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DOL Finalizes Fiduciary/Conflict of Interest Rule

In the face of resistance from financial sector vendors, plan administrators and plan sponsors, the DOL successfully navigated OMB review and today released a final regulation redefining ERISA fiduciary investment advice and setting forth conflict of interest rules. We will assess changes from the proposal and analyze likely impacts in a forthcoming publication. The new fiduciary definition and some limited conditions of the Best Interest Contract Exemption are effective in April 2017; the remaining requirements go into effect on January 1, 2018.

Background

ERISA plan fiduciaries must act prudently and solely in the interest of participants and beneficiaries. In keeping with this goal, the law sets forth a series of “prohibited transactions” that restrict fiduciary self-dealing. Fiduciaries can be held personally liable for losses in the case of a breach of duty.



An ERISA plan fiduciary includes any party that “renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority to do so.” Previously, the DOL used a five-point test to determine fiduciary status for a person giving investment advice. The DOL in 2010 sought to expand the types of investment advice that trigger fiduciary status, but ultimately withdrew that proposal following substantial pushback from the financial services industry. See our [November 11, 2010](#) *For Your Information*.

In April 2015, DOL released its re-proposal of the regulation defining who is a fiduciary as a result of giving investment advice — also known as the “conflict of interest” rule. This proposed rule broadened the fiduciary definition to include a wider scope of investment advice relationships, but also included a number of key carve-outs. Particularly significant to employee benefits plans were carve-outs for investment education and advice provided by an employee of the plan sponsor to a plan fiduciary, where the employee does not receive compensation for the advice beyond his or her normal compensation. See our [April 21, 2015](#) *For Your Information*.

DOL received over 3,000 comments in response to the proposal, held four days of hearings on it in August, 2015 and had more than 100 meetings on the proposal. In the meantime, there have been various congressional efforts to derail DOL's final rule. See our *Legislate* issues from [February 8, 2016](#) and [December 21, 2015](#).

Definition of Fiduciary/Conflict of Interest Final Rule

DOL's final regulation, Best Interest Contract Exemption, five additional documents focusing on affected prohibited transaction exemptions, and supporting materials are collected on [DOL's website](#).

Key Points

Among other aspects of the lengthy regulatory package, the final rule addresses some important plan sponsor concerns with the proposed rule — including potential restrictions on efforts to educate participants about investing savings plan assets; potential fiduciary status of their own employees responding to participant questions; and applicability to health savings accounts (HSAs) and other welfare plan benefits.

Investment Education

The final rule clarifies that investment education is not included in the definition of retirement investment advice, and that advisors and plan sponsors can provide general education on retirement saving without triggering fiduciary duties. Further, in response to criticism of the proposed rule, the final rule permits educational material to identify a specific investment product or alternative and stay outside the definition of fiduciary investment advice under certain circumstances.

Employees as Fiduciaries

Under the final rule, payroll, accounting, human resources, and financial department employees who routinely develop reports and recommendations for the employer and other named plan fiduciaries are not investment advice fiduciaries unless they receive fees or other compensation beyond their normal compensation in exchange for such work.

Communications between employees, such as human resources department staff who discuss the plan or its distribution options with other employees, are not fiduciary in nature as long as they meet certain conditions — for example, the individuals involved are not registered or licensed advisors under securities or insurance laws.

Health and Welfare Arrangements

The final rule applies only to benefits that contain an investment component — and not to health, disability or term life insurance policies that lack this feature. HSAs involve an investment component, and therefore are subject to fiduciary requirements for IRAs.

Timing for Implementation

Compliance with the new standards will be phased in through January 1, 2018. The new fiduciary definition and some limited conditions of the exemption will become effective in April 2017; the remaining exemption requirements will go into effect on January 1, 2018.

Authors

Julia Zuckerman, JD
Marjorie Martin, FSPA, EA, MAAA

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