

# DOL ERISA Fiduciary Changes



RETIREMENT MANAGEMENT SERVICES, LLC  
*Plan Consulting • Administration • Design*

RETIREMENT MANAGEMENT SERVICES, LLC  
905 Lily Creek Road Louisville, KY 40243  
6/2/2024

On April 23, 2024, the U.S. Department of Labor (DOL) issued a new “retirement security rule” package that amended the five-part test for determining whether a person is an ERISA fiduciary by reason of providing investment advice for a fee. The new 2024 fiduciary definition also included a proposed new fiduciary “investment advice” rule and proposed amendments to certain prohibited transaction exemptions. The new retirement security rule package is expected to go into effect on September 23, 2024.

The old rules required an investment advisor to meet all five requirements of the five-part test and receive direct or indirect compensation to be considered an investment advice fiduciary with respect to ERISA plans or IRAs. A person was considered to be providing investment advice if they:

1. render advice to the ERISA plan or IRA as to the value of securities or other property or make recommendations as to investing in, purchasing, or selling securities or other property,
2. on a regular basis,
3. pursuant to a mutual agreement, arrangement, or understanding with the ERISA plan, the ERISA plan fiduciary, or the IRA owner that,
4. the advice serves as a primary basis for investment decisions with respect to the ERISA plan or IRA assets, and
5. the advice was individualized based on the needs of the ERISA plan or IRA.

The new rule significantly expands the circumstances under which a person could be treated as providing investment advice that is subject to the ERISA fiduciary standards. It replaces the five-part test’s requirements with a much broader test that is based on the investor/participant’s reasonable expectations and context. The rule says that a person is considered to be providing investment advice if they provide a recommendation on any securities transaction or investment transaction, including any investment strategy involving securities or other investment advice to a participant, sponsor, or beneficiary that also satisfies any of the following three requirements:



Retirement Management Services, LLC  
905 Lily Creek Road  
Louisville, KY 40243

[www.consultRMS.com](http://www.consultRMS.com) Phone: 502-429-0767

1. The person either directly or indirectly has discretionary authority or control with respect to purchasing or selling securities or other investment property for the retirement investor;
2. The person either directly or indirectly makes investment recommendations to investors on a regular basis as part of its business and the recommendation is provided under circumstances indicating that the recommendation is based on the circumstances and needs of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or
3. The person making the recommendation represents or acknowledges that it is acting as a fiduciary when making investment recommendations.

The new rules eliminate the requirement that investment advice be provided on a regular basis. This means that one-time advice can be subject to the fiduciary standard if the advisor makes (or has an affiliate that makes) investment recommendations to any investor on a regular basis as part of its business. The new rules also look to whether the objective circumstances surrounding the recommendations make it reasonable for the retirement investor to believe that it could rely upon the advice as a basis for an investment decision that is in the retirement investor's best interest. It no longer allows an advisor to avoid fiduciary status by making disclaimers that there is no mutual agreement, arrangement, or understanding and that anything the advisor says will not serve as a primary basis for an investment decision. Although the proposed rule did not include a formal definition of what would constitute a recommendation, the DOL noted in the preamble that it views a "recommendation as a communication (written or oral) that, based on its content, context and presentation (including the extent to which the communication is more individually tailored to a specific retirement investor or group of investors) would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action." The DOL also stated that the determination of whether a recommendation has been made would be based on an objective, rather than subjective, analysis of the facts and circumstances. However, at the same time, the DOL describes the standard for a "recommendation" under the SEC's Regulation Best Interest as meeting the standard for a recommendation under the proposed rule. That standard turns on the inherently



Retirement Management Services, LLC  
905 Lily Creek Road  
Louisville, KY 40243

[www.consultRMS.com](http://www.consultRMS.com) Phone: 502-429-0767

subjective inquiry as to whether the communication reasonably would influence an investor to trade a particular security or group of securities. For example, if such recommendations address the need or individual circumstances of the retirement investor such that the retirement investor reasonably could believe it could rely on the interactions as a basis for determining that an investment in the fund is in its best interest then it could be a considered fiduciary investment advice under the new rules.

This will significantly expand what constitutes fiduciary investment advice and this will affect many advice providers that currently take the position that their communications and interactions with ERISA plans and IRA clients are not subject to the fiduciary duty or prohibited transaction rules under ERISA or Section 4975 of the Code.

As expected, the Department of Labor's new retirement security rule is facing its first legal challenge. Just a few days after it was finalized in April, a lawsuit was filed in the U.S. District Court for the Eastern District of Texas. Plaintiffs said the department exceeded its authority in crafting the rule and asked the court to vacate the rule under the Administrative Procedures Act on the grounds that it is contrary to law as well as arbitrary. The lawsuit calls the rule an "assault on insurance agents selling annuities," and said it reflects deep-rooted misunderstandings and bias on the part of the DOL against annuities and the insurance sales channel through which they are sold.

Until we have a final decision on the new rules, as plan sponsors, you should review your service agreements and reach out to your financial service providers to ensure that they are planning on complying with the new rules, including full disclosure of any potential conflicts of interest when this is settled.



Retirement Management Services, LLC  
905 Lily Creek Road  
Louisville, KY 40243

[www.consultRMS.com](http://www.consultRMS.com) Phone: 502-429-0767