

COMPLIANCE UPDATE

DOL Final Rule: Definition of the Term “Fiduciary;” Conflict of Interest Rule – Retirement Investment Advice; and Related Prohibited Transaction Exemptions

Release Date: April 8, 2016

Effective Date: June 7, 2016

Compliance Date: Generally, April 10, 2017, for the Fiduciary Rule and Prohibited Transaction Exemptions

Compliance with the Best Interest Contract Exemption is extended by a Transition Period until January 1, 2018, during which time firms may comply with more limited conditions than the full conditions required under the exemption. See release for details.

Section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (“ERISA”) and section 4975(e)(3)(B) of the Internal Revenue Code (the “Code”) define who is a “fiduciary” for purposes of applying, among other things, the prohibited transaction rules. The adopted rule revises the DOL’s interpretation of that definition, expanding who is deemed a fiduciary to include, for example, persons who recommend rollovers of plan assets to IRA accounts, solicitors for investment advisers, and investment advisers to holders of IRA accounts.

Who is a Fiduciary?

A person is a fiduciary with respect to a retirement plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner (these will be collectively referred to as “Retirement Accounts”) to the extent he or she (i) exercises any discretionary authority or discretionary control respecting management of such Retirement Account or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such Retirement Account, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such Retirement Account.

What is Investment Advice?

A person is rendering investment advice if such person provides to a Retirement Account the following types of advice for a fee or other compensation, direct or indirect:

- (i) A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation 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) A recommendation as to 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 versus advisory); or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made.

To be considered investment advice, the recommendation must be made either directly or indirectly (e.g., through or together with any affiliate) by a person who:

(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of ERISA or the Code;

(ii) Renders the advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is based on the particular investment needs of the advice recipient; or

(iii) Directs the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

What is a Recommendation?

“Recommendation” means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.

Recommendation

- *Individually tailored recommendations.* The more individually tailored the communication is to a specific advice recipient or recipients about, for example, a security, investment property, or investment strategy, the more likely the communication will be viewed as a recommendation.
- *Selective lists.* Providing a selective list of securities to a particular advice recipient as appropriate for that investor is a recommendation, even if no recommendation is made with respect to any one security.
- *A series of actions,* directly or indirectly (e.g., through or together with any affiliate), that may not constitute a recommendation when viewed individually may amount to a recommendation when considered in the aggregate.

Not a Recommendation*

- *Platform providers.* Marketing or making available to a plan fiduciary of a plan, without regard to the individualized needs of the plan, a platform from which a plan fiduciary may select or monitor investment alternatives.
- *Selection and monitoring assistance.* Platform providers may also (A) Identify investment alternatives that meet objective criteria specified by the plan fiduciary; (B) Upon request of the plan, identify a limited or sample set of investment alternatives based on only the size of the employer or plan, the current investment alternatives designated under the plan, or both; or (C) Provide objective financial data and comparisons with independent benchmarks to the plan fiduciary.
- *General Communications.* Furnishing or making available general communications that a

- *Software Programs.* It also makes no difference whether the communication was initiated by a person or a computer software program.

reasonable person would not view as an investment recommendation, including general circulation newsletters, commentary in publicly broadcast talk shows, remarks and presentations in widely attended speeches and conferences, research or news reports prepared for general distribution, general marketing materials, general market data, including data on market performance, market indices, or trading volumes, price quotes, performance reports, or prospectuses.

- *Investment Education.* Furnishing or making available any of the following categories of investment-related information and materials: (A) plan information; (B) general financial, investment, and retirement information; (C) asset allocation models that do not identify any specific investment product; and (D) interactive investment materials, provided that the information and materials do not include recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations with respect to investment or management of a particular security or securities or other investment property.
- *Transactions with independent fiduciaries with financial expertise.* Providing advice to an independent fiduciary of the plan or IRA who is (A) A bank or similar regulated institution; (B) An insurance carrier; (C) An investment adviser registered under the Investment Advisers Act of 1940 or state laws; (D) A broker-dealer registered under the Securities Exchange Act of 1934; or (E) Any independent fiduciary that holds, or has under management or control, total assets of at least \$50 million.
- *Swap and security-based swap transactions.* Providing advice as a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, or a swap clearing firm in connection with a swap or security-based swap to an independent fiduciary of a plan.
- *Employees.* Providing advice to a plan fiduciary in the capacity of an employee of the plan sponsor, or providing non-investment related advice to another employee who is a beneficiary

or participant in the plan.

- *Execution of Securities Transactions.* A broker, dealer, or bank is not a fiduciary solely as a result of executing a securities transaction in the ordinary course of business pursuant to the instructions of a plan fiduciary.

*Limitations exist on those activities listed as “Not a Recommendation.” To qualify, firms should review the specifics of the rule and confirm that they are conducting their practices within these limitations.

What does it mean to be a Fiduciary?

As a fiduciary to Retirement Accounts, you are obligated to adhere to ERISA’s fiduciary standards and the prohibited transaction rules. Fiduciaries may need to rely on various Prohibited Transaction Exemptions (“PTEs”) to carry out their business activities with Retirement Accounts. The adopted rules amended some existing PTEs and created new PTEs, including a significant new exemption called the Best Interest Contract Exemption. Fiduciaries must determine whether and how they can comply with these PTEs.

Does this affect Fee-Only RIAs?

Fee-only registered investment advisers that have operated as fiduciaries under the Investment Advisers Act may wonder whether this rule affects them. There are a couple ways that it could impact RIAs. First, fiduciary duty under ERISA is a higher standard than under the Advisers Act. ERISA fiduciary status involves personal liability for breaches, and ERISA fiduciaries are not permitted to enter into prohibited transactions (actions involving conflicts of interest that could benefit the fiduciary or its affiliates) with an ERISA plan. Disclosure cannot cure a prohibited transaction under ERISA as it can with many conflicts under the Advisers Act. To the extent an RIA currently manages assets of an ERISA retirement plan, it is already subject to this duty; however, the revised rule extends this duty to IRA accounts as well.

Second, the new rule could affect an RIA’s business practices. For example, in the context of new clients it could result in moving up the date on which the RIA becomes an ERISA fiduciary if, in the RIA’s conversations with a prospective client, it makes a “recommendation,” as defined in the rule, prior to signing the contract with the client. Another way it could potentially affect the RIA is in the use of soft dollars for such accounts, as soft dollars may be prohibited as additional compensation to the adviser.

Next Steps

If you meet the ERISA definition of a fiduciary, you will need to take steps to comply:

- Evaluate services offered by your firm, types of clients, and compensation structures
- Identify conflicts of interest and prohibited transactions that arise
- Determine Prohibited Transaction Exemptions on which you will rely

- If necessary, adjust business practices and implement policies and procedures to comply
- Adopt written policies and procedures and maintain appropriate books and records
- Amend service agreements, disclosure documents, and solicitor agreements
- Review insurance policies and marketing materials

Unanswered Questions

The Department of Labor released a set of FAQs on the new rule and is anticipated to release additional FAQs by the end of the year. While they provided explanation regarding some issues, other questions remain open, including questions about soft dollars and Level Fee Fiduciaries in the Best Interest Contract Exemption. Advisor Solutions Group, Inc. is proceeding with the guidance that has been released and will incorporate new guidance as it comes out.

More Information

The text of the rule release and related exemptions and FAQs is available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2>

The above information is only a summary of the rule and should not be relied upon for compliance with the rule.

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