

DOL Proposed Rule: New Definition of “Investment Advice Fiduciary”

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On October 31, the Department of Labor (DOL) released a [proposed rule](#) (the Proposed Rule) aiming to redefine and expand who qualifies as an “investment advice fiduciary” under the Employee Retirement Income Security Act of 1974, as amended (ERISA). This change could cause more financial services providers to become subject to ERISA’s obligations, which would include adherence to ERISA’s expert standard of care and duty of loyalty, and the avoidance of certain conflicts of interests. Notably, this is the DOL’s third proposed change to the definition of “investment advice fiduciary.”

The Proposed Rule^[1] defines an “investment advice fiduciary” as a person who:

1. Provides investment advice or makes an investment recommendation to a “retirement investor” (*i.e.*, a plan, plan fiduciary, plan participant or beneficiary, individual retirement account (IRA), IRA owner or beneficiary, or IRA fiduciary);
2. Receives a “fee or other compensation, direct or indirect” for the advice or recommendation; and
3. Makes the recommendation in one of the following contexts of a professional relationship where the individual investor would reasonably expect to receive sound investment recommendations that are in their best interest:

The provider has discretion over the retirement investor’s investment decisions;

The provider makes investment recommendations to investors on a regular basis as part of his, her, or its business, and the recommendation is provided under circumstances that would indicate that (i) the recommendation is based on the retirement investor’s particular needs or circumstances, and (ii) the advice may be relied upon by the retirement investor as a basis for making investment decisions that are in the retirement investor’s best interest; or

When making the investment recommendation, the provider acknowledges or represents that they are acting as a fiduciary.

The 1975 Definition of “Investment Advice Fiduciary”

The Proposed Rule would replace the DOL’s 1975 definition of “investment advice fiduciary,” which is currently used to determine whether a financial service provider is acting in a fiduciary capacity. The definition consists of a five-part test (the 1975 Test), which means that a financial service provider is an “investment advice fiduciary” if it:

1. Renders advice to the plan as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property;
2. On a regular basis;
3. Pursuant to a mutual agreement, arrangement, or understanding with the plan, plan fiduciary or IRA owner, that;
4. The advice will serve as a primary basis for investment decisions with respect to plan or IRA assets, and that;
5. The advice will be individualized based on the particular needs of the plan or IRA.

As noted above, the 1975 Test requires that the financial service provider’s advice be provided to the specific individual on a “regular basis.” The 1975 Test does not include one-time advice given to a participant in an employer-sponsored 401(k) plan trying to decide whether to roll over his or her assets into an IRA or leave them in their 401(k) plan.

In the Proposed Rule, the DOL seeks to revise the “regular basis” requirement of the 1975 Test by expanding it to describe the financial service provider’s business, instead of applying it to the relationship with the individual receiving the advice. This revision of “regular basis” would capture the one-time advice recommendations, so that a financial service provider giving one-time advice on whether a retirement investor should roll over their employer-sponsored 401(k) into an IRA *would be* an investment advice fiduciary.

Comparison to the DOL’s 2016 Fiduciary Rule

In 2016, the DOL proposed an updated definition of “investment advice fiduciary” that was struck down in 2018 by the Fifth Circuit for rulemaking being too broad and exceeding the DOL’s authority. According to the DOL in its [Fact Sheet](#), the new proposed investment advice fiduciary definition is “more narrowly tailored than the 2016 fiduciary rule, which applied to virtually all paid recommendations to retirement investors” and does “not impose any new contract or warranty requirements.”

The DOL is accepting comments on this proposed fiduciary rule until January 2, 2024.

[1] 88 FR 75890

Caitlin Oh also contributed to this article. She is not licensed to practice law in any jurisdiction; application pending for admission to the Georgia Bar.

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