

The DOL's Fiduciary Regulation—It's Here!

On April 6, 2016, the Department of Labor (DOL) released the long-anticipated final regulation that defines when investment advice provided for a fee is a fiduciary act. The process to get this regulation into its final form has been lengthy, controversial, and contentious.

A Regulation That Will Surely Impact Financial Advisors

Many advisors in today's environment are held to a suitability standard. Others must adhere to an even higher standard—that of a fiduciary. In a fiduciary role, an advisor must act in the best interest of the client.

The DOL's final regulation is clearly intended to unify all advisors under the higher standard of a fiduciary in order to protect retirement savers from potentially biased advice and reduce costs. As such, firms and advisors should carefully evaluate their business practices and compare them to the new rules, paying particular attention to the following:

- The difference between investment education and investment advice, including how each might apply to a retirement plan versus an IRA owner
- Compensation structures and related exemptions
- Distribution, rollover, and transfer recommendations and related exemptions
- Disclosure and administrative requirements for compliance

Investment Advice and Investment Education

The key to determining whether investment advice is given is whether a "recommendation" is made. Any communication that is reasonably viewed as a suggestion that a plan fiduciary, plan participant, beneficiary, or IRA owner either engage in or refrain from a particular course of action is a recommendation. The more individualized the communication, the more likely it will be considered a recommendation and, therefore, investment advice.

Examples of recommendations giving rise to investment advice include:

- buying, selling, or holding investments; and
- entering into a transaction, such as a distribution, rollover, or transfer.

Communications involving investment policies and strategies—for example, portfolio composition, selection of others to provide investment advice, or selection of investment account arrangements (advisory vs. brokerage accounts)—are also considered recommendations/investment advice under the final regulation.

Certain asset allocation models and interactive education tools are considered to be educational in nature and are therefore *not* deemed to be advice. This remains true even if those materials include references to specific investments under a plan. For IRA owners, however, any reference to specific investment options *is* considered advice.

Compensation Structures

When the fiduciary regulations were originally proposed, one of the greatest concerns was how they might potentially impact various financial services business models that have existed for decades. Specifically, some were worried that variable compensation models would be eliminated, leaving level compensation models as the only way to service retirement plans.

To address this concern, the re-proposed regulation contained a new prohibited transaction exemption called a Best Interest Contract (BIC). The BIC requires advisors to act in the best interest of the client. It also allowed the use of a variety of compensation models, provided that certain conditions were met. Nevertheless, the BIC was viewed by many as too complicated and too restrictive.

The final regulations addressed some of these objections. For example, the BIC may now be used with plans of all sizes and for virtually all types of investments. In addition, the BIC's disclosure requirements have been simplified. These enhancements may lead some to see the BIC as a viable tool that can be used to comply with the new regulations. Others, however, may still choose to migrate to a level compensation model.

Distribution, Transfer, and Rollover Recommendations

The final rule takes into account the dramatic increase in rollovers in recent decades. It also addresses the potential opportunity for an advisor to recommend strategies that put the advisor's best interests ahead of the client's.

Advising a client to take a distribution or rollover assets from one retirement plan to another is considered investment advice under the final rule. Depending upon an advisor's compensation model, the advisor may have to comply with the BIC or a streamlined exemption in the BIC (for level fee advisors) to avoid a prohibited transaction.

Disclosure and Administration Requirements

While the final rules clarify and eliminate some of the more onerous data retention and disclosure requirements, significant compliance and administration changes will still need to be implemented. This is especially true if the advisor will rely on the BIC to comply with the new regulation.

Advisors will need to determine if they will be required to

- prepare disclosures of fees and conflicts of interests, including assessing the timing of delivery;

- update or enter into contracts, including assessing the timing of the signature;
- document that a recommendation made was in the client's best interest;
- create and adopt policies and procedures, including advisor incentives and quotas;
- maintain a website containing specific information;
- provide additional information upon request; and
- email the DOL of its intent to comply using the BIC.

There's Time to Get Ready

The date by which firms and advisors must comply with the rule is April 10, 2017. The BIC exemption has a transition period from April 10, 2017, until January 1, 2018. This time frame should allow financial services firms and advisors to better prepare for the challenges presented by the new fiduciary rule.

Our Commitment to Providing Clarity & Guidance

As we continue to analyze this extensive and multi-faceted guidance, Ascensus remains committed to providing regular updates and counsel. Backed by one of the largest ERISA consulting teams in the country, our experts will work hand in hand with our valued partners, advisors, and their clients to offer support and guidance as they work to understand the implications that this ruling has on their businesses. Ascensus stands ready to help our clients navigate the evolving landscape of the retirement industry.

Check the [Industry & Compliance News](#) section of www.ascensus.com regularly for updates regarding the DOL's ruling from our regulatory experts.