



## Employee Benefits & Executive Compensation ADVISORY ■

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### DOL Changes the Landscape: How Will the New Fiduciary Rules Affect Plan Sponsors?

Since the Department of Labor issued new rules that go into effect on April 10, 2017, regarding the fiduciary status for purposes of providing investment advice to plans and participants, many plan sponsors have questions about the impact of these new fiduciary rules on them. Plan sponsors should be mindful of how the new fiduciary rules will affect them before the rules go into effect on April 10, 2017.

#### **Definition of Investment Advice Under the New Fiduciary Rules**

Before April 10, 2017, the existing fiduciary definition covers persons who provide “investment advice” relating to plan assets for compensation. There is a five-prong definition for “investment advice” that includes: (1) making investment recommendations; (2) on a regular basis; (3) with a mutual understanding; (4) that is the primary basis for the plan’s decisions; and (5) individualized to the plan’s needs. If no investment advice is given, then the person is not a fiduciary under ERISA.

After April 10, 2017, the new fiduciary rules will change the landscape for many entities making investment recommendations. While advisors, consultants, recordkeepers and third-party administrators are the primary targets of the new fiduciary rules, plan sponsors will also have consequences under the new fiduciary rules as co-fiduciaries of such service providers as well as under specific contractual obligations plan sponsors have with them.

Under the new fiduciary rule, a person is deemed to be a fiduciary under ERISA if he or she provides investment advice or makes a recommendation to a plan, plan fiduciary, participant, beneficiary, IRA or IRA owner for a fee or other compensation to act or refrain from acting on investment decisions, investment management or IRAs. Unlike the existing rules, under the new fiduciary rules, investment advice now includes one-time advice (without the “regular basis” condition), and there is no longer a need for mutual understanding of the parties or reliance by one party on the recommendation. This results in a much broader sweep of fiduciary status. Under these new fiduciary rules, the investment advice includes addressing particular investment needs or a particular investment decision and does not have to be individualized. The fees only need to be received by a person who provides the investment advice, whether directly or indirectly, for the person to become a fiduciary, and the advice no longer needs to be the primary basis for the decision.

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### ***Recommendation exclusions***

There are three exclusions from recommendations under the new fiduciary rule: (1) platform providers; (2) investment education; and (3) general communications. The new fiduciary rules also specifically address three types of recommendations that were not considered to be recommendations before the new fiduciary rule. First, the new fiduciary rule covers recommendations for the selection of other persons to provide investment advice (although the adviser's own "hire me" recommendation is not considered conflicted fiduciary investment advice). Second, recommending a rollover distribution is now fiduciary advice, which covers rollover advice that does not include any actual investment recommendation. Third, the new fiduciary rules expressly revise the prior fiduciary definition to cover investment management recommendations.

### ***Fiduciary exclusions***

There are three exclusions from the definition of a fiduciary under the new fiduciary rule: (1) sellers to fiduciaries with more than \$50 million in assets or institutional fiduciaries (such as banks); (2) swap counterparties; and (3) plan-sponsor employees. Additionally, there is a new prohibited transaction exemption called the "best interest contract exemption" that allows an advisor to earn variable compensation for investment advice, provided that certain disclosures and other requirements are met.

### **Impacts on Plan Sponsor**

Plan sponsors will see an impact under these new fiduciary rules in three main areas: (1) the plan sponsor's role with the plan itself; (2) the plan sponsor's role in participant interactions; and (3) the plan sponsor's role with vendors and service providers.

### ***Designated fiduciary functions***

The conventional roles of the employer as the plan sponsor and the investment committee as a named fiduciary will not change. Employees may assist the fiduciary or participants in the normal course of business without becoming a fiduciary under the new rules.

### ***Participant interactions***

Plan sponsors are still able to provide nonspecific education to participants without becoming a fiduciary under the new rules. Plan sponsors should review the education given to participants to ensure it is not specific and will not be considered fiduciary advice under the new rules. Since rollovers and distributions are now considered fiduciary advice, plan sponsors need to assess what information and advice is given to participants to ensure fiduciary status is not affected or is handled with a third party through the best interest contract exemption under the new rules. Additionally, plan sponsors should analyze any asset allocation models provided to participants as a tool for investing retirement plan funds. Plan sponsors should also ensure the qualified default investment alternative (QDIA) meets the requirements to be exempt from investment advice. Since many of these functions are provided by service providers to the plan, the arrangements with the service providers should be analyzed for compliance with the new fiduciary rule. Plan sponsors should still be mindful of co-fiduciary duties for the selecting and monitoring of other fiduciaries who have interactions with participants.

***Vendors and service providers***

Changes to products and services by vendors and service providers will be the biggest change that plan sponsors will see in the upcoming months as advisors, record keepers and other plan providers take steps to ensure their own compliance with the new rules. Contracts with service providers should be carefully reviewed, especially the indemnification language and the language acknowledging fiduciary status to make sure the plan or plan administrator is not becoming obligated for fiduciary actions of its service providers. The scope of the plan sponsor's responsibilities in a fiduciary capacity with service providers is important to identify in this process, as well as determining whether the pricing, services and compliance solutions of service providers will change as a response to this new fiduciary rule.

If a service provider provides an amendment or new contract in the next few months to address their concerns under this new rule, plan sponsors should consider the impact of the amendment carefully. If a new contract or amendment is not received from a service provider, plan sponsors should review the current contract to determine if an amendment or revisions to the agreement should be initiated with the service provider due to the changing landscape under the new fiduciary rule.

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