

GOT FIDUCIARY? SELLING ANNUITIES IN A POST-DOL WORLD

BRADFORD CAMPBELL, ESQ.
Faegre Drinker

2024 ADVANCED SALES FORUM



Hon. Bradford P. Campbell



Partner, Faegre Drinker Washington, DC

Mr. Campbell concentrates his practice in Employee Benefits advice, specializing in ERISA Title I issues, including fiduciary conduct and prohibited transactions. He also serves as an expert witness in ERISA litigation. The former Assistant Secretary of Labor for Employee Benefits, head of the Employee Benefits Security Administration, Mr. Campbell was ERISA's primary Federal regulator and law enforcement official. He played a key role in ERISA retirement and health reform initiatives, and his regulatory and policy decisions had a fundamental impact on the structure and operation of ERISA plans, including:

- Proposing the initial 408(b)(2) service provider and 404(a)(5) participant disclosure regulations
- Issuing final regulations establishing Qualified Default Investment Alternatives (QDIAs), electronic fee disclosure, and participant access to investment advice
- Administering an enforcement program reporting more than \$2.6 billion in monetary results and more than 200 criminal indictments

The Saga of the DOL Fiduciary Rule: The Only Constant Is Uncertainty

- We were supposed to be discussing the details of the 2024 DOL Fiduciary Rule's changes to qualified annuity sales after Sept. 23rd.
- However, two Texas courts stayed the September 23rd date while litigation challenging the rules package works its way through court.
- Further, the Fiduciary Rule is not just tied up in litigation, but also will likely be influenced by the outcome of the November election.
- So instead, we'll be talking about:
 - What the would-be Rule would do (if it takes effect);
 - What the current DOL standard actually is; and
 - How the current standard itself might change in the near future.

When is Advice Fiduciary? 45 Years of the 5-Part Test

- From 1975 until ~~September 23, 2024~~ litigation ends, DOL regulations provided a five-part test to determine when a plan or participant was receiving fiduciary investment advice—must meet all 5
- Fiduciary Advice was:
 1. Making an individualized recommendation regarding assets in a plan
 2. On a regular basis
 3. For compensation
 4. Subject to a mutual understanding
 5. That the advice will be a primary basis for the plan/participant's decision-making.

DOL Believes Five-Part Test “Underinclusive”

- Since 2010, DOL embarked on a series of regulatory projects to try to replace the five-part test, and to “modernize” (expand) conditions in exemptions related to providing investment advice.
- DOL concerned IRA rollovers and distribution advice not subject to ERISA fiduciary standard—rule change would broadly apply fiduciary standard to IRAs and rollover/distribution advice for all financial professionals.
 - ✓ 2016: DOL replaces the 1975 rule with a new, more expansive test—in essence, any transaction involving a plan or IRA was fiduciary.
 - ✓ 2018: 5th Circuit vacates overbroad 2016 rule--ERISA intended fiduciary advice only for special relationship of trust and confidence.
 - ✓ 2020: DOL issues PTE 2020-02, providing new exemption for fiduciary advice with many new conditions.

The Final 2024 Fiduciary Rule Package:

- Retirement Security Rule—Definition of an Investment Advice Fiduciary expands definition of fiduciary advice, DOL asserts it is materially different from vacated 2016 rule.
- Amendment to Prohibited Transaction Exemption 2020–02: Provides additional conditions to current exemption (including broad eligibility ban)
- Amendment to Prohibited Transaction Exemption 84–24 (applies to non-security annuities sold by independent producers)
- Litigation challenging rule and exemptions pending.

2024 Definition of Fiduciary Status

Applies to recommendations to “retirement investors”—ERISA plans, discretionary plan fiduciaries, plan participants (including rollover and distribution recommendations), and IRAs (including transfers and exchanges).

Applies to investment professionals making recommendations on a regular basis as part of their business under circumstances indicating to a reasonable investor 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 needs or circumstances, and
- may be relied upon by the retirement investor as intended to advance the retirement investor’s best interest.

2024 PTEs and Annuities

- Effect on producer? Cannot receive a commission or other form of compensation without complying with an exemption.
- PTE 2020-02 must be used for **annuities that are securities** and has to be used where **employees or certain statutory employees** are the producers. The insurance company is a co-fiduciary unless a broker-dealer, RIA, or bank/trust assumes that role;
- PTE 84-24 could be used for independent producers for fiduciary recommendations of **non-security insurance products that only require an insurance license**. The insurance company would not be a co-fiduciary, but would have enhanced oversight responsibilities.

Prohibited Transactions and Exemptions

- New “eligibility” requirements for PTE 2020-02 and PTE 84-24 raise concerns.
- If any member of the financial institution’s control group is convicted of certain crimes under US or analogous foreign law (many of which are unrelated to advice), the entire control group is banned from using the PTE for ten years.
- Example: member of control group convicted of bribing local official in French real estate deal, no PTE for ERISA advice.
- To put that into perspective: ERISA plans and IRAs together hold \$26 trillion.

Prohibited Transaction Exemptions

Both PTE 2020-02 and PTE 84-24 generally require satisfaction of these conditions:

- Impartial Conduct Standards: (Duty of Care, Duty of Loyalty, No Misleading Statements, Reasonable Compensation)
- Disclosures: (Material facts regarding conflicts of interest, fees and expenses, type and scope of services, etc.)
- Policies and procedures: (extensive requirements)
- Annual retrospective review and report: (certified by senior leader)

History of Uncertainty Regarding Fiduciary Rule

- 2016: Obama DOL replaces the 1975 rule with a new, more expansive test—in essence, any transaction involving a plan or IRA was fiduciary.
- 2018: 5th Circuit vacates 2016 rule in Chamber case, 1975 rule applies.
- 2020: Trump DOL issues PTE 2020-02 guidance “reinterpreting” the five part test, resurrecting expanded reach on rollovers, fully in effect in 2022.
- 2022: Lawsuits filed against guidance, ASA in Florida, FACC in Texas.
- 2023: Florida--DOL loses in part. Court rules that the regular basis test can't include advice to IRAs. (Texas not yet decided).
- 2024: Biden DOL issues new fiduciary rule—different words, similar effect as 2016, scheduled to go into effect September 23, 2024.
- 2024: Lawsuits filed against new rule, courts grant stay while litigation begins. Status quo remains...but what is it?

What is the Status Quo on the Fiduciary Rule?

- That's more complicated than you'd think.
- With the 2024 rule stayed, the current test is:
 1. The 1975 Five-Part Test,
 2. As MODIFIED by DOL's 2020 guidance,
 3. But that guidance was LIMITED by a 2023 Florida court decision (ASA case), and
 4. The 2020 guidance could be further limited or scrapped by a Texas court still considering the matter (FACC case).

DOL's 2020 Reinterpretation of 1975 Rule

- 2020 guidance reinterprets the 1975 Rule's five-part test to expand reach. (Note: this was a Trump Admin decision)
- The effect? Some rollover recommendations (where “ongoing” relationship with the client) are fiduciary:
 - ✓ Rescinded AO 2005-23A (it said most rollovers not fiduciary).
 - ✓ “Regular basis”—prior advice regarding retirement accounts is “ongoing” relationship meeting regular basis requirement
 - ✓ “Mutual understanding” and “primary basis”—disclaiming fiduciary intention in “boilerplate fine print” not dispositive
 - ✓ One-time sales transaction not fiduciary
 - ✓ (Florida court limited regular basis—can't count post-rollover advice in the IRA as part of test)

What's the Litigation Situation on 2024 Rule?

- Two cases in separate Texas courts—FACC and ACLI. Both separately received a nationwide stay of the DOL rule from their judges (applies through any appeal).
- FACC challenging fiduciary definition and PTE 84-24 only—ACLI challenging whole package (definition, PTE 84-24, PTE 2020-02, etc.)
- DOL can appeal the stays, or go on to the lawsuits on the merits.
- DOL likely to lose at District court level (see stay ruling language re ACLI “virtually certain” to prevail)
- DOL can appeal to 5th circuit—two potential arguments:
 - (1) DOL changed the 2024 rule enough to comply with the 2018 Chamber case, or
 - (2) 5th circuit ought to revise the 2018 Chamber ruling (need en banc).

Questions?

Thank you!

Bradford P. Campbell

+1 (202) 230-5159 (office)

+1 (571) 243-1938 (mobile)

bradford.campbell@faegredrinker.com





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