

# eBenefits Alert: Long-Awaited DOL Fiduciary Rules Issued, Definition of “Fiduciary” Expanded to Protect Retirement Plan Investors

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## 1. What are the new rules about and why were they issued?

The Department of Labor (“DOL”) previously issued fiduciary regulations many years ago, back in 1975. Given the proliferation of participant-directed investments and IRAs as well as the increased complexity of financial instruments, the DOL believes that these old rules are no longer adequate to protect retirement benefit (both ERISA and IRA) investors. The DOL’s primary concern is that providers of retirement investment alternatives may have significant conflicts of interest causing them to make investment recommendations that are not in the best interests of the investor.

## 2. What types of communications are treated as investment advice?

A person renders investment advice if s/he has a relationship described in 4, below, and provides a plan, plan fiduciary, plan participant, IRA, or IRA owner the following types of advice in exchange (directly or indirectly) for a fee or other compensation:

- A recommendation as to the advisability of acquiring, holding, or disposing of plan (or IRA) investments, or a recommendation as to how those investments should be invested after they are rolled over, transferred, or distributed from the plan or IRA.
- A recommendation as to the management of plan (or IRA) investments, including recommendations regarding investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services; or recommendations with respect to rollovers, transfers, or distribution from a plan or IRA, including whether, in what amount, in what form, and to what destination the rollover, transfer, or distribution should be made.

## 3. What constitutes a “recommendation?”

The determination of whether a communication is a “recommendation” is subjective rather than objective. The regulations describe a “recommendation” as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the recipient engage in or refrain from taking a particular course of action. The more tailored the communication is, the more likely it is to be considered a recommendation.

## 4. What type of relationship must exist between parties in order for a “recommendation” to be considered investment advice?

The new rule covers the following types of relationships:

- Recommendations by persons who represent or acknowledge that they are acting as a fiduciary;
- Advice rendered in the context of a written or verbal agreement, arrangement, or understanding that the advice is based on the particular investment needs of the recipient; and
- Recommendations directed to a specific recipient regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

## 5. What types of communications are not considered investment advice?

- Providing a “platform” from which to select or monitor investments, including providing assistance in selecting and monitoring investment alternatives that meet objective criteria identified by a plan fiduciary and providing objective financial data and comparisons with independent benchmarks. The person providing the services must disclose in writing that he or she is not undertaking to provide impartial investment advice or give advice in any fiduciary capacity and also must disclose the extent to which he or she has a financial interest in any of the identified investment alternatives.
- Providing general communications regarding plan investments, such as newsletters, general marketing material, and data on market performance.
- Providing investment education, such as information regarding the general operation of the plan, the effect of fees and expenses on rate of return, general methods and strategies for managing assets in retirement, and asset allocation models and interactive investment materials (if certain requirements are met).
- Providing advice to an independent fiduciary with financial expertise, including banks; certain insurance carriers; registered investment advisors; registered broker-dealers; independent fiduciaries that hold, or have under management or control, total assets of \$50 million or more. In order to qualify for this exception, the person providing the advice may not receive a fee or other compensation directly from the plan, plan fiduciary, plan participant, IRA, or IRA owner for the advice.

## 6. What is the Best Interests Contract Exemption (“BICE”) and when does it apply?

In connection with the new fiduciary rules the DOL issued a prohibited transaction exemption, allowing for certain actions by financial services providers that would otherwise be prohibited as “self-dealing” to be exempt from the prohibited transaction rules of ERISA and the Internal Revenue Code. In order to qualify for the exemption, financial service providers will need to take a number of steps to ensure that they are acting in the best interests of investors. The steps include establishing procedures to both disclose and avoid potential conflicts of interest.

## 7. Are appraisals, e.g., valuations of an employer conducted in connection with an ESOP transaction, addressed in the new rules?

No, the DOL says that it will address appraisals in a separate rulemaking project.

## 8. When will the new rules take effect?

The rules will generally take effect in April, 2017, but full compliance with the BICE requirements will be delayed until January 1, 2018. Until January 1, 2018, the DOL says that it will focus on assisting with compliance with the rules rather than enforcement. Until April, 2017, the current fiduciary rules apply. These rules generally do not provide as much protection to investors as the new rules. Plan sponsors might want to keep this in mind during the next year, particularly with respect to advice given to terminating participants by investment service providers regarding rollovers to IRAs.

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