

DOL Fiduciary Rule Applicable to HSA & Other Individual Savings Accounts

The Department of Labor (DOL) recently released its long-awaited [final fiduciary rule](#). Referred to by the DOL as the “conflict-of-interest” rule, it’s designed to protect retirement savers from biased advice. Simply stated, the DOL wants to protect consumers from financial professionals who may be looking to take advantage of compensation arrangements that could potentially lead to abuses.

With its release, the DOL has clarified that health savings accounts (HSAs), Coverdell education savings accounts (ESAs), and Archer Medical Savings Accounts (MSAs) are covered by the final rule. The application of the final rule to these accounts has received little media or industry attention. Nevertheless, it’s significant for providers of these plans.

Final rule expands definition of investment advice

The final rule defines when certain individuals and businesses become fiduciaries by providing investment advice for a direct or indirect fee. In effect, the rule aims to increase the number of fiduciaries by broadening the term “investment advice.”

As defined in the final rule, investment advice generally includes the following:

- A recommendation to buy, sell, hold, or exchange investments or a recommendation on how to invest assets that are rolled over, transferred, or distributed from a retirement plan or IRA.
- A recommendation regarding the management of retirement plan or IRA assets (e.g., investment strategies) or a recommendation regarding rollovers, transfers, or distributions from a retirement plan or IRA. This includes in what amount, in what form, to what destination, and whether a rollover, transfer, or distribution should be made.

Why are certain individual savings accounts covered by the final rule?

Considering the definition of investment advice provided above, it seems logical that HSAs, ESAs, and MSAs would be unaffected by the final rule. But asserting its authority to issue guidance pertaining to Internal Revenue Code (IRC) Sec. 4975, the DOL defined “IRA” in the final rule by referencing IRC Sec. 4975(e)(1), which includes HSAs, ESAs, and MSAs. Considering that such accounts are subject to the same prohibited transaction rules as IRAs, the DOL believes that HSA, ESA, and MSA owners are entitled to receive the same protections as IRA owners.

The DOL noted in the preamble to the final rule that these accounts are given tax preferences, as are IRAs. And some of the accounts, such as HSAs, have associated investment accounts that can be used as long-term savings accounts for retiree health care expenses.

According to a recent study by Devenir, the number and value of HSAs grew over 20% in 2015, resulting in 16.7 million health savings accounts worth a total of \$30.2 billion by the end of the year. This study reflected more rapid growth in the value of investment accounts within HSAs, which increased 33% over the same period.*

***Source:** Devenir Research. (2016). [2015 Year-End HSA Market Statistics & Trends](#).

Why is the final rule significant for HSA providers?

Many consider investment accounts to be accounts holding investment property such as mutual funds, stocks, bonds, or other securities. But the DOL final rule clarifies that the term “investment property” includes certificates of deposit and similar investment products.

As a result, depository organizations such as banks and credit unions must carefully consider the details of the final rule and how it will affect their policies and procedures. HSA providers that become fiduciaries under the final rule will generally be subject to its compliance requirements. If an exemption doesn't apply, certain arrangements will result in prohibited transactions.

The key to determining whether investment advice is given is whether a “recommendation” occurs. A recommendation is a communication that “would be reasonably viewed as a suggestion” to take a particular course of action, or refrain from doing so. The more the advice is tailored to the recipient, the more likely it will be viewed as a recommendation.

Under the final rule, HSA providers can make available investment education materials (e.g., certain plan information, asset allocation models, interactive investment materials, and general financial, investment, and retirement information) without becoming fiduciaries *if* the materials generally don't identify specific investment alternatives or distributions options.

General communications—such as newsletters, marketing materials, public presentations, investment reports, and non-personal information—aren't considered recommendations giving rise to fiduciary status.

Next steps

HSAs have experienced tremendous growth over the past 12 years. This trend is likely to continue and accelerate in the future. As HSA balances continue to grow, more HSA owners are considering using investment accounts—including CDs and similar investments—and HSA providers are frequently partnering with third-party brokers or their in-house investment advisors to provide other investment options.

While it will take some time to fully analyze the DOL's final rule, HSA providers should begin reviewing the types of communications that they provide to HSA owners, the compensation schemes and incentive payments for employees working with HSAs, and their arrangements with third-party brokers and investment advisors, if applicable.

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