

GRIST Alert: Labor Department's broader 'fiduciary' definition will take effect April 10, 2017



By Heidi Rackley, Norma Sharara, and Paul Strella of Mercer's WRG and Robin Solomon of Ivins, Phillips & Barker, Chartered | April 6, 2016

Just-released Department of Labor (DOL)'s final regulations treat a wider range of investment recommendations — including counseling about taking a distribution from a qualified plan or individual retirement account (IRA) — as fiduciary investment advice. The new rule sets aside 40-year-old regulations that DOL believes fail to protect participants from investment advice skewed by undisclosed conflicts of interest. While much of the debate about the broadened fiduciary definition has focused on the implications for brokers, the final rule raises important issues for plan sponsors. This GRIST describes how the final rule addressed some key employer concerns with the proposed rule (GRIST #US20150059, April 30, 2015).

Arrangements subject to new rule. Despite employer calls to carve out health savings accounts (HSAs) and Archer medical savings accounts (MSAs), the final rule covers those accounts. The rule also applies to employer-sponsored retirement plans, IRAs, and Coverdell education savings accounts. (Where this article mentions IRAs, the discussion includes HSAs, Archer MSAs, and Coverdell education savings accounts.) However, DOL has carved out health, disability, and term life insurance policies that do *not* include an investment component.

Distribution counseling. Like the proposed rule, the final rule treats recommendations about rollovers, transfers, or distributions from a qualified plan or IRA as fiduciary investment advice.

Investment education. To help employers and advisers better understand the line between investment education that isn't subject to fiduciary standards and investment advice that carries fiduciary obligations, the final rule provides more details on the types of information and activities considered nonfiduciary investment education:

- *Asset allocation models may name plan investment options.* Allocation models and interactive investment materials can identify specific investment options under ERISA-covered plans (which are selected and monitored by a plan fiduciary) without crossing the line into fiduciary advice, if certain conditions are met. This is a change from the proposed rule, which only excluded materials showing generic asset categories, which many employers considered confusing to participants. But in the IRA context, references to specific investments are generally treated as fiduciary advice under the final rule.

- *General communications aren't advice.* To allay sponsor fears that generic plan communications like newsletters might be considered investment advice, the final rule clarifies that investment advice does not include widely circulated "general communications that a reasonable person would not view as an investment recommendation."

Employee conversations. An employee who gives investment advice to another employee won't be treated as a fiduciary in most cases.

Call centers. DOL rejected employer calls for a blanket exemption for information provided by call centers.

Platform provider proposals. The final rule clarifies that a platform provider's written proposal illustrating a sample fund lineup won't be considered fiduciary advice as long as (i) the sample lineup is based solely on the size of the plan, its current investment alternatives, or both; and (ii) the response discloses whether the provider has a financial interest in any of the alternatives (and if so, the precise nature of that interest).

Appraisals. In a change from the proposed rule, the final rule does not apply to any appraisals, regardless of the plan type or purpose. Instead, DOL will undertake a separate rule-making project on appraisals.

Best-interest contract exemption. The final rule broadens and simplifies the new "best-interest contract" prohibited transaction exemption (PTE). This PTE allows advisers to set their own reasonable compensation practices, including commissions and revenue sharing, as long as the adviser contractually agrees to serve the client's best interests. For existing clients, advisers can satisfy this PTE using "negative consent," where the amended contract automatically takes effect unless the client terminates the advisory relationship within 30 days of receiving notice of the changes.

Effective date. The new fiduciary definition will take effect April 10, 2017. But the best-interest contract requirements are phased in, with more limited conditions applying through 2017 year-end. The final rule will take full effect Jan. 1, 2018. Republicans vow to kill the rule before it takes effect, but they face an uphill battle in light of Democratic support.

US20160044

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