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# HHS Final Rule Amends HIPAA Privacy Rules Post-*Dobbs*

ELIZABETH LOH

JUNE 2024

The Department of Health and Human Services (HHS) has issued a final rule which amends the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rules (the "Final Rule"). HHS issued the Final Rule in the wake of the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*. HHS explains that the Final Rule is meant to support President Biden's Executive Orders on protecting access to reproductive health care — in particular, by protecting information related to reproductive health care and bolstering patient-provider confidentiality. The new Final Rule will require certain compliance actions by covered entities (e.g., health care providers and group health plans) and their business associates.

## Prohibitions on Certain Uses and Disclosures of PHI

The HIPAA Privacy Rules generally provide that covered entities are prohibited from using or disclosing protected health information (PHI), except as permitted by the HIPAA Privacy Rules. The newly issued Final Rule helps strengthen privacy protections by further prohibiting the use or disclosure of PHI by a covered entity or their business associate ("regulated entities") for any of the following activities:

1) **Investigations:** Conducting a criminal, civil, or administrative investigation into any person for the mere act of seeking, obtaining, providing, or facilitating lawful reproductive health care.

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2) **Imposing Liability:** Imposing criminal, civil, or administrative liability on any person for the mere act of seeking, obtaining, providing, or facilitating lawful reproductive health care.

3) **Identification:** Identifying an individual, health care provider or other person for purposes related to such an investigation or proceeding.

*Note:* HHS has defined the terms "seeking, obtaining, providing, or facilitating reproductive health care" very broadly to include activities such as "expressing interest in, performing, furnishing, paying for…arranging…insuring… administering…providing coverage for…" Accordingly, entities such as patients, group health plans, and health care providers will have certain protections under these rules.

## New Definition of "Reproductive Health Care"

HHS has created a new definition of "reproductive health care" to help regulated entities determine whether a request for the use or disclosure of PHI includes the types of PHI implicated by the Final Rule.

The Final Rule defines the term "reproductive health care" broadly to mean "health care that affects the health of an individual in all matters relating to the reproductive system and to its functions and processes." The Final Rule provides a list of examples of what is included in the definition of "reproductive health care," including but not limited to:

- Contraception, including emergency contraception;
- Pregnancy-related health care, including but not limited to miscarriage management, pregnancy termination, pregnancy screening;
- Fertility or infertility-related health care, including services such as assisted reproductive technology (e.g., in vitro fertilization), as well as other care, services, or supplies used for the diagnosis and treatment of infertility;
- Diagnosis and treatment of conditions related to the reproductive system (e.g., perimenopause, menopause, endometriosis, etc.); and
- Other types of care, services and supplies used for the diagnosis and treatment of conditions related to the reproductive system (e.g., mammography, pregnancy-related nutrition services, postpartum care products).

## Prohibition Applies Where Reproductive Health Care Is Lawful

The prohibition against the use or disclosure of PHI about reproductive health care applies where the regulated entity has reasonably determined that one or more of the following conditions exists:

1) the reproductive health care is lawful under the law of the state in which such health care is provided under the circumstances in which it was provided. For example, if a resident of one state travels to another state to receive reproductive health care, such as an abortion, which is lawful in the state where such health care was provided;

2) the reproductive health care is protected, required, or authorized by Federal law, including the U.S. Constitution, regardless of the state in which such health care is provided. For example, if use of the reproductive health care (e.g., contraception) is protected by the Constitution; or

3) the reproductive health care was provided by a person other than the covered health care provider, health plan or business associate that receives the request for PHI and is presumed to be lawful.

*Note:* Regulated entities that receive a request for PHI must presume that any reproductive health care obtained was lawful under the circumstances under which it was provided. This presumption of lawfulness applies unless the regulated entity has actual or factual knowledge to the contrary; for example, where a law enforcement official provides a health plan with evidence that the information requested concerns reproductive health care provided by an unlicensed person, in a jurisdiction requiring that such care is provided by a licensed provider.

## Attestation Requirement

HHS has implemented an attestation requirement to help regulated entities determine whether the use or disclosure of reproductive health care–related PHI is permitted under the Final Rule.

A regulated entity must obtain a signed attestation from the individual requesting PHI if it receives a request for PHI related to reproductive health care, and the request relates to (i) health care oversight activities; (ii) judicial and administrative proceedings; (iii) law enforcement purposes; or (iv) disclosures to coroners and medical examiners. This attestation serves two purposes. First, the attestation provides assurances from the person requesting the PHI that the use or disclosure will not be for a prohibited purpose. In addition, the attestation puts the individual who is making the request for PHI on notice of the potential criminal penalties associated with obtaining PHI in violation of the HIPAA rules.

The attestation must be written in "plain language" and must be provided as a stand-alone document (i.e., the attestation cannot be combined with other documents). Further, the attestation may be provided electronically.

The Final Rule makes clear that an attestation itself is not determinative of whether the use or disclosure is for a prohibited purpose. The regulated entity must consider the totality of the circumstances surrounding the attestation and whether it is reasonable to rely on the attestation in those circumstances. The Final Rule provides an example demonstrating that it may not be reasonable for a regulated entity to rely on an attestation filed by a public official when that public official has publicly stated their interest in investigating or imposing liability on those who seek, obtain, provide or facilitate certain types of lawful reproductive health care.

*Note:* Regulated entities must comply with this Attestation Requirement by December 23, 2024. HHS is developing a model attestation form that regulated entities can use to comply with this new attestation requirement and intends to publish the model form ahead of the required compliance deadline. Accordingly, a regulated entity may choose to wait for HHS to issue their model attestation form before implementing this attestation requirement.

## Updating HIPAA Notice of Privacy Practices

### *General notice of privacy practices requirements*

Under the HIPAA rules, a covered entity (e.g., a group health plan) must generally provide a HIPAA notice of privacy practices to each group health plan participant. This notice must describe the uses and disclosures of PHI that may be made by the covered entity; the participant's rights; and the covered entity's legal duties with respect to the PHI.

Employers with self-funded group health plans must provide employees with a notice of privacy practices upon enrollment and within 60 days of a material change to the notice. If an employer sponsors a fully insured group health plan and does not have access to PHI (except for summary health information and enrollment/disenrollment information), it is not required to provide the notice of privacy practices. Instead, the notice obligation rests with the insurance carrier. If an employer sponsors a fully insured group health plan and has access to PHI, then the group health plan must maintain the notice of privacy practices and provide the notice upon request (only). The Final Rule will require covered entities to update their HIPAA Notice of Privacy Practices.

### *What updates must be made?*

Covered Entities must update their HIPAA Notice of Privacy Practices to include the following information:

- a description of the additional privacy safeguards for reproductive health care;
- a description, including at least one example, of the types of uses and disclosures of PHI related to reproductive health care that are prohibited;
- a statement putting the individual on notice that PHI which is disclosed under the HIPAA privacy rule may be redisclosed by the recipient and may no longer be protected;
- a description, and at least one example, of the types of uses and disclosure of PHI for which an attestation is required; and

- an explanation that substance use disorder treatment records, or testimony relaying the content of such records, will not be used or disclosed in civil, criminal, administrative or legislative proceedings against the individual — absent patient consent or a court order.

### *What is the deadline for making these updates?*

Covered entities must update their HIPAA Notice of Privacy Practices by February 16, 2026. *Note:* While there is an HHS-issued model Notice of Privacy Practices, this model notice has not been updated since 2014, and it is not clear whether HHS will issue a revised model that reflects the Final Rule.

## Business Associate Agreements

In response to comments asking HHS to clarify whether business associate agreements will need to be amended to reflect the requirements of the Final Rule, HHS replied that the prohibition for use and disclosures of reproductive health care information applies "directly to all regulated entities; meaning, all HIPAA covered entities and business associates." Further, under the Final Rule, the attestation requirement now directly applies to business associates. Accordingly, business associates that have access to or hold the PHI of covered entities will be subject to and directly liable under the Final Rule, regardless of whether the requirements of the Final Rule are specified in a business associate agreement. Nevertheless, HHS does anticipate that some business associate agreements will likely need to be updated to reflect the parties' respective responsibilities when either party receives a request for disclosure of reproductive health care PHI.

## Action Items

Both self-funded group health plans and fully insured group health plans that have access to PHI must comply with the Final Rule, including the obligation to take the following actions:

- provide updated HIPAA training to workforce members by December 23, 2024;
- update HIPAA policies and procedures to include these new rules by December 23, 2024;
- draft attestation form and utilize such form in accordance with the new rules by December 23, 2024;
- update HIPAA notice of privacy practices and properly distribute such updated notices by February 16, 2026; and
- review business associate agreements to determine whether any amendments are necessary for compliance with the Final Rule, such as clarifying each party's respective responsibilities when a request for reproductive health care PHI is received.

If you have any questions regarding compliance with the Final Rule, please contact us.

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# The Retirement Security Rule: Designed for Permanency?

YATINDRA PANDYA and ROBERT GOWER

JUNE 2024

## Introduction

On April 25, 2024 the Department of Labor (DOL) issued the final Retirement Security Rule (the "Final Rule"), providing a new regulatory definition of an "investment advice fiduciary" under the Employment Retirement Income Security Act of 1974 (ERISA). The Final Rule looks to end the DOL's decades-long effort to replace the 1975 definition of who may be considered a fiduciary when providing investment advice for a fee or other compensation. In 2010, a proposed rule was withdrawn by the DOL. A 2016 final rule (the "2016 fiduciary rule") was vacated by the Fifth Circuit Court of Appeals in 2018, leaving as the rule a five-part regulatory test issued a year after enactment of ERISA (the "1975 regulation"). For discussion on background leading up to the Final Rule, see our November 30, 2023 article, "Retirement Security Rule: Definition of an Investment Advice Fiduciary & Proposed Amendment to Prohibited Transaction Exemption 2020-02".

The Final Rule directly addresses concerns raised by the Fifth Circuit Court of Appeals that led to the demise of the 2016 fiduciary rule by applying a context-based approach that includes an objective facts and circumstances test as to what constitutes fiduciary advice. In addition, in response to industry reaction to the Proposed Rule, the DOL made certain changes and clarifications in the Final Rule. Through these efforts, the DOL believes that, compared to the 1975 regulation, the Final Rule better reflects the text and the purposes of ERISA and better protects the interests of retirement investors by applying itself narrowly to trusted advice relationships. According to the DOL, part of the reason the 1975 regulation allows so many advice providers to avoid fiduciary status is that the retirement marketplace has changed dramatically since 1975 when defined benefit plans predominated and participant-directed defined contribution plans had barely come into being. To illustrate this shift, by the first quarter of 2022 the assets held by defined contribution plans and IRAs outnumbered defined benefit plans by $21.4 trillion to $3.7 trillion. Furthermore, the DOL notes particular concern with assigning fiduciary status to recommendations of rollovers to IRAs:

> *"The decision to roll over assets from a plan to an IRA is often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings."*

In 2020, more than ninety-five percent of all flows into IRAs came from defined contribution plans, and between 2022 through 2027, $4.5 trillion in assets held in defined contribution plans is projected to be rolled over to IRAs. Now, a little under half-way through that period, plan fiduciaries, advisors, and investors still must rely on the 1975 regulation, which includes numerous loopholes.

This article outlines the DOL's objectives and enhancements to the definition of fiduciary investment advice in the Final Rule, and how it differs from the Proposed Rule and vacated 2016 fiduciary rule. The article also discusses the Final Rule's potential impact on investors and investment professionals who are currently subject to the existing regulatory landscape (the 1975 regulation). The article also addresses related prohibited transaction exemptions which form the regulatory package, and how the package aims to level the playing field and provide clear and equal application of fiduciary protections in rendering investment advice.

## Key Takeaways

- On September 23, 2024, the Final Rule becomes applicable, replacing the existing 1975 regulation and applying a modern approach to "fiduciary investment advice," thereby capturing more relationships the DOL believes should be subject to a fiduciary standard.
- An investment advice fiduciary is determined via two contexts — acknowledgement of fiduciary status and an objective facts and circumstances test.
- Sales pitches and investment information or education without a "call to action" do not give rise to fiduciary status.
- With amendments to prohibited transaction exemptions, the broader rulemaking package streamlines conflicted investment advice to a single standard, eliminating complexities and disparities.
- The DOL believes the final rulemaking package will better honor legitimate retirement plan investor expectations that they can place trust and confidence in the advice provider and their recommendations, and providers will be subject to a clearer and more level playing field.

## Part I: The Final Rule

The Final Rule provides updated criteria to determine whether an advice provider is an investment advice fiduciary under ERISA, and therefore subject to ERISA's fiduciary standards. The analysis begins with a threshold question as to whether a person makes a *compensated recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property* to a retirement investor. If the answer to that question is yes, then such advisor must satisfy either of the two contexts below with respect to that recommendation. If the advisor satisfies either context, they are an investment advice fiduciary because they render compensated "investment advice" with respect to property of the plan. The two contexts are:

1. **Facts and circumstances test:** 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 and the 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.
2. **Acknowledgement of fiduciary status:** The person represents or acknowledges that they are acting as a fiduciary under ERISA with respect to the recommendation.

Notably, the DOL departed from a three-prong approach in the Proposed Rule by omitting the context regarding **discretionary authority or control**. That context would automatically treat recommendations from persons who

have discretionary authority or control over the retirement investor's assets as fiduciary investment advice, provided the other parts of the test were satisfied. This would have been an expansion of the *discretionary authority or control* prong of the 1975 regulation, from "securities or other property of the plan" to "securities or other property of the *Retirement Investor*". In omitting this provision entirely, the DOL acknowledged commenters on the Proposed Rule, stating the general approach of a facts and circumstances test would more appropriately define an investment advice fiduciary and would likely include, to a more targeted extent, parties with investment discretion.

Other notable changes and clarifications made under the Final Rule:

### *Written Disclaimers*

A written disclaimer as to an advisor's fiduciary status does not control to the extent that it is inconsistent with the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor. In other words, a written disclaimer is not determinative as to fiduciary status, but it is also not prohibited. The DOL notes that weight will be given to a disclaimer to the extent that it is consistent with the parties' interactions.

### *Retirement Investor*

The Final Rule added a new defined term, **retirement investor**, and an investment advice fiduciary is not included in that definition. This should alleviate some concern related to the flow of information in the institutional marketplace, in which advice providers may provide advisory tools to fiduciaries who, in turn, render investment advice to retirement investors.

### *Recommendation*

The DOL did not define the term "recommendation"; instead, it provided the meaning of the phrase "*a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities property or other investment property*" to include the following:

- Recommendations involving securities, other investment property, and investment strategies, including recommendations as to how securities or other investment property should be invested after rollover, transfer, or distribution; and including recommendations on rollovers, benefit distributions, or transfers from plans or IRAs.
- Recommendations on management of securities or other investment property, and account types, including recommendations on the selection of other persons to provide investment advice or investment management; and recommendations regarding proxy voting appurtenant to ownership of shares of corporate stock.[1]

The DOL further confirmed that the determination of whether a recommendation is made will be construed consistent with the SEC Regulation Best Interest, which includes factors such as whether the recommendation can reasonably be viewed as a **call to action**, whether the recommendation reasonably would influence an investor to trade a security, and how tailored the recommendation is to a specific individual or group. Absent a call to action, there is no recommendation and by definition, no fiduciary investment advice.

### *Sales Pitches and Investment Education*

Normal marketing activity is not a recommendation. What would have been the third context from the Proposed Rule is now a provision that stands for the proposition that a recommendation is not "investment advice" if it is made outside of the two contexts in which a recommendation becomes fiduciary investment advice. Although stated generally, and some might say in an unnecessarily tautological manner, the DOL uses this provision to clarify that communications that are sales pitches or investment information/education do not fix fiduciary status if such communication falls outside of the Final Rule's two specified contexts. The Final Rule clarifies that what makes a sales pitch a recommendation is a **call to action**. Similarly, the line between investment information or education and a recommendation depends on whether there is a **call to action**. Should a recommendation occur as part of a sales pitch, it is evaluated separately and may be fiduciary investment advice if it meets either context. That is to say, a sales pitch cannot shield a recommendation from becoming fiduciary investment advice.

### *Facts and Circumstances Test*

The first context in the Final Rule is an objective facts and circumstances test based on reasonableness. This replaces the five-part test in the 1975 regulation with an updated test that advances the DOL's objectives of closing various loopholes in that regulation, as well as responding to the Fifth Circuit concerns in *Chamber*, and surviving similar challenges going forward.

- "Reasonable investor in like circumstances": In response to commenters who questioned whether the facts and circumstances test was subjective or objective, the DOL included the phrase *in like circumstances* to clarify that such test should indeed be evaluated on an objective basis. As a result, the test takes into account the circumstances of the investor, which could result in different outcomes depending on the nature of the investor. For example, a *sophisticated investor* may be evaluated differently from a retail investor as to what they reasonably would understand based on the interaction with the advisor.

- "Regular basis": The regular basis requirement does not preclude one-time advice if the advisor regularly makes investment recommendations to other investors and the regulation's other conditions are met.

- "...serve as the *primary* basis for investment decisions": In keeping with the Proposed Rule, the DOL dropped "primary" — stating, as an example, that a plan fiduciary should be able to rely upon any or all of the consultants that it hired to render advice, regardless of arguments about whether one could characterize the advice, in some sense, as primary, secondary, or tertiary.

- "Best interest": the DOL clarifies that use of the term "best interest" in the last prong of the facts and circumstances test is meant colloquially, and not meant to refer back to elements of the precise regulatory or statutory definitions of prudence or loyalty.

- "For a fee or compensation": Advice **for a fee or other compensation** is applicable only if the fee or **other compensation** would not have been paid but for the recommended transaction or the provision of advice, including if the investment advice provider's eligibility for the compensation (or its amount) is based in whole or in part on the recommended transaction or the provision of advice.

### *Related Amendments to Prohibited Transaction Exemption 2020-02*

Amendments to PTE 2020-02 were part of a wider regulatory package that included amendments to PTE 84-24 as well as other PTEs broadening the reach of a uniform standard to prohibited transaction relief among investment advisors.

The final amendments to PTE 2020-02, which focus on fiduciary standards in providing investment advice related to rollovers, expanded coverage to transactions involving pooled employer plans and robo-advice transactions. In addition, amended PTE 2020-02 updated its impartial conduct standards to require a separate Care Obligation and Loyalty Obligation, similar to regulatory efforts under SEC Regulation Best Interest and the Investment Advisors Act. With that change, investment advice fiduciaries must provide certain disclosures to the advice recipient, including a fiduciary acknowledgment, a relationship and conflict of interest disclosure, and a rollover disclosure. With respect to **rollover** cases, the advisor must provide the retirement investor with information sufficient to understand what they are giving up in their employer-sponsored plan, as well as what they may gain from rolling over their retirement savings to an IRA. The provision of such information comes in the form of a *rollover disclosure*. Specifically, the disclosure is required where advice is rendered to roll over assets from an employer-sponsored plan, and also if a recommendation is made regarding the post-rollover investment of assets currently held in an employer-sponsored plan. Because the disclosure compares certain information from the employer-sponsored plan and the destination IRA, the advice provider will inevitably seek out such information on the employer-sponsored plan. From its discussion in the preamble, it does not appear the DOL expects the requirement for a rollover disclosure to place an extra burden on plan sponsors, fiduciaries, or their administrators. Instead, the DOL reminds investment professionals that necessary plan information is

readily available in, for example, a 404(a)-5 disclosure, or if that is not the case, the investment professional may make reasonable assumptions based on the plan's most recent Form 5500.

## Part II: Impact of the Final Rule

The Final Rule will replace the 1975 regulation on September 23, 2024. Under the 1975 regulation's five-part test, a person is a fiduciary only if they: (1) **render advice** as to the value of securities or other property, or **make 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 agreement, arrangement, or understanding** with the plan or a plan fiduciary that (4) the advice will serve as a **primary basis** for investment decisions with respect to plan assets, and that (5) the advice will be **individualized** based on the **particular needs** of the plan/participant. The Final Rule signifies the DOL's overall dissatisfaction with the 1975 regulation, which it contends over time worked to defeat, rather than honor, legitimate investor expectations that they can place trust and confidence in the advice provider and their recommendations. Under the five-part test, the DOL found that many investment professionals, consultants, and financial advisors have no fiduciary obligation under ERISA despite the critical role they play in guiding plan and IRA investments. After September 22nd, plan sponsors, participants and fiduciaries are likely to encounter new scenarios that constitute fiduciary investment advice. While most of the burden of the Final Rule's changes fall on investment professionals and their financial institutions, plan sponsors, fiduciaries and participants should be aware of new circumstances giving rise to fiduciary status and understand when an advisor is considered to be acting in a fiduciary capacity.

**One-time advice** can be fiduciary investment advice and is not evaluated any differently under the Final Rule solely because it was provided to a retirement investor only once. This principal is most apparent with the Final Rule's elimination of the 1975 "regular basis…" prong, by transitioning to the standard "…as part of their business." The updated language is intended to exclude persons outside of the financial services industry who may engage in isolated communications that could fit the definition of a covered recommendation but would not generally be understood as professional investment advice. This works both to overcome concerns the rule would sweep too broadly, and at the same time does not automatically exclude one-time advice from treatment as fiduciary investment advice. The latter is central to the DOL's increased concern with non-fiduciary advice related to rollovers.

Similarly, the DOL maintained its removal of "**primary basis**" from the regulatory text. The Final Rule more directly addresses what the "primary basis" language may have sought to achieve through its change to the "regular basis" prong discussed above, in that, only those who provide investment advice as part of their regular business are fiduciaries under the rule.

**Written disclaimers** cannot be used as a means of avoiding ERISA fiduciary status. Disclaimers are not prohibited, but instead given weight in a facts and circumstances analysis and may be useful in scenarios such as a request for proposal, or the provision of investment education. However, by and large, the Final Rule makes written disclaimers of fiduciary status far less relevant.

As discussed above, a **call to action** delineates when a sales pitch or investment information or education becomes a recommendation. Coupled with clarification that a "**hire me**" communication without more is not a recommendation, the Final Rule makes meaningful efforts to expand coverage beyond the 1975 regulation, while seeking to address Fifth Circuit concerns that the DOL's 2016 fiduciary rule went impermissibly beyond regulating trusted advice relationships.

An **objective reasonableness** standard from the perspective of the retirement investor replaces the requirement that the parties must have a *mutual understanding*. No longer is it relevant to consider whether the advisor and the investor are aligned with respect to the investment advice, or the understanding of the advisor as to their role in the interaction.

**Carve-outs**. The DOL reiterates that it carefully considered the Fifth Circuit's decision, noting that the use of regulatory carve-outs and special provisions in the 2016 fiduciary rule was criticized as overly broad. For example, a carve-out is not available to sophisticated investors, who are evaluated under the facts and circumstances test.

## Part III: Designed for Permanency?

The DOL provided a direct assessment of commenters who assert the Final Rule is mere repetition of the 2016 fiduciary rule.

> *"... **commenters err** in asserting that this rulemaking is simply a repeat of the 2016 Rulemaking, or in contending that the final rule fails to take proper account of the nature of the relationship between the advice provider and the advice recipient."*

The tenor of the preamble to the Final Rule reflects the DOL's firmly held beliefs with respect to expanding the definition of fiduciary investment advice, but at the same time is conciliatory in terms of industry and public concerns as well as the Fifth Circuit vacatur. With that, the DOL hopes to convey that the Final Rule and the regulatory context are streamlined and more narrowly tailored than the 2016 fiduciary rule vacated by the Fifth Circuit, with a clear focus on relationships of trust and confidence, as listed below:

- The Final Rule and associated PTEs, unlike the 2016 fiduciary rule, contain no contract or warranty requirements. The 2016 fiduciary rule required that advisors and financial institutions give their customers enforceable contractual rights.
- The amended PTEs, unlike the 2016 fiduciary rule, do not prohibit financial institutions and advisors from entering into class-wide binding arbitration agreements with retirement investors.
- PTE 2020-02, as finalized, specifically provides an exemption from the PTE rules for pure robo-advice relationships, unlike the 2016 fiduciary rule.
- PTE 84-24, unlike the 2016 fiduciary rule, does not require insurance companies to assume fiduciary status with respect to independent insurance agents — an important concern of insurers with respect to the 2016 fiduciary rule.
- Neither PTE 2020-02 nor PTE 84-24, as amended, requires financial institutions to disclose all their compensation arrangements with third parties on a publicly available website, as was required by the 2016 fiduciary rule.

### *Overall changes to address concerns of overbreadth*

In the preamble, the DOL recounted its changes to address concerns from commenters (and in response to the Fifth Circuit opinion regarding the 2016 fiduciary rule) that its Final Rule would be overbroad. Those changes include:

- Confirmation that whether a recommendation has occurred will be interpreted consistent with the SEC's framework;
- Elimination of the provisions in the Proposed Rule that extended fiduciary status based on discretionary authority or control beyond just the *plan* to the *retirement investor*;
- Changes to the contexts giving rise to fiduciary status intended to keep them narrow and objective;
- Adoption of a new regulatory provision that confirms that sales recommendations that are not made in circumstances that satisfy the facts and circumstances test, or where fiduciary status has been specifically acknowledged, will not result in investment advice fiduciary status;
- Providing that investment information or education, without an investment recommendation, is not advice for purposes of the Final Rule; and
- Revision of the definition of a ''retirement investor'' to exclude plan and IRA fiduciaries that are investment advice fiduciaries.

### *Legal Challenges*

On May 2, only weeks after the Final Rule was published, a lawsuit challenging the Final Rule was filed by the Federation of Americans for Consumer Choice in the U.S. District Court for the Eastern District of Texas. The case (which is, not surprisingly, arising in the Fifth Circuit) postures that the Final Rule covers the same professionals and transactions, and is substantively the same as the "overly broad" 2016 fiduciary rule. Just last week, the DOL responded with a brief, stating that the Final Rule is distinct from the 2016 fiduciary rule in that it focuses on how advisors present themselves in the relationship with

the investor, and that the Final Rule does not create new contractual requirements establishing fiduciary status or place limits on mandatory arbitration.

A substantially similar suit was filed in the Northern District of Texas by the American Council of Life Insurers on May 24. If either or both suits survive, the future of litigation may depend on the outcome of the 2024 presidential election.

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1 However, guidelines or other information on voting policies for proxies that are provided to a broad class of investors without regard to a client's individual interests or investment policy, and that are not directed or presented as a recommended policy for the plan or IRA to adopt, would not rise to the level of a covered recommendation under the rule.

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## FIRM NEWS

Trucker Huss, APC is pleased to announce that **Bryan J. Card** has rejoined the firm. Bryan previously worked for Trucker Huss from 2018 to 2022. He most recently worked for a large multinational law firm, focusing on benefits and executive compensation matters.

Welcome back, Bryan!

We are also pleased to announce that...

**Joseph Chan** has joined the firm as an associate in the litigation group; he is based in our San Francisco office. Joseph is a graduate of the University of California, Santa Barbara, and the Washington University School of Law. Prior to entering the practice of law, Joseph earned a certified public accountant license and practiced accounting for a number of years. Immediately prior to joining Trucker Huss, Joseph practiced employee benefits law with a large, national law firm.

**Xiaolu Xu** has joined the firm as an associate in our San Francisco office, and she will support several of our practice areas. Xiaolu is a graduate of the Emory University School of Law, holds an L.L.M. degree from UC Davis Law School, and received a Bachelor of Laws degree from Nanjing University of Information Science and Technology. She previously practiced law in China.

Welcome, Joseph and Xiaolu!

On May 2–4, **Mary Powell, Angel Garrett** and **Brian Murray** were speakers at the ABA May Tax Meeting in Washington DC.

Mary participated in a panel for the Employee Benefits Welfare Plan, EEOC, FMLA and Leave Issues Subcommittee.

Angel and Brian participated in a Litigation Update for the Employee Benefits Litigation Subcommittee.

On May 7–9, Trucker Huss was proud to be involved in the American Bar Association Joint Committee on Employee Benefits (ABA JCEB) virtual meeting — *ERISA: Beyond the Basics* — for which **Clarissa Kang** served as a Program Co-chair. In addition to Clarissa's leadership, the following Trucker Huss attorneys presented during the program:

**Sarah Kanter** on the panel: *ERISA & Tax Considerations for Family-Forming Benefit Plans*

**Mary Powell** on the panel: *Health Plan Design and Compliance Issues Involving Gender-Affirming Care After* Bostock v. Clayton County

**Robert Gower** on the panel: *Fiduciary Rule*

**Joseph Faucher** on the panel: *The Next Frontiers of Plan Fee Litigation*

On May 7–10, **Dylan Rudolph** presented at the ESOP Association National Conference 2024 in Washington D.C. on the panel: *Preparing for DOL & IRS Audits.*

On June 6, **Scott Galbreath** and **Angel Garrett** were co-presenters at the Capital Forum on Pensions hosted by the WP&BC Sacramento Chapter. Scott spoke on *The Wide World of Corrections* and Angel gave a *Pension Litigation Update*.

On June 14, **Kevin Nolt** spoke on *Common Retirement Plan Compliance Errors and How to Correct Them* at the 2024 CalCPA Employee Benefit Plans Audit Conference.

On June 18, **Mary Powell** presented to the Benefits/Executive Compensation Section of the Dallas Bar Association on the *Secret Behind High Drug Costs,* focusing on the activities of Pharmacy Benefit Managers.

On June 20, **Mary Powell** and **Alaina Harwood** presented a Trucker Huss Webinar: *Gender-Affirming Care — Health Plan Design and Compliance.* In view of the Supreme Court's finding in *Bostock v. Clayton County* that Title VII protection against employment discrimination on the basis of sex extends to an individual's gender identity, employers will need to understand and consider various federal and state laws when reviewing/designing health plan provisions regarding coverage for gender dysphoria.

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