of fiduciary status in this case would also be helpful. However, the clear inference is that a RFP response can be investment advice if the response includes an individually tailored recommendation and the other definitional requirements are met. Indeed, the Department added a provision in PTE 2020-02 that provides exemptive relief for discretionary managers that provide investment advice in connection with responding to a RFP.

## C. Broad Swath of Recommendations Covered

A recommendation of "any securities transaction, any other investment transaction or any investment strategy involving securities or other investment property" is defined to include recommendations related to:

- The advisability of acquiring, holding, disposing of or exchanging securities or other investment property, including after a rollover, transfer or distribution from a plan or IRA;
- The management of securities or other investment property, including:
  - Recommendations as to investment strategies and policies
  - Portfolio composition – even where no specific security is mentioned;
  - Selection of other persons to provide investment advice or investment management services;
  - Selection of investment account arrangements; or
  - Voting of proxies

- Rolling over, transferring or distributing assets from a plan or IRA including
- Whether to engage in the transaction; and
- The amount, form and destination of a rollover, transfer or distribution

We describe below some of the consequence of including so many recommendations in the definition of “investment advice.”

## **1. Most Distribution Recommendations are Investment Advice and Subject to ERISA’s Fiduciary Responsibility Provisions**

The Department unequivocally stated its view in the preamble to the Investment Advice Regulation that the provision of investment advice to a participant or beneficiary in an ERISA-covered plan (both defined benefit and defined contribution plans) regarding taking a distribution from the plan is subject to the fiduciary duty provisions of ERISA and thus the enforcement provisions of ERISA, (e.g., breach of fiduciary duty lawsuits, personal liability for breaches, DOL examination and enforcement authority). This means that a recommendation, explicit or implicit, to take a distribution from an ERISA-covered plan and rollover to an IRA is subject to Title I of ERISA. Additionally, a recommendation to take a distribution from a plan, even absent a rollover recommendation, is still subject to Title I of ERISA. As a result, any such recommendations must be made in accordance with ERISA’s fiduciary duties of prudence and loyalty. In addition, if the financial professional or the financial institution, as applicable, makes the recommendation in the face a fiduciary conflict, e.g., prohibited fiduciary self-dealing under section 406(b)(1) of ERISA, they will have to comply with PTE 2020-02 (or PTE 84-24 in the case of Independent Producers) to address the conflict. The Department firmly rejected the position that the application of Title I in such circumstances creates a cause of action not authorized by Congress.

## **2. ERISA’s Fiduciary Responsibility Provisions Apply to Virtually All Recommendations to Plan Participants Regarding IRA Investments After a Rollover Even Absent a Rollover Recommendation**

In the preamble, DOL emphasizes its view that when communicating with a Retirement Investor who is a current participant in an ERISA plan, any recommendation relating to investments after the participant takes a distribution from the plan would also involve a recommendation, which the Department refers to as an “implicit recommendation,” with respect to the participant’s holdings in the plan. This position makes it difficult for advisers who attempt to bifurcate a prospective client relationship into two parts, (i) the provision of distribution education and (ii) providing recommendations to the prospective client as to how the IRA assets will be invested once transferred.

DOL’s position in this regard is likely to be one of the most controversial aspects of the Final Advice Regulation, as DOL would treat a financial professional as an ERISA fiduciary even the professional’s interaction with an ERISA plan participant specifically excludes any discussion of the participant’s plan account and only relates to investments after a rollover that the participant has decided to take without consulting the financial professional. Some financial institutions may decide that the risks associated with ERISA fiduciary status (i.e., being subject to both the fiduciary responsibility provisions of ERISA and enforcement of those provisions by participants, beneficiaries, other fiduciaries and DOL) are simply not worth taking.

## **3. The Limits of “Hire Me”**

Under the Final Advice Regulation, a recommendation regarding one’s own expertise as an investment advisor or asset manager is not a covered recommendation (i.e., only recommendations of “other persons” to provide advisory or management services are covered). However, the range of communications that are allowed under this “hire me” exception is quite narrow, such that any accompanying covered recommendation, such as a recommendation relating to an investment strategy that adviser or manager employs, an investment fund it manages, the type of portfolio allocations it favors, etc., are likely to separately constitute a covered recommendation. In most instances, advisors and managers must do more than tout their expertise in order to be hired, which renders the “hire me” exception virtually useless in most circumstances. However, as discussed elsewhere in this alert, language in the Final Advice Regulation may allow sales conversations to not be “investment advice” even if recommendations are made during the sales process.

## **D. An Advice Fiduciary is Not A Retirement Investor**

DOL made a potentially significant change in the Final Advice Regulation’s definition of the term “Retirement Investor” by deciding to exclude from the definition persons who are fiduciaries by reason of providing investment advice. As a result, the Final Advice Regulation essentially carves out any recommendation to an advice fiduciary, such an advisor or consultant to a plan fiduciary committee. DOL’s rationale for this change is that an advice fiduciary doesn’t have the authority or control to directly implement a covered recommendation. This change may be quite helpful in addressing various issues associated with wholesaling, providing model portfolios to advisors and in responding to RFPs or RFIs, if issued by the consultant.



A number of questions remain, however, such as whether a person making an otherwise covered recommendation can rely on its good faith belief that the recipient is an advice fiduciary only, and the consequences if a discretionary plan fiduciary is “in the room” for a sales pitch involving a covered recommendation. Although not addressed in the preamble, based on DOL’s rationale for this change, it may also be the case that recommendation to a subset of plan fiduciaries (e.g., a subcommittee that has been designated by a plan’s investment committee to evaluate potential investment funds or options for selection by the full committee) will not cause the person making the recommendation to be an investment advice fiduciary even where the rest of the elements of the regulation are met.

## E. Contexts Where a Covered Recommendation to a Retirement Investor Will Be Fiduciary Investment Advice

Unlike the proposal, the Final Advice Regulation does not impose fiduciary status on a person merely for making a covered recommendation where they or an affiliate exercise discretion over the investments of a Retirement Investor. This change is a very positive development – particularly for discretionary asset managers and their affiliates. In the preamble discussion regarding its decision not to adopt the proposed provision, DOL noted its belief that the two provisions in subsection (c)(1) of the Final Advice Regulation discussed below, “would likely include, to a more targeted extent, parties with investment discretion.” In other words, DOL’s view is that in many instances, it would be reasonable for a Retirement Investor to view a discretionary investment manager as working to advance the retirement investor’s best interest when such manager makes a recommendation to the Retirement Investor. Notably, among the amendments to PTE 2020-02 published on the same day as the Final Investment Advice Regulation, is a new section that would provide relief to discretionary investment managers who become investment advice fiduciaries in the process of being engaged by a Retirement Investor. Amendments to PTE 2020-02 are discussed in full [here](#).

### 1. Professional Investment Recommendations Reasonably Viewed as Individualized and Intended to Advance the Retirement Investor’s Best Interest

Subsection (c)(1)(i) of the Final Advice Regulation includes the crux of the new investment advice definition. Under this provision, a person becomes an investment advice fiduciary by making a covered recommendation to a Retirement investor and: (a) the person acting alone or together or through an affiliate makes professional investment recommendations as a regular part of its business; (b) under circumstances that would indicate to a reasonable investor that the recommendation is based on a review of the Retirement Investor’s particular needs or individual circumstances, (c) reflects the application of professional or expert judgment to the Retirement Investor’s particular needs or individual circumstances; and (d) may be relied on by the Retirement Investor to advance their best interest.

This formulation appears more workable than the proposal. The preamble explains that requiring the recommendation be made by an investment professional is intended to exclude most persons outside of the financial services industry, employees of plan sponsor and others who, regardless of whether they work for or represent a financial services firm, do not themselves regularly make investment recommendations. DOL also likens the effect of its more objective formulation (i.e., what a reasonable person in like circumstances would understand) to the 1975 regulations “mutual understanding” prong, saying that, “the final rule will result in the application of fiduciary status under circumstances in which both parties should reasonably understand that the retirement investor would rely on the recommendation for investment decisions.” [32152]. While not dispositive of the nature of the relationship, DOL cautions that titles, credentials or marketing slogans intended to convey that a person is a financial professional and trusted advisor would contribute to the Retirement Investor’s reasonable belief that a covered recommendation is being made by a person acting in a fiduciary capacity.

Like the proposal, the Final Advice Regulation does not include the “regular basis” requirement found in the 1975 regulation. Therefore, a person who is in the business of providing investment recommendations can be an advice fiduciary with regard to a prospective client based on a single covered recommendation.

However, as revised in the Final Advice Regulation, this subsection has a more limited reach than the proposal because it requires that a *reasonable investor in like circumstances* would perceive the recommendation as individualized and as intended to advance the Retirement Investor’s best interest. These are helpful changes from the proposal in a few different respects. First, adding a reasonableness requirement is helpful in ensuring that the Retirement Investor’s perspective regarding the nature of a covered recommendation is not dispositive unless it is reasonable. Also helpful is the addition of “like circumstances” because the circumstances under which covered recommendations will occur will vary greatly. Thus, a recommendation to an individual who is relatively unsophisticated in investment matters would be evaluated differently than a recommendation to a sophisticated professional discretionary fiduciary. Particularly in the context of recommendations to sophisticated Retirement Investors, financial institutions and financial professionals may have more room to agree up front with the Retirement Investor that a reasonable investor in like circumstances would not view a particular recommendation as advice.

Two of the elements of this subsection focus on the extent to which a reasonable Retirement Investor in like circumstances would view a covered recommendation as individualized. First, it must be reasonable for the Retirement Investor to believe the person making the recommendation has some knowledge of the investor's needs or individual circumstances. In the preamble, DOL cautions that the determination of whether it was reasonable for the Retirement Investor to have this understanding will be based on the facts and circumstances and will not require, for instance, that the Retirement Investor be told that the recommendation is individualized. Similarly, if a financial professional gathers significant information from a Retirement Investor before making a covered recommendation, a statement that the recommendation is not based on a review of that information seems unlikely to be given much weight by DOL. This subsection also requires that the Retirement Investor reasonably understand that the recommendation is based on the application of professional or expert judgment to the investor's particular needs or individual circumstances. It's not clear how much this requirement adds as it is hard to imagine a circumstance where a person makes professional investment recommendations as a regular part of their business and the recommendation is based on a review of the Retirement Investor's individual circumstances but the recommendation does not involve the application of professional judgment to those circumstances.

The last element of this subsection requires that the Retirement Investor reasonably view the recommendation as intended to advance the investor's best interest. DOL characterizes "best interest" in this context as a reasonable expectation by the Retirement Investor that the adviser is "looking out for them." In the context of an individualized sales presentation, this language may leave room for a person providing a covered recommendation to clarify with the Retirement Investor that the recommendation is not *solely* intended to advance the investor's best interest. In every sales context, the seller has an interest in completing the sale and therefore will virtually always have its own interest in the transaction, which interest may not be fully aligned with the Retirement Investor's. It's not clear, however, whether this sort of clarification would be sufficient to avoid fiduciary status.

## 2. Acknowledging Fiduciary Status Under ERISA or the Code

In order to ensure that a person may not acknowledge or represent that they are a fiduciary under ERISA or the Code and also claim that under particular circumstances they did not meet all of the elements of the regulatory test, DOL included a provision whereby a person will be an investment advice fiduciary if they make a covered recommendation to a Retirement investor and acknowledge their fiduciary status with respect to that recommendation.

## III. Effective Dates

The entire package will be final and effective as of September 23, 2024. However, DOL included an additional one-year transition period, also beginning on September 23, 2025, during which parties may receive relief under PTE 2020-02 and PTE 84-24, as amended, by acknowledging their fiduciary status and complying with the Impartial Conduct Standards in those exemptions.

## IV. Comparison of 2023 Proposal to the 2024 Final Advice Regulation

As discussed, the Department in the Final Advice Regulation made several changes to the language in the 2023 proposal defining the term "investment advice." We provide a summary comparison in the chart below.

### 2023 Proposed Investment Advice Regulation

**"Recommendation" not a defined term.** Described in the preamble as, "a communication [oral or written, including electronic] that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action."

**"Covered" Recommendation** includes those as to:

- The advisability of acquiring, holding, disposing of, or exchanging securities or other investment property
- Rolling over, transferring or distributing assets from a plan or IRA, including whether to engage in the transaction, and the amount, form and destination
- How securities or other investment property should be invested after a rollover, transfer or distribution from a plan or

### 2024 Final Investment Advice Regulation

**"Recommendation" not a defined term.** Described as:

- Facts and circumstances analysis
- Reasonably viewed as a "call to action"
- The more individually tailored the communication, the greater the likelihood it is a recommendation
- DOL will construe the term in a manner consistent with SEC framework under Regulation Best Interest

No Substantive Change from Proposal

## 2023 Proposed Investment Advice Regulation

### IRA

- The management of securities or other investment property, including, among other things, recommendations on:
  - Investment policies or strategies,
  - Portfolio composition,
  - Selection of other persons to provide investment advice or investment management services
  - Selection of investment account arrangements (e.g., brokerage vs advisory)
  - Voting of proxies appurtenant to securities

**Retirement Investor includes:** a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary

### Three Covered Contexts:

The person either directly or indirectly (*e.g.*, through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor

The person either directly or indirectly (*e.g.*, through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest

The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations

## 2024 Final Investment Advice Regulation

**Retirement Investor includes:** a plan, a fiduciary with discretion over a plan or IRA, a fiduciary with responsibility for administration of a plan or IRA, a plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary

**Retirement Investor does not include:** an investment advice fiduciary

DOL also clarified that a participant, beneficiary or IRA owner is not a fiduciary for purposes of the Final Advice Regulation

### Two Covered Contexts:

Not included in Final Advice Regulation – DOL was persuaded by comments arguing applying fiduciary status based on discretion (including by affiliate) over any purchases or sales of securities or investment property of a retirement investor was overbroad and unworkable

The person either directly or indirectly (*e.g.*, through or together with any affiliate) makes *professional* investment recommendations to investors on a regular basis as part of their business under circumstances that a reasonable investor would view as indicating the recommendation is based on a review of, and reflects the application of professional judgment to, the investor's particular needs or individual circumstances and which may be relied upon as intended to advance the Retirement Investor's best interest

The person making the recommendation represents or acknowledges that they are acting as a fiduciary under ERISA or the Code, or both, with respect to the recommendation

## V. Summary and Next Steps

While the Final Advice Regulation includes improvements over the 2023 proposal, the final rule nevertheless significantly expands the definition of "investment advice" well beyond the current definition. Therefore, financial institutions will have to work quickly to identify those situations in which their interactions with Retirement Investors would be investment advice and, if so, determine (i) whether they want to change those interactions in order to avoid fiduciary advice status or (ii) how they will comply with ERISA's fiduciary duty provisions and ERISA's and the Code's prohibited transaction provisions. Therefore, we encourage our clients to contact their Groom attorney as soon as possible so they are in the best position to react to the Final Advice Regulation.