



NEW SEC GUIDANCE HAS LIMITED IMPACT ON RETIREMENT PLANS

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July 9, 2019

A comprehensive package of rules and interpretations adopted June 5 by the Securities and Exchange Commission (SEC) imposes enhanced standards on broker-dealers and clarifies the duties for registered investment advisers (RIAs). The package targets the retail investor space, which includes individual retirement accounts (IRAs), health savings accounts (HSAs) and most retirement plan rollover advice. The new guidance will have little direct impact on benefit plan sponsors but could affect how plan participants receive advice on their plan funds.

OVERVIEW OF GUIDANCE PACKAGE

The guidance package has four pieces:

- **Regulation Best Interest.** The centerpiece of the new guidance is Regulation Best Interest (RBI), which establishes a standard of conduct for broker-dealers. Under the rule, broker-dealers must act in the retail customer's best interest when recommending any securities transaction or investment strategy.
- **Interpretation of investment advisers' standard of conduct.** This statement clarifies aspects of an RIA's fiduciary duty under the Investment Advisers Act of 1940 (Advisers Act), which includes duties of care and loyalty. The interpretation isn't intended to create any new legal obligations for advisers.
- **Interpretation of solely incidental prong of broker-dealer exclusion.** The second interpretive statement addresses the Advisers Act's exclusion for brokers or dealers providing "solely incidental" advice. This statement aims to more clearly delineate when advisory activities cause a broker-dealer to become an investment adviser subject to the Advisers Act. Like the interpretation of an RIA's fiduciary duty, this interpretation isn't intended to create new legal obligations.
- **Relationship summary form.** The final piece of the guidance package is Form CRS, which broker-dealers and RIAs will use to provide retail investors with simple, easy-to-understand information about the nature of their relationship with their financial professional. RIAs and broker-dealers also must

electronically file this form with the SEC. For RIAs, this filing will become Part 3 of Form ADV; for broker-dealers, Form CRS will be a new stand-alone filing made through the Web CRD portal.

SEC proposed three components of the package in April 2018: the RBI, the interpretive statement on RIA conduct and the relationship summary form. The final versions maintain the originals' overall structure and scope but make a number of modifications and clarifications. The interpretive statement on the broker-dealer exclusion is new, issued in response to questions and comments received on the 2018 proposals.

LIMITED IMPACT ON RETIREMENT PLANS

The guidance package will have little direct impact on retirement plan sponsors but could affect how plan participants receive advice on their plan funds — particularly when requesting a rollover.

Rollover Advice

A key clarification is an explicit statement that the RBI applies to account recommendations, including recommendations to roll over or transfer assets from an employer retirement plan to an IRA, regardless of whether the rollover is tied to a specific securities transaction. The 2018 proposal wasn't clear whether the RBI would cover rollover advice that doesn't involve any sale of securities (such as when a participant takes a lump sum from a defined benefit plan). The final regulation says putting the client's interest first is critical when brokers or investment advisers make rollover recommendations.

Nonetheless, the RBI emphasizes that broker-dealers can still recommend proprietary products under certain conditions. Along with providing specific disclosures, the broker-dealer must maintain and enforce written conflict-of-interest policies and procedures. In addition, the recommendation must not prevent the broker-dealer from acting in the customer's best interest.

The interpretive statement on investment advisers' standard of conduct says advice about rollovers is also subject to the Advisers Act's fiduciary duties of care and loyalty. An adviser's fiduciary duty applies to all investment advice provided to clients, including advice about account type, such as "advice about whether to roll over assets from one account (e.g., a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages." When providing advice about account type, the adviser has a duty to evaluate whether the client's best interest is served by the account or program (and to monitor that it remains in the client's best interest throughout the adviser-client relationship).

Recommendations vs. Education

The RBI makes clear that "education" is exempt from the new rules. Education includes activities such as:

- Providing general financial and investment information
- Explaining the provisions of an employer-sponsored retirement plan, plan participation and its benefits, and the investment options available
- Using asset allocation models based on generally accepted investment theory

SEC doesn't want to discourage companies from offering educational information, but cautions them to take care that communications intended as education don't cross the line into recommendations. Employers that provide call centers for benefit plans will want to make sure call center staff are aware of the distinction.

EFFECTIVE DATE

The regulation will take effect 60 days after publication in the Federal Register, but with a transition period through June 30, 2020. SEC is establishing a committee specifically to address implementation questions and anticipates offering "significant assistance and support" during and beyond the transition period.

NEW DOL FIDUCIARY RULE POSSIBLE

Under current Department of Labor (DOL) regulations dating back to 1975, investment-advice fiduciary status under ERISA is determined by a test that evaluates several factors. Among other conditions, fiduciary status does not apply unless the advice is given on a regular basis and serves as the primary basis for the individual's investment decisions. As one-time transactions, rollovers generally fall outside this definition of fiduciary investment advice.

In 2016, DOL finalized its controversial new fiduciary rule that significantly rewrote the definition of investment-advice fiduciary. Under the new definition, the "regular basis" and "primary basis" requirements no longer applied. But a federal court struck down the new fiduciary rule in 2018 ([US Chamber of Commerce v. US Dep't of Labor](#), 885 F.3d 360 (5th Cir. 2018)), placing the 1975 rule back in effect.

In the latest regulatory [agenda](#), DOL says a new fiduciary rule may be in the works. Although DOL's intent isn't yet known, a new rule might align the ERISA definition of investment-advice fiduciary with the new SEC rule.

RELATED RESOURCES

Non-Mercer Resources

- [Regulation Best Interest: The Broker-Dealer Standard of Conduct](#) (SEC, June 5, 2019)
- [Commission Interpretation Regarding Standard of Conduct for Investment Advisers](#) (SEC, June 5, 2019)
- [Commission Interpretation Regarding Solely Incidental Prong of Broker-Dealer Exclusion from the Definition of Investment Adviser](#) (SEC, June 5, 2019)
- [Form CRS](#) (SEC, June 5, 2019)
- [Press Release](#) (SEC, June 5, 2019)

Mercer Law & Policy Resources

- [2019 Legislative and Regulatory Outlook for Employer-Sponsored Retirement Plans](#) (Feb. 5, 2019)

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