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# DOL to Re-Propose Definition of Fiduciary

The DOL intends to re-propose a rule to amend the definition of fiduciary under ERISA. The proposed regulations could be released as early as July, but more likely it will be later this year. The DOL has informally indicated that the re-proposed rule will be substantially similar in approach to its initial proposal. If adopted, the proposed change could have a significant impact on advisors. This summary will discuss some of the most substantial consequences of the proposed changes.

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Most significantly, the proposal would result in most advisors being considered a plan fiduciary. This is due to the DOL's proposal to expand what constitutes "investment advice." The scope of this definition is important because under ERISA, any person who provides "investment advice" for compensation is considered a fiduciary.

Under the current rule, the scope is fairly narrow and advice generally only qualifies as "investment advice" if it satisfies each element of a five-part test (see Table 1). The proposal will expand this scope in two important ways:

### 1 New Categories of "Investment Advice"

The proposal expands the type of advice that constitutes "investment advice" by adding any advice or recommendations that **relate to the management** of securities or other properties. This would include recommendations on selecting investment managers or proxy voting. It also includes any investment education in connection with individualized account plans. The proposal would also add **appraisals and fairness opinions** as a category of "investment advice," which would impact appraisers and valuation experts.

### 2 Increased Applicability of Rule

The proposal eliminates the requirement for fiduciary status that investment advice be provided pursuant to a mutual agreement and rendered on a regular basis. Instead, it applies if there is any understanding or agreement. As a result, **casual or even one-time advice** could potentially trigger fiduciary status. The proposal also clarifies that this includes advice to a plan's participants and beneficiaries and the DOL is contemplating whether this should include advice related to distributions.

## What is the Significance of being a Fiduciary?

The increased likelihood of triggering a fiduciary status is a concern because ERISA imposes a number of strict duties on plan fiduciaries. It is important for advisors to be aware of the risks that accompany these additional duties.

**Table 1: How Investment Advice is Defined:**

| Current Rule | Proposed Rule |
|---|---|
| Individualized | Individualized, but also includes persons marketing or making available **an investment platform** without regard to the individualized needs of the plan , unless they provide in writing that advice is not impartial |
| Regarding the **value** of securities or other property | Related to **valuation or management** of securities. Includes appraisals and fairness opinions |
| Provided on a **regular basis** | Regardless of whether provided on a regular basis |
| Pursuant to a **mutual** understanding | **Any** understanding |
| Serves as **primary basis** for investment decisions | May be considered **in connection** with investment decisions |

### Prohibited Transactions

If the new rule is adopted, advisors risk losing being able to receive commission-based compensation because it may be a prohibited self dealing transaction. The DOL has suggested that the re-proposed rule will provide exemptions for certain forms of compensation that may otherwise be prohibited under the proposed rule, but has not specified which forms will be exempted.

### Personal Liability

If any losses occur as a result of a violation of any of these duties, fiduciaries are held personally liable.

### Increased Expenses

As a fiduciary, firms would be exposed to increased risks of litigation and would have increased expenses for fiduciary liability insurance.

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