

DOL Publishes Final Rule Redefining

OVERVIEW:

Last week, the United States Department of Labor ("DOL") published a [final rule](#) which redefines the people and organizations who are fiduciaries under the Employee Retirement Income Security Act of 1974 ("ERISA") by virtue of providing investment advice to an employee benefit plan or plan participant.

The final rule is the DOL's latest attempt to modernize the current rule, which has been in place since 1975. At that time, the DOL explained, the most common type of plan was a defined benefit pension plan. These plans were primarily managed by professional money managers and funded by employers, who shouldered the risk of poor investment performance and shortfalls. Today, however, most workers save for retirement in 401(k) plans and IRAs, and have responsibility for making investment decisions for themselves.

In its press release, the DOL stated that its goal in issuing the final rule is to "protect retirement investors by requiring trusted advice providers to follow high standards of care and loyalty when they make investment recommendations."

Summary of the Rule

Under the final rule, a person is an investment advice fiduciary if they provide a "recommendation" to a retirement investor in one of the following contexts:

- The person either directly or indirectly (e.g., through or together with any affiliate) makes professional investment recommendations to retirement investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:
 - is based on review of the retirement investor's particular needs or individual circumstances,
 - reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and
 - may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or
- The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

The recommendation also must be provided "for a fee or other compensation, direct or indirect" as defined in the final rule. A "retirement investor" is an ERISA plan, plan participant or beneficiary, an IRA or IRA owner, or a plan or IRA fiduciary.

"Recommendations" include:

- Advising on the acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or 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;
- Advising on 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., account types such as brokerage versus advisory) or voting of proxies; and
- Recommending rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.

Takeaways for Plan Sponsors

While the final rule is largely directed at financial services firms, there are some takeaways for plan sponsors.

1. In the preamble to the final rule, the DOL makes clear that human resources and other employees of a plan sponsor who speak with employees about the company's retirement plan are not subject to the final rule.
2. If the final rule becomes effective (as noted below, a lawsuit challenging the rule has already been filed), plan sponsors may see changes in the way their retirement plan service providers interact with plan participants, and the fees associated with the plan. The nature and extent of the changes will depend on the service provider's current service model, and the extent to which the service provider is willing to accept ERISA fiduciary status. One of the DOL's most important goals in updating the rule was to clarify that service providers who encourage plan participants to "roll over" their retirement plan accounts from an employer-sponsored retirement plan and into the service provider's own proprietary products (typically, an IRA or annuity product with higher fees) are investment advice fiduciaries. If the final rule becomes effective, service providers will need to determine whether they wish to continue this practice and accept fiduciary status or forgo the practice and the associated revenue. They may seek to replace the lost revenue by imposing additional fees for the services that they continue to provide to retirement plans.

Effective Date and Early Challenge to the Rule

The final rule is scheduled to become effective September 23, 2024 (150 days following the regulations' publication in the Federal Register). However, as expected, the first lawsuit seeking to vacate the rule and prevent the DOL from enforcing it has already been filed.

If you have any questions about the final rule or how it may impact your retirement plan, please contact [Mark Smith](#) or [Karen Toth](#) - attorneys in [Barley Snyder's Employee Benefits Practice Team](#).

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