



## DOL pension proposal could rock fund firms

Expanded definition of 'fiduciary' likely to hamstring mutual funds that work with plan sponsors and participants.

**By Darla Mercado**

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Record keeping companies such as Fidelity Investments and JP Morgan will likely raise costs on retirement plan clients and limit the guidance they can provide them — if the Department of Labor's proposed definition of fiduciary rule goes through, say industry groups.

The DOL's proposed rule would broaden the term, which could mean companies that provide services to retirement plans would be considered fiduciaries. As a result, those service providers will curtail the investment guidance they have been providing retirement plans, charge plans more for

participant investment education and complicate the rollover process for service providers as participants exit plans, critics said.

Prices will rise for plan sponsors, too. Providers are likely to pass on the increased costs of compliance to customers. What's more, employers may look to an independent party to give them investment guidance, which could drive up costs of administering a plan, industry groups noted in their comments.

Thursday, Feb. 3, was the deadline for comments to the DOL, and a hearing has been scheduled in Washington for March 1.

"The proposed fiduciary redefinition lowers the threshold so that normal things that a provider does, such as giving the plan sponsor a sample list of funds, could potentially make them a fiduciary," said Larry H. Goldbrum, general counsel of The SPARK Institute Inc. The group had filed a comment letter to the DOL.

The DOL's proposed rule was first floated last October, amid a series of regulatory initiatives aimed at increasing transparency for plan sponsors and participants. The rule redefines when an investment adviser is acting as a fiduciary to a retirement plan. The proposal changes the current five-part test that regulators say allowed advisers to skirt fiduciary responsibility even though they were often providing advice.

The expanded definition would not only make brokers working with plans into fiduciaries, but could also apply to firms like Fidelity and The Vanguard Group – which provide investments, product platforms and recordkeeping services to retirement plans.

That prospect alarmed the Investment Company Institute, which called for the DOL to clarify an exception in its proposed regulation for service providers, allowing them to help plan fiduciaries pick out funds for their own investment menus.

"Were record keepers to withdraw from providing assistance because of uncertainty about the rule, plans would have to forgo this information or hire an independent fiduciary at considerable cost," the ICI wrote.

The rule would also likely shake up other aspects of the service providers' business. For instance, companies that provide platforms for plan sponsor clients collect fees for making fund options available.

If the rule became a reality, service providers that are not giving impartial advice would have to state that in writing to plan sponsors. If a company that supplied plans with a platform decided to act as a fiduciary, however, it would have to change the way it collects fees from the investments it features on the platform.

"The entire vendor platform gets a significant portion of revenue from variable fees in different investment options that they themselves recommend," said Marcia S. Wagner, managing director of

The Wagner Law Group. "You're forcing the variable-compensation section of the market into a flat-fee arrangement, and it won't be an easy transition."

Broadening the scope of "fiduciary" to include service providers would also limit education to participants and individual retirement account holders, wrote the Securities Industry and Financial Markets Association in its comment letter to the DOL.

SIFMA is concerned that service providers that offer investment education to participants and IRA owners could be deemed as fiduciaries if an employer were to consider the educational material when making investment decisions.

"The same information that is given to a plan participant on the day before he rolls his account balance into an IRA becomes fiduciary advice on the day after the rollover," SIFMA wrote. If the education places fiduciary liability on the service provider sharing the information, costs will likely go up for participant education – and the plans will shoulder that cost, SIFMA claims.

While the DOL did not take a hard stance on rollover activity in the rule, it did ask for comments on whether the final version of its fiduciary rule should consider rollover recommendations as participants exit a plan to be advice.

A service provider that's providing record keeping services to a plan is ideally positioned to capture rollover dollars as participants exit, and they can provide assistance to employees as they search for options.

But if distribution counseling fell under investment advice, it could cut the service provider out of the equation and open the door for advice from others.

"In most situations the existing provider has a closer relationship with participants, but the way the rules are set up would make it harder for them to provide distribution counseling and easier for a boiler room broker to make cold calls to plan participants," Mr. Goldbrum said.

"This sets up a situation where you push participants to advisers with no affiliation to the plan and a clear interest in getting that money distributed," he added.

Not all industry participants were against the proposal to expand the definition of fiduciary, however. The CFP Board of Standards Inc. supported the expansion and pushed the Labor Department to limit the scope of an exception which would require advisers and service providers to disclose in writing when they are not providing impartial advice.

"While a fiduciary may obtain disclosure and consent for potential conflicts from plans and participants, the department should not allow disclosure of an adverse interest to negate fiduciary status," the CFP Board noted in its letter.

The group also supported labeling plan distribution recommendations as investment advice. “Some of the greatest abuses we have seen began with bad and self-interested advice that a plan beneficiary take a lump sum distribution from a benefit plan,” the CFP board wrote.