

# DOL Unveils Final Rule Setting Fiduciary Standards for Giving Investment Advice

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The U.S. Department of Labor today unveiled a long-awaited final rule that addresses conflicts of interest in the investment services industry by changing the 40-year-old definition of “fiduciary” as it relates to ERISA retirement plans.

The final rule, nearly seven years in development, comes just shy of a year after DOL released the proposed version of the rule. A five-month comment period followed the proposal’s release during which DOL received a reported 3,000 comment letters and held more than 100 meetings with stakeholders.

DOL said the [final rule](#) will protect investors by requiring anyone who, for compensation, provides retirement investment advice to retirement plans and individuals to abide by a fiduciary standard — “putting their clients’ best interest before their own profits,” according to an agency fact sheet. “This final rulemaking fulfills the Department’s mission to protect, educate, and empower retirement investors as they face important choices in saving for retirement in their IRAs and employee benefit plans.”

The final rule describes the kinds of communications that would constitute investment advice, and the types of relationships in which those communications would give rise to fiduciary investment advice responsibilities. DOL’s Employee Benefits Security Administration published a side-by-side comparison of the proposed and final versions of the rule at <http://www.dol.gov/ebsa/pdf/conflict-of-interest-chart.pdf>.

In announcing the final rule April 6, DOL Secretary Tom Perez acknowledged criticism from the banking and broker-dealer industries that the proposed rule placed financial advisors in a “penalty box” for pushing their employer’s proprietary products to retail investors. “Folks said it would be like having someone recommend a Chevy when you are working at a Ford dealership,” he said. “And so we took that to heart, and we clarified that there is no bias against proprietary products and we created special rules to ensure those advisors could meet the standard.”

The rule’s applicability date is April 10, 2017.

## Industry, Consumer Reaction

The Investment Adviser Association CEO Karen Barr said in an April 6 statement that the IAA was pleased to see that the DOL “clearly recognizes that many advisers already commit to providing high-quality advice that always puts their client’s best interest first. We have long believed that the fiduciary standard should be applied to all financial professionals giving investment advice. Our members, SEC-registered investment advisers are already held to that standard.”

“The IAA is also pleased to see that — based on preliminary information — the DOL appears to have taken a number of our significant concerns with the proposal into account. For example, the IAA and others commented that the proposal appeared to favor low-fee and low-cost — typically passively managed — investments over all else, ignoring returns, quality, and other factors that may be important to investors,” Barr went on to say. “The DOL expressly acknowledges that it did not adopt the low-fee streamlined option considered in the proposal because of that concern, and

further clarified that the adviser is not required to recommend the lowest fee option if another investment is better for the client. These are welcome changes.”

The ERISA Industry Committee, a plan sponsor group, said it was pleased with the final rule but still concerned that plan sponsors might incur additional costs or hurdles to provide retirement products.

“ERIC is pleased that [DOL] adopted a number of our requests to ensure plan sponsors could continue to provide effective education materials on the importance of retirement savings and protect employees from being deemed a fiduciary who merely discuss the investment options with other employees,” said Will Hansen, ERIC’s senior vice president of retirement policy. “What remains to be seen is how the financial industry will respond to this new rule and whether it will negatively impact the ability to obtain advice or increase the cost of such advice.”

The Consumer Federation of America, a coalition of consumer groups, called the development a win for retail investors. “While we will conduct a more detailed analysis of the rule over the coming days and weeks, our initial review indicates that the rule is a huge win for consumers,” said CFA Financial Services Counsel Micah Hauptman. “It appears that the rule properly closes the loopholes in the current rule so that financial professionals can no longer evade their obligation to serve their customers’ best interest, appropriately applies to recommendations to roll over to an IRA ... and has a strong, legally enforceable best interest standard backed by requirements for firms to rein in toxic and often perverse compensation practices,” he said.

### **Exemptions**

Under the final rule, ERISA fiduciary obligations are not imposed on advisers when communicating with independent plan fiduciaries, if the adviser knows or reasonably believes that the independent fiduciary is a licensed and regulated provider of financial services — including banks, insurance companies, investment advisers and broker-dealers — and other conditions are met, according to DOL’s fact sheet.

Employees working in a company’s payroll, accounting, human resources and financial departments who routinely develop reports and recommendations for the company and other named fiduciaries of the sponsors’ plans are not investment advice fiduciaries, as long as they receive no fee or other compensation for such recommendations beyond their normal compensation for work performed for their employer, DOL noted.

This exclusion also covers communications between employees, such as HR staff who communicate information to other employees about the plan and distribution options in the plan, as long as they meet certain conditions, such as not being registered or licensed advisers under securities or insurance laws, and receive only their normal compensation for work performed by the employer.

### **Finding out More**

The EBSA fact sheet can be found at <http://www.dol.gov/ebsa/newsroom/fs-conflict-of-interest.html>. For more on ERISA plans, see [Tab 800](#) of the *Guide*.