

Ask Kidder.

How will the revised DOL Fiduciary definition affect you?

The [Department of Labor](#) (DOL) believes that if it can help eliminate “conflicted advice”, it can improve the retirement accounts and futures of U.S. citizens. The issue revolves around fiduciary governance and responsibility.

This past April, the DOL reintroduced a proposed regulation to redefine who is a “fiduciary” of an ERISA employee benefit plan. The original revision was introduced in 2010, but quickly withdrawn due to a firestorm of questions and concerns. Now the DOL has modified its proposal, extending the rule beyond participant-directed 401(k) and defined contribution plans to include Individual Retirement Accounts (IRAs).

During the 90-day comment period, the DOL received over 330,000 comments from the public. In August, a public hearing was held in Washington, D.C., with many in favor and many opposed to the new rule.

In addition to defining a “fiduciary”, the new proposal also focuses on “conflicts of interest”. The goal is to improve consumer protection for plan sponsors, fiduciaries, participants, beneficiaries and IRA owners. Providers who sell, service, and provide advice for plans are also considered — both fee-based providers, who operate under a Registered Investment Advisor structure AND commission-based service providers, who operate under a broker-dealer or life insurance company structure. Because of their different business models, rules of operation and compliance standards, fee-based and commission-based were difficult to blend together under the prior proposal.

For commission based providers, the new proposal utilizes a “Best Interest Contract” Exemption (BIC) that requires the provider to contractually acknowledge fiduciary status, commit to standards of impartial conduct, and adopt policies and procedures to minimize and disclose any conflicts of interest.

For fee-based providers, who accept and serve in a fiduciary capacity already, a special BIC is not needed.

By accepting fiduciary status, these providers operate under a prohibited transaction exemption (PTE). Under ERISA, you are not allowed to receive a benefit, including compensation, unless you operate under a PTE. Now, every 401(k) plan or IRA will have someone acknowledging or accepting fiduciary status and having no conflicts of interest (if they want to be paid).

Conflicted advice can include receiving incentives, trips, or other benefits that may influence the advice. There are a number of carve-outs in the proposed definition, so certain communications, such as basic plan information, marketing materials and educational support are not

considered as “fiduciary” in nature. However, a violation will generate negative consequences and penalties to a provider.

The inclusion of IRAs was not anticipated. While this may help the consumer, it will negatively impact the operations of many IRA providers, as well as how they deliver information, disclose fees and provide advice. The DOL has historically focused on ERISA based plans, and IRAs are not covered by ERISA. But based on shared authority between the Treasury and IRS, the DOL has extended its reach to IRAs under this proposal.

What were the public comments?

Concerns included the complexity of complying with the BIC requirements, the ability to effectively monitor the BIC, and the added cost to plans and IRAs of implementing the BIC. However, the DOL believes that overall costs will be reduced. Some suggested that the proposal may reduce the quantity and quality of advice available to plan participants and IRA holders. Others said that the real goal should be to improve participant outcomes and retirement readiness. Labor Secretary, Thomas Perez, noted that the DOL is committed to an updated fiduciary standard.

What’s next?

The DOL will review the public hearing comments, accept additional comments, and will prepare a final rule. Final rules usually go into effect 60 days after publication in the Federal Register. Requirements of the final rule generally become applicable eight months after publication, subject to some exceptions. It is very likely that the new rule will be applicable in late 2016 or during 2017.

What is Kidder’s view?

Kidder has long expected a change in the fiduciary definition and its affect on the industry. As a result, we have provided increased disclosure, fiduciary training, and expanded [fiduciary governance](#) options for plan sponsors and advisors. In addition, Kidder has held a [Centre for Fiduciary of Excellence](#) (CEFEX) designation since 2012. To be awarded a CEFEX designation, Kidder conducts an annual independent audit of its systems, practices, procedures, and processes. In 2014, Kidder also expanded its service model to include plan fiduciary services.

Plan and IRA providers of the future will either need to be committed to understanding and accepting the expanded fiduciary role, get out of the business, or collaborate with organizations like Kidder who are already prepared for the changes to come.