

CASE OF THE WEEK
w/o 04.12.15
ERISA Investment Advice Fiduciary

Our ERISA consultants on the Learning Center Resource Desk regularly receive calls from financial advisors on a broad array of technical topics related to IRAs and qualified retirement plans. We routinely guide financial advisor through the Internal Revenue Service (IRS), Department of Labor (DOL) and Pension Benefit Guaranty Corporation (PBGC) rules and regulations that govern retirement plans.

A recent call with a financial advisor in Ohio is representative of a common question about the definition of an investment advice fiduciary. The advisor asked: **"Now that the DOL has released its regulations that define when a financial advisor is subject to a fiduciary standard, when do the new rules take effect?"**

Highlights of Discussion

- Hold your horses. The investment advice fiduciary regulations that the DOL released on April 14, 2015, along with carve-outs, new class exemptions and amendments to applicable existing prohibited transaction exemptions (PTEs)—444 paged in all—are **proposed** at this time—not final. ([Link to Conflicts of Interest Proposed Rule](#) et al)
- Until they are finalized, the industry must continue to operate under the existing 40-year-old rules that define an investment advice fiduciary that were established under the Employee Retirement Income Security Act of 1974 (ERISA), existing DOL regulations [DOL Reg. 2510.3-21(c)] and PTEs (75-1, 86-128, 77-4, 80-83, 83-1 and 84-24).
- The next steps for the DOL's proposals are
 - ✓ Formal publication in the Federal Register (which starts the regulatory clock ticking),
 - ✓ An initial public comment period (2 ½ months or 75 days)
 - ✓ A public hearing within 30 days of the close of the comment period
 - ✓ Another comment period following the hearing and publication of the hearing transcript (length of time unknown—assume 30 days),
 - ✓ Publication of a final rule in the Federal Register
 - ✓ A 60-day delayed effective date from date of final publication and
 - ✓ An eight-month delayed applicability date from the date of final publication.
- Adding up all those steps, and assuming the DOL eventually finalizes its proposals, the industry is at least 6 ½ months away from an effective date, and over a year away from applying any potential new rules.
- Until the regulatory process plays out, the industry must continue to operate under the existing rules (referenced above). In broad terms, the existing fiduciary advice rule follows a five-part test. Under the five-part test, a person is considered an investment advice fiduciary if he or she, in exchange for a fee, gives investment advice
 1. About the value of or advisability of investing in securities or other property;
 2. On a regular basis;
 3. Pursuant to an agreement or arrangement with the plan;
 4. With the understanding that the advice will serve as a primary basis for investment decisions; **AND**
 5. That is individualized to suit the needs of a specific plan.

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Note that the individual must satisfy all five of the criteria to be considered an investment advice fiduciary.

Conclusion

At this point the DOL has re-proposed rules to identify an investment advice fiduciary. A lengthy regulatory process must play out before any changes take effect or can be applied. The action step at this point is for interested parties to prepare and submit comments to the DOL on its proposals in an effort to help it formulate final rules that are optimal for investors as well as the advice industry. Page 2 of the [Notice of Proposed Rule Making Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice](#) explains several methods one may follow to submit comments. Stay tuned for further developments.