# Are Personal Advisers ERISA Fiduciaries?

## Maybe yes, if advising about a 401(k)

**QUESTION:** *I'm an adviser who provides investment advice to individuals. If a client has a 401(k) plan account where he works and wants me to give advice about the asset allocation and investment selection in that account or wants advice about plan rollovers, am I subject to ERISA [Employee Retirement Income Security Act]? If I am, what are my responsibilities?*

**ANSWER:** In providing ongoing investment advice about the client's 401(k) plan account, you probably act as a fiduciary under ERISA. If so, you have a duty to act prudently and solely in the interest of the client. Also, you need to be mindful of the prohibited transaction rules.

The determination of whether you are a fiduciary under ERISA is based on the definition in the "old" Department of Labor (DOL) rule that was reinstated when the "new" DOL rule was thrown out. Under that definition, and as confirmed by the DOL in Interpretive Bulletin (I.B.) 96-1, you are a fiduciary if you provide investment advice to a participant about his 401(k) account in a way that meets the DOL's five-part test: 1) you provide advice to the plan participant about investments for a fee, 2) on a regular basis, 3) under a mutual understanding, 4) that the advice will form a primary basis for investment decisions, and 5) that the advice is individualized based on the participant's unique needs.

For part 1) to apply, you—i.e. the adviser—must receive a fee for the participant advice. If the fee is paid by the plan, you may need to provide the responsible plan fiduciary with a disclosure under ERISA 408(b)(2). The 408(b)(2) disclosure applies if you reasonably expect to receive $1,000 or more in compensation from the participant's 401(k) account. The disclosure consists of an acknowledgment of your status as a registered investment adviser (RIA) and ERISA fiduciary and a description of the participant advisory services and fee.

But if the fee isn't paid from the plan, a 408(b)(2) disclosure isn't needed.

The fee does not need to be paid by the plan in order for you to qualify as a fiduciary under the part 1) of the five-part test. It may be paid by your client. What if it's not clear that the fee covers the advice for the 401(k) account? In all likelihood, the DOL—and a plaintiff's attorney—would assert that the fees you receive pay for the 401(k) plan advice, as well—even if not specifically mentioned in the service agreement—on the grounds that no one works for free.

If the five-part test is met, you are an ERISA fiduciary with respect to that client's 401(k) account. In other words, you are not an ERISA fiduciary of the plan as a whole, but rather one with respect to a portion of the plan—namely, the assets held in your client's account.

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As an ERISA fiduciary, you are subject to a duty to act prudently and to a duty of loyalty to the client. The prudence standard for participant advice is the same prudence standard that applies to all ERISA fiduciaries. This means you need to consider the relevant facts and circumstances, including the client's investment objectives and financial needs, and then arrive at an investment recommendation that aligns with those factors. Because the purpose of 401(k) money is retirement, you should give investment advice that is consistent with that purpose.

Also, as to prohibited transactions, a fiduciary may not make recommendations that can generate more compensation for the fiduciary or for a party in whom the adviser has an interest, e.g., investments managed by an affiliate. There are other prohibited transactions, as well. As a fiduciary, you need to know those rules and either avoid such transactions or rely on a prohibited transaction exemption (PTE).

If you are a fiduciary for a client's 401(k) account, recommending a rollover to an individual retirement account (IRA) that you will advise could be prohibited. If you will be paid the same from the IRA as you were for the participant advice, the transaction is permitted. However, if you will be paid more—e.g., a higher percentage of the assets—from the IRA as a result of the rollover recommendation, the DOL will consider it a prohibited transaction.

The good news is that, right now, the DOL and the IRS have agreed not to enforce the prohibited transaction rules if you: satisfy a best interest standard, which mirrors the prudent man standard; charge a reasonable fee; and make no materially misleading statements. This DOL nonenforcement policy is discussed further in our column "Prohibited Transaction Relief," PLANADVISER, July/August 2018.

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 *Art by Tim Bower*