

# DEPARTMENT OF LABOR IMPACT ON NEW FIDUCIARY RULES

## Key Points for Retirement Plan Sponsors

After a number of attempts to implement stronger protections for investors who rely on advice from a financial advisor, the U.S. Department of Labor (DOL) issued new rules in April, 2016. The significant growth of 401(k) plans and IRAs led the DOL to pursue an update of fiduciary-related rules that had not been substantially changed since 1975.

The rules expand the definition of who is a fiduciary, and include prohibited transaction exemptions that allow certain advisors who act as fiduciaries to continue to receive common forms of compensation if they provide advice that is impartial and in the best interest of the investor. Many of the provisions are effective in April, 2017. All of the new rules will be in effect on January 1, 2018.

Financial services firms and financial advisors will have to make prudent investment recommendations, charge reasonable compensation and offer clear disclosures to clients concerning recommended investments and their compensation in order to comply with the new rules.

Reviewing the following questions and answers should help you prepare for implementation of the new rule.

**Q: What are the purposes of the new regulations?**

**A:** The DOL wants to ensure that financial advisors who provide advice about retirement accounts put their clients' interests first. Another goal is to require transparency about the cost of investment advice and the costs of financial products recommended by an investment advisor.

**The new rules also apply to plan-to-IRA transfers.**

**Q: What is the expanded definition of fiduciary?**

**A:** A person provides fiduciary investment advice to a plan if, among other things, he or she provides a recommendation regarding investment securities for a fee or other compensation. Further, fiduciary advice is present if the person making the recommendation indicates he or she is acting as a fiduciary within the meaning of ERISA or the Internal Revenue Code, offers the advice pursuant to

a written or verbal agreement that it is based on the specific needs of the recipient of the advice, or directs the advice to a specific recipient.

**Q: What constitutes a recommendation?**

**A:** It is a communication that would reasonably be seen as a suggestion that the advice recipient take or refrain from a particular course of action.



**Q: Would the investment advice rule apply to a recommendation to roll money out of a 401(k) plan into an IRA?**

**A:** Yes, the DOL's final rule indicates that a recommendation of a distribution or rollover from a 401(k) into an IRA will constitute fiduciary advice under ERISA. Plan sponsors should confer with the plan's recordkeeper to determine how requests for plan distributions will be handled after the final rule becomes effective.

**Q: What is not viewed as covered investment recommendations?**

**A:** Non-fiduciary communications include:

- Education – Regardless of who is providing the education or in what form, presentation of plan information and/or objective information about investment choices in the plan (such as fees, expenses, investment objects, risk and return characteristics and historical return information) is non-fiduciary.

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- General Communications – These include descriptions of investment concepts, market data about performance, price quotes and newsletters.
- Platform Providers – Making available a platform of investment alternatives without regard to individual investor needs is not considered investment advice as long as the plan fiduciary is independent of the service provider.

Other categories of communications not considered investment advice include asset allocation models and interactive investment materials, so long as they are designated investment alternatives selected or monitored by an independent plan fiduciary, and certain other conditions are met.

**Q: Are there exemptions from the new rules?**

**A:** Yes. The Best Interest Contract (BIC) exemption provides an exemption from prohibited transactions that allows firms to maintain current compensation and fee practices as long as they mitigate conflicts of interest and provide advice designed to be in the best interest of their client. Under the BIC advisors must adhere to impartial conduct standards and provide various disclosures.

## One requirement of the Best Interest Contract Exemption (BICE) is disclosure on the firm's website.

**Q: Are our employees who work on various aspects of the plan considered fiduciaries under these rules?**

**A:** If employees who work in payroll, accounting, human resources or finance routinely prepare reports or recommendations for the company or named fiduciaries as part of their normal job duties and do not receive any compensation beyond their normal pay, they will not be viewed as fiduciaries.

So long as they make no recommendations to a participant, these employees can provide non-fiduciary education including general financial, investment and retirement information. They also can:

- Help participants enroll, decide how much to save and learn more about the basics of the plan.

- Provide education on an individual or group basis, in writing or orally, via a call center, or by way of video or computer software.
- For plans, use of hypothetical asset allocation models or interactive investment materials intended to educate participants and beneficiaries as to what investment options are available are permitted, so long as they are designated investment alternatives selected or monitored by an independent plan fiduciary.

**Q: What plan decisions made by a plan sponsor are affected by the new rule?**

**A:** The same fiduciary standards apply, whether the plan sponsor hires someone to manage the plan, or does some or all of the plan management itself. The plan sponsor remains a fiduciary with respect to selecting and monitoring investments for the plan unless working with a 3(38) fiduciary (including default investments for automatic employee contributions), meeting conditions for fiduciary liability relief for these investments, hiring a service provider and disclosing information to participants, and reporting to Government Agencies, among other decisions.

**Q: What should we as a plan sponsor do now?**

**A:** While implementation dates of the new rules are months away, there are several steps you can take now, including:

- Review your existing relationships with plan service providers to identify who may be treated as a fiduciary when the rules go into effect.
- Review any written agreements with service providers to ensure compliance with the new regulations.
- Refresh your knowledge of fiduciary best practices.
- Review any education materials with your financial advisor to determine if there are inadvertent investment recommendations.
- Make sure that employees working on various aspects of the plan understand the new rules.

**Q: Where can I get more information?**

**A:** Contact Diversified Financial Advisors. More information can also be found at the Department of Labor's website (<http://tinyurl.com/NewFiduciaryRules>) including the full rules, Fact Sheets and Frequently Asked Questions.

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