

PLAN CONTRIBUTION RECOMMENDATIONS ARE NOT FIDUCIARY INVESTMENT ADVICE

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While the long-term future of the Department of Labor's final rule defining fiduciary investment advice and related prohibited transaction exemptions is less than clear, the final rule is applicable, and has been since June 9, 2017. (Please note that delays currently in effect or pending relate to the related prohibited transaction exemptions only.)

Because the rule is now applicable, it sets the standard for what constitutes fiduciary investment advice. To briefly summarize, under the rule, a communication to a plan, plan participant, or beneficiary constitutes fiduciary investment advice if it is:

1. A "recommendation" regarding specific investment transactions or investment management, including advice related to roll-overs;
2. Made for a fee or other compensation, direct or indirect; and
3. Made by a person who acknowledges fiduciary status or otherwise targets the recommendation to a specific recipient or recipients

The rule defines a "recommendation" as "a 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." An objective analysis must be applied when determining if a communication is fiduciary investment advice.

The rule specifies the following four categories of communications that will not generally constitute investment advice under the rule: (1) plan information, (2) general retirement-related information, (3) asset allocation models, and (4) interactive investment materials. Additionally, the following categories of communications and transactions are explicitly excluded from the rule: (1) transactions between advisers and certain independent plan fiduciaries, (2) certain swap and security-based swap transactions, and (3) most communications by plan sponsor employees. For more details regarding the rule, related exemptions, and related procedural history, please see our previous articles on the subject [here](#), [here](#), and [here](#).

Recently, DOL issued FAQs in which it clarified that, under the new rule, an investment adviser's recommendations to plan participants regarding specific plan contribution amounts would not constitute fiduciary investment advice - provided

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they are not accompanied by recommendations for specific investment products or investment management of specific investments. The FAQs include the following examples of contribution-related recommendations that would not constitute fiduciary investment advice under the new rule:

- A plan enrollment brochure sent to participants that recommends a target percentage of pay to save for retirement (e.g., 15%) and a strategy for contributing to the plan to reach that target (e.g., begin with 2% deferrals and increase by 1% each year until reaching 15%).
- A targeted email to a participant around her participation anniversary date, recommending a specific increase in her contributions to work toward a particular savings goal.
- A targeted email to a participant on his birthday suggesting a specific contribution amount and goal based on his current savings in the plan and his age.
- A call-center call to a participant that includes recommendations for a specific overall retirement savings goal (e.g., 15% of pay, taking into account employee and employer contributions) and a specific increase in the participant's contributions to take advantage of employer matching contributions to help reach the goal.

The FAQs also state that recommendations to plan administrators or other plan fiduciaries regarding methods to increase employee participation in or contributions to plans are not fiduciary investment advice, provided they are not accompanied by recommendations for specific investment products or investment management of specific investments.

Again, it is important to remember that the final fiduciary rule is applicable now. Plan sponsors should continue to carefully examine and monitor their investment adviser relationships to ensure compliance with the rule. (DOL Conflict of Interest FAQs, August 2017)