



# COMPLIANCE BULLETIN

## DOL's New Fiduciary Rule Impacts HSAs

### HIGHLIGHTS

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- The DOL's final rule updates guidance that has been in place since 1975 for today's marketplace.
- According to the DOL, the new rule compels investment advisors to put their clients' best interests first.
- In addition to ERISA plans and IRAs, the final rule's prohibitions on conflicted investment advice apply to HSAs.

### IMPORTANT DATES

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#### April 10, 2017

The final rule's expanded definition of "fiduciary" takes effect

#### January 1, 2018

Certain requirements under the DOL's revised prohibited transaction exemptions for investment advisors take effect

### OVERVIEW

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In April 2016, the Department of Labor (DOL) released a [final rule](#) that expands who is considered a "fiduciary" when providing investment advice to retirement plans and their participants. The final rule's guidance also applies to individual retirement accounts (IRAs) and health savings accounts (HSAs).

Under the rule, a person is a fiduciary if the person receives compensation for providing investment advice with the understanding that it is based on the particular needs of the person being advised or that it is directed at a specific plan sponsor, plan participant or account owner. Fiduciary status is significant because fiduciaries are required to act in their clients' best interests and may be held personally liable in the event of a fiduciary breach.

### ACTION STEPS

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Individuals who provide advice on HSAs may be considered fiduciaries if their communications rise to the level of investment recommendations covered by the final rule.

Employers should review their arrangements with HSA service providers to determine if the providers will qualify as fiduciaries under the new rule. Advisers should also review their business practices in light of the final rule's expanded definition and make any necessary modifications.

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# COMPLIANCE BULLETIN

## Fiduciary Role

ERISA and the federal Internal Revenue Code (Code) impose standards of conduct on individuals who manage an employee benefit plan and its assets, who are called “fiduciaries.” For example, fiduciaries are required to act prudently and solely in the interest of plan participants and beneficiaries.

Fiduciaries can be held personally liable for losses when there is a fiduciary breach of duty.

In addition, certain transactions are prohibited in order to prevent dealings with parties who may be in a position to exercise improper influence over the plan.

Under ERISA and the Code, **people who give investment advice for a fee are considered fiduciaries**, regardless of whether that fee is paid directly by the customer or by a third party. The final rule revises guidance that has been in place for 40 years to broaden the definition of fiduciary to include a wider scope of investment advice relationships.

According to the DOL, the final rule compels more investment advisors to put their clients’ best interests first by requiring them to comply with federal fiduciary standards and the prohibited transaction rules. It also distinguishes activities that are not investment advice, like education. The final rule’s expanded definition of “fiduciary” becomes applicable on **April 10, 2017**—one year from when the final rule was officially published. Other provisions related to prohibited transaction exemptions for investment advisors do not go into full effect until Jan. 1, 2018.

*The expanded definition of “fiduciary” is intended to better protect plans and participants from conflicts of interest when they receive investment advice for a fee.*

## Covered Employee Benefits

In addition to ERISA plans and IRAs, the final rule covers HSAs, Archer MSAs, Coverdell Education Savings Accounts and ERISA-covered 403(b) plans. While acknowledging that HSAs generally hold fewer assets and may exist for shorter durations than IRAs, the DOL determined that HSA owners are entitled to receive the same protections from conflicted investment advice as IRA owners. The DOL also recognized that HSAs may have associated investment accounts that can be used as long-term savings accounts for retiree health care expenses.

In addition, the DOL clarified that the final rule does not apply to recommendations to welfare plans (such as health plans, disability plans or term life insurance) where they do not contain an investment component.

## Investment Advice

Under the final rule, a person is a fiduciary if the person receives compensation for providing investment advice with the understanding that it is based on the particular needs of the person being advised or that it is directed to a specific plan sponsor, plan participant or account owner.

Investment advice includes:

- ✓ **Investment recommendations**, which means advice on buying, holding, selling or exchanging securities or other investment property, or advice on investing securities or other property after a rollover or distribution from a plan.

# COMPLIANCE BULLETIN

- ✓ **Investment management recommendations**, which means advice on investment policies or strategies, portfolio compensation, selection of others to provide investment advice or investment management services, selection of investment account arrangements (for example, brokerage vs. advisory) or recommendations with respect to rollovers, transfers or distributions from a plan or IRA.

Also, to become a fiduciary, the person providing the investment advice must:

- Represent or acknowledge that he or she is acting as a fiduciary under ERISA or the Code;
- Provide investment advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular needs of the advice recipient; or
- Direct investment advice regarding the advisability of a particular investment or management decision to a specific recipient(s).

Under the final rule, a recommendation means “communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.”

The more tailored the communication is to a specific recipient, the more likely that the DOL is to view it as a recommendation.

## Exceptions

In the final rule, the DOL clarifies that some common communications do not meet the definition of “recommendation,” and, thus, do not constitute fiduciary investment advice.

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|-------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Investment education</b>   | A plan sponsor, service provider or others can provide investment educational information without becoming a fiduciary.                                                                                                                                                                                                       |
| <b>General communications</b> | General communications that a reasonable person would not view as an investment recommendation, such as general circulation newsletters, remarks or presentations in widely attended speeches and conferences or general marketing materials, are not investment advice.                                                      |
| <b>Platform providers</b>     | Service providers or third-party administrators (TPAs) that offer a “platform” or selection of investment alternatives for a defined contribution retirement plan (for example, a 401(k) plan) without regard to the individualized needs of the plan, its participants or beneficiaries are not providing investment advice. |

The final rule explains that a **plan sponsor’s employee** does not become a fiduciary by providing advice to a plan fiduciary or to another employee, provided the person receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee’s normal compensation for work performed for the employer.

This exclusion also covers communications between employees, such as human resources department staff who communicate to other employees about the plan and its distribution options, as long as they meet certain conditions (that is, they are not registered or licensed advisors under securities or insurance laws and only receive their normal compensation for work performed by the employer).

# COMPLIANCE BULLETIN

The DOL's final rule also includes some broad exemptions that are intended to provide fiduciary advisers with flexibility to continue many common fee and compensation practices, as long as certain protections are in place to ensure that their advice is in their clients' best interest.

## More Information

The DOL's [web page](#) on the final rule includes links to the final rule and related prohibited transaction exemptions. It also includes links to frequently asked questions ([FAQs](#)) on the final rule and fact sheets that describe the final rule's requirements.