

§2510.3-21 Definition of “Fiduciary.”

(a)-(b) [Reserved]

(c) *Investment advice.*

(1) For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (~~the Act~~ERISA), section 4975(e)(3)(B) of the Internal Revenue Code (Code), and this paragraph, a person renders “investment advice” with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property (as defined in paragraph (f)(10) of this section) to ~~the plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary~~ (a retirement investor), ~~and the person satisfies paragraphs~~ (as defined in paragraph (f)(11) of this section), and either paragraph (c)(1)(i), or (ii), or (iii) of this section are satisfied:

~~(i) 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;~~

(i) ~~(ii)~~ 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 ~~provided~~made under circumstances ~~indicating~~that would indicate to a reasonable investor in like circumstances that the recommendation is based on ~~the~~review of the retirement investor’s particular needs or individual circumstances ~~of,~~ reflects the application of professional or expert judgment to the retirement ~~investor~~investor’s particular needs or individual circumstances, and may be relied upon by the retirement investor as ~~a basis for investment decisions that are in~~intended to advance the retirement investor’s best interest; or

(ii) The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both, with respect to the recommendation.

(i) A person does not provide “investment advice” within the meaning of this paragraph (c)(1)(iii) if they make a recommendation but neither paragraph (c)(1)(i) nor (c)(1)(ii) of this section is satisfied. For example, a salesperson’s recommendation to purchase a particular investment or pursue a particular investment strategy is not investment advice if the person does not represent or acknowledge that they are acting as a fiduciary under ERISA Title I or Title II with respect to the recommendation and if the circumstances would not 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. Similarly, the mere provision of investment information or education, without an investment recommendation, is not advice within the meaning of this rule.

~~(iii) The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.~~

~~(iv) For purposes of this paragraph, when advice is directed to a plan or IRA fiduciary, the relevant retirement investor is both the plan or IRA and the fiduciary.~~

~~(iv)~~ Written statements by a person disclaiming status as a fiduciary under ~~the Act, the Code~~ ERISA Title I or Title II, or this section, or disclaiming the conditions set forth in paragraph (c)(1)(~~iii~~) of this section, will not control to the extent they are inconsistent with the person’s oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.

(2) A person who is a fiduciary with respect to a plan or IRA by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such person does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) ~~(i)~~ Exempt such person from the provisions of section 405(a) of ~~the Act~~ ERISA concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) ~~(ii)~~ Exclude such person from the definition of the term “party in interest” (as set forth in section 3(14)(B) of ~~the Act~~ ERISA) or “disqualified person” (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

(d) Execution of securities transactions. (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of ~~the Act~~ ERISA or section 4975(e)(3)~~(B)~~ of the Code, with respect to a plan or an IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan or IRA in the

ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:

(i) ~~(#)~~ Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) ~~(#)~~ The instructions specify:

(A) ~~(A)~~ The security to be purchased or sold,

(B) ~~(B)~~ A price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, et seq.), a price which is determined in accordance with Rule 22c-1 under the Investment Company Act of 1940 (17 CFR 270.22c-1),

(C) ~~(C)~~ A time span during which such security may be purchased or sold (not to exceed five business days), and

(D) ~~(D)~~ The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to a plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the

provisions of paragraph (d)(1) of this section shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of ~~the Act~~ [ERISA](#) concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition⁷ of the term “party in interest” (as set forth in section 3(14)(B) of ~~the Act~~ [ERISA](#)) or “disqualified person” (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

(e) ~~(e)~~ For a fee or other compensation, direct or indirect. For purposes of section 3(21)(A)(ii) of ~~the Act~~ [ERISA](#) and section 4975(e)(3)(B) of the Code, a person provides investment advice “for a fee or other compensation, direct or indirect,” if the person (or any affiliate) receives any explicit fee or compensation, from any source, for the [investment](#) advice or the person (or any affiliate) receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase, sale, or holding of a security or other investment property or the provision of investment advice, including, though not limited to, 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 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.

(f) ~~(f)~~ *Definitions.* For purposes of this section—

(1) The term "affiliate" [of a person](#) means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee, representative, or relative (as defined in paragraph (f)~~(1213)~~ of this section) of such person; and any corporation or partnership of which such person is an officer, director, or partner.

(2) ~~(2)~~ The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(3) ~~(3)~~ The term "IRA" means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(4) ~~(4)~~ The term "IRA owner" means, with respect to an IRA, either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) ~~(5)~~ The term "IRA fiduciary" means a person described in [Code](#) section 4975(e)(3) ~~of the Code~~ with respect to an IRA. [For purposes of this section, an IRA owner or beneficiary who is merely receiving investment advice is not an IRA fiduciary.](#)

(6) ~~(6)~~ The term “plan” means any employee benefit plan described in section 3(3) of ~~the~~ ActERISA and any plan described in section 4975(e)(1)(A) of the Code.

(7) ~~(7)~~ The term “plan fiduciary” means a person described in ERISA section (3)(21)(A) ~~of~~ ~~the Act~~ and ~~or~~ Code section 4975(e)(3) ~~of the Code~~ with respect to a plan. For purposes of this section, a plan participant or beneficiary ~~of the plan~~ who is receiving investment advice is not a “plan fiduciary” with respect to the plan.

(8) ~~(8)~~ The term “plan participant” or “participant” means, for a plan described in section 3(3) of ~~the Act~~ ERISA, a person described in section 3(7) of ~~the Act~~ ERISA.

(9) ~~(9)~~ The term “beneficiary” means, for a plan described in section 3(3) of ~~the~~ ActERISA, a person described in section 3(8) of ~~the Act~~ ERISA.

(10) The phrase “recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property” means recommendations as to:

(i) ~~(i)~~ ~~As to the~~ The advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, ~~as to~~ investment strategy, or ~~as to~~ how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;

(ii) ~~(ii)~~ ~~As to the~~ 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.*, account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

(i) ~~(iii) As to rolling~~ Rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.

(11) The term “retirement investor” means 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.

~~(11)~~ 12 The term “investment property” does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.

~~(12)~~ 13 The term “relative” means a person described in section 3(15) of ~~the Act~~ ERISA and section 4975(e)(6) of the Code or a ~~brother, a sister~~ sibling, or a spouse of a ~~brother or sister~~ sibling.

(g) ~~(g)~~ Applicability. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. ~~237~~ 752 (2018), transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. Accordingly, in addition to defining a “fiduciary” for purposes of section 3(21)(A)(ii) of ~~the Act~~ ERISA, this section applies to the parallel provision in section 4975(e)(3)(B) of the Code, which defines a “fiduciary” of a plan defined in Code section 4975 (including an IRA) for purposes of the prohibited transaction provisions in the Code. For example, a person who satisfies paragraphs (c)(1)(i) or (ii) and (e) of this section in connection with a recommendation to a retirement investor that is an employee benefit plan as defined in section 3(3) of ~~the Act~~ ERISA, a fiduciary of such a plan as defined in paragraph (f)(11), or a participant or

beneficiary of such plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to Title I of ~~the Act~~ERISA.

(h) ~~(h)~~ *Continued applicability of State law regulating insurance, banking, or securities.* Nothing in this section shall be construed to affect or modify the provisions of section 514 of Title I of ~~the Act~~ERISA, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities.

Summary report:	
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<u>Table Insert</u>	0
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Table moves from	0
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