DOL new Fiduciary Rule – implementation or delay – from the plan sponsor's viewpoint

By Gerald Wernette, CPA, CEBS, AIFA, C(k)P | A Rehmann Exclusive

On April 6, 2016, the Department of Labor (DOL) released its final rule that redefines who is considered a fiduciary of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code. The final rule focuses on those who give investment advice to a plan, its participants or beneficiaries — including individual retirement accounts (IRAs) and 401(k) plans — and expands the group who may be considered a fiduciary. This rule is aimed at the financial advisor community, but, a plan sponsor who may have freely provided recommendations and information in the past could now be on the hook as a fiduciary for this same behavior. The Fiduciary Rule currently has an April 10, 2017, effective date, but now it appears that effective date may be delayed due to further examination of the impact of the rule by the DOL. As the retirement plan community continues to digest the impact of such a rule and prepare for its potential implementation, here are the elements a plan sponsor needs to know:

What counts as investment advice?

Providing investment advice — communication in the form of a recommendation — is what differentiates a non-fiduciary from a fiduciary under the new regulation. Its content, context and presentation would reasonably be viewed as a suggestion for the recipient to engage in or refrain from taking a particular course of action.

A person provides investment advice if they offer the following types of advice for a fee or other form of compensation:

- Recommendations to buy, hold, sell or exchange investments; or recommendations on how funds should be invested following their rollover, transfer or distribution from the plan

- Recommendations involving the management of investments, including:
  - Investment policies/strategies
  - Portfolio composition
  - Selection of investment account arrangements
  - Selection of other persons to provide investment advice, management services or recommendations with respect to rollovers
  - Distributions or transfers from the plan with regard to the aforementioned items

There are exceptions to this rule, including:

- Plan fiduciaries who are independent of the advisor and have financial expertise

- The marketing of retirement plan platforms and response to requests for proposals (RFPs) are not considered investment advice

The expanded definition of investment advice will continue to grow in importance as plan sponsors find participants becoming encouraged to leave funds in the plan rather than roll them into an IRA, as that may be deemed the best suited course of action for a particular participant.

What are the differences between investment advice and investment education?

Investment education can still be provided without triggering fiduciary status as long as certain conditions are met. Investment education can only consist of:

- Information and materials that describe investments without making any recommendations

- General information about the plan

- General financial, investment and retirement information

- Information on models of asset allocation portfolios of hypothetical individuals with different time horizons

- Interactive investment materials that provide the means to estimate and evaluate future retirement income needs and assess the impact of different allocations on that income

Will plan sponsor employees who provide advice be considered fiduciaries?

Generally, they will not, because they are not receiving a fee for doing so. Providing information to participants about the plan and distribution options is typically allowed, assuming they receive no added payment outside of their normal compensation for doing so.

What are the benefits of an enhanced focus on financial wellness?

Many employers are welcoming the rule's flexibility in providing general education materials to participants without triggering fiduciary liability. Because of the demand for holistic financial wellness education, gone are the days of narrow investment education focused on investment allocation. Now, employers want different messages to be delivered to millennials, Gen Xers and baby boomers.

Another benefit of this plan is the accountability it requires of plan sponsors. This rule increases the pressure on plan sponsors to know and document their fiduciary responsibilities, such as:

- Their duty to monitor investment managers and service providers, understand their roles and fees, and document the benchmarking of those fees to demonstrate they're reasonable for the services provided.

- Knowledge of fee disclosures. Under the new rule, a service provider can't deem his fees reasonable if he is not disclosing all fees. Fees now include any incentives the advisor and/or his broker dealer might be receiving for fiduciary services. This creates extra disclosure requirements for advisors working under broker dealers and, in turn, plan sponsors need to understand the additional fee disclosures they will receive where these situations exist.

- Avoidance of conflicts of interest. The "best interest contract exemption" (BICE) enables fiduciary advisors and investment firms for whom they work to continue setting their own compensation practices so long as they (among other things) commit to putting their clients' best interests first. They must submit BICE disclosures by the effective date of January 1, 2018.

What should a plan sponsor do?

There will be role-based to-do lists to generate and follow before April 10, 2017. If the rule is delayed, changed or scrapped, this could mean even more work for plan sponsors. In the meantime, here is what Plan Sponsors should consider:

- Review fiduciary "best practices," including the duty to monitor the plan's service providers

- Focus on benchmarking the fees of the plan and monitoring investment options following a documented process anchored by an investment policy statement

- Best Practices should be focused on improving outcomes, especially for participants

- Review competitive/peer benchmarking to ensure your plan is helping you to attract and retain employees.

- Understand that this rule is directed at investment advice and is not confined to defined contribution plans — health savings accounts (HSAs) with investment components are subject to this rule

- If the DOL Fiduciary Rule is postponed or scrapped, the burden of closely watching and assessing the performance of service providers will fall even more on the shoulders of plan sponsors and participants Review agreements or correspondence from service providers, particularly investment advisors, for statements regarding their fiduciary status. Also, note where changes may be forthcoming from the providers, including potentially higher fees.

- Review any educational materials provided by investment advisors, and any communications to plan participants regarding rollovers and distributions. Ensure that no inadvertent recommendations are being made.

- Review which employees regularly communicate with plan participants and beneficiaries and how they are compensated. Following that, educate them about the new rule's requirements.

As the DOL continues to release FAQs and further guidance to help us all interpret these complicated and comprehensive rules, Rehmann will be here to provide our business wisdom, and to assist with the following tools and resources:

- **Fiduciary Fitness Review:** The Fiduciary Fitness Review   is an independent compliance tool used to measure the health of a retirement plan. This tool provides resources as a means to identify and remedy potential weaknesses in your plan through education, diligence and process. Retirement plans require prudent governance by plan sponsors and fiduciaries, and the Fiduciary Fitness Review confirms and documents proper roles and execution of responsibilities.

- **Plan Design Analysis/PLANavigator™:** This interactive system and report shifts the paradigm of creating successful retirement plans with Courageous Plan Design™. Every plan sponsor should strive to construct a retirement plan that creates successful outcomes for participants. Each plan is unique, as the best design for one may be different for another. A "courageous" plan is one that maximizes participant retirement income potential through Courageous Plan Design. In a "courageous" plan, the difficult decisions that participants must face are simplified while still accommodating their specific preferences.

- **Plan Health Review:** Evaluating the effectiveness of your retirement plan is vital to ensure that it can help your participants attain their retirement savings goals. Being proactive about the health of your plan is also important because of regulations that hold retirement plan fiduciaries to higher standards when making investment and plan decisions. With so much riding on the plan, a checkup might be in order. A plan health review:
    - Evaluates plan effectiveness relative to companies with similar retirement benefit structures and goals.
    - Helps identify opportunities to improve participant outcomes by evaluating your plan's current services and investment platform.
    - Examines specific criteria and compares the results to established benchmarks.

- **Reveal Viability Report:** We use a model to help us show the relationship between higher employer costs due to delayed retirement behavior and, in turn, to assist in finding ways to help plan sponsors mitigate this potential risk.

About the Author

Gerald Wernette Rehmann Principal and the Director of Retirement Plan Consulting is based in the Farmington Hills, MI office. He may be reached at 248.579.1163 or at gerald.wernette@rehmann.com.

Investment advisory services offered through Rehmann Financial, a Registered Investment Advisor.

4086 Legacy Parkway, Lansing, MI 48911 | 517.316.2400