



## Education Too Narrowly Defined

**THE ISSUE:** The Department of Labor's (DOL's) newly-proposed fiduciary rules draw a distinction between "investment education" and "investment advice." Those who provide "investment advice" would be subject to the new fiduciary duty rules, while those who provide only "education" would not become fiduciaries. The proposed education carve-out does not allow any mention of specific investment products or choices, even as an example of type or class of investment option. As drafted, the education carve-out is too narrow to be workable. It would transform true education into advice so early in the education process that it would hamper the educational effort for most investors.

**EXPLANATION:** The education exception allows an advisor to stop short of becoming an investment advice fiduciary only if he/she is explaining general categories of investments. Fiduciary duty attaches if and when a specific investment is brought into the conversation. Thus, if advisors confine their comments with a client to a discussion of types of investments, but do not mention a specific product, the advisor is not acting as a fiduciary. However, if the advisor uses a particular investment as an example of an investment being discussed, then the advisor becomes an investment advice fiduciary.

**THE PROBLEM:** Once an advisor assumes fiduciary responsibility, he/she is subject to ERISA prohibited transactions and parties-in-interest/self-dealing rules that preclude most customary forms of compensation (commissions, 12b-1 fees, trailing commissions, etc.) unless a prohibited transaction exemption (PTE) applies. For individual or small plan advice situations, the most common applicable PTE will be the best interest contract (BIC) exemption. That exemption triggers the need for an elaborate contract between the advisor and the retirement investor, and between the retirement investor and the financial institution(s) offering the investment being discussed. (Other extensive requirements also attach; for example, specific in-contract elements, and extensive disclosure requirements).

Consequently, if the advisor mentions any specific investment in any context, he/she becomes a fiduciary. And if the PTE will allow him/her to be paid on anything other than a fee-for-advice basis, a complicated contract must be executed before:

- a retirement investor has even decided whether to work with a particular advisor
- the investor has even tentatively chosen the investments he/she wishes to consider, and
- an advisor can so much as mention a specific investment—even only as an example of a generic type of investment

This is unworkable in the real world, especially among middle and lower income savers. Fee-for-service generally is available only to those with more than a specified minimum amount to invest. For many generally financially unsophisticated investors of modest means, the fee itself will be a barrier to getting professional advice. And even for those who have enough to invest and who can afford the fee, the need for a contract will be intimidating. Further, education that excludes the use of examples is at best incomplete—it will cause the advisor to offer, and the investor to receive, far less information than is possible when examples can be used. The result will be far fewer middle/lower income retirement savers who can get professional investment advice.

**THE SOLUTION:** The education exception must be broadened, at least with respect to permitting investment education to include the discussion of specific products. Prior to the imposition of investment advice requirements, advisors and their clients/prospects must be able to discuss specific investment options before a recommendation and a specific choice is made.

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