

## The DOL's Expanded Fiduciary Rule Applies to Health Savings Accounts

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July 21, 2017

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The DOL's final fiduciary rule (the "**Final Rule**") went into effect on June 9, 2017 after several delays. The Final Rule clarifies when a person who provides investment advice becomes a fiduciary to a plan for purposes of ERISA and the Internal Revenue Code. Under the Final Rule, the term "plan" explicitly includes health savings accounts ("**HSAs**"). While employers typically have little direct HSA involvement beyond engaging an HSA service provider (e.g., a trustee or custodian) and forwarding payroll contributions, the Final Rule does raise issues for employers to consider:

- Employers should review the products and services offered by their HSA service provider to HSA participants and determine if the service provider is a fiduciary as defined in the Final Rule. If applicable, the employer should consider including an affirmative acknowledgement in its HSA provider services agreement to the effect that such provider is a fiduciary under the Final Rule to the HSA participants and that the provider will comply with its fiduciary requirements.
- Employers commonly pay fees to HSA service providers on behalf of their employees. Under the Final Rule, "investment advice" includes providing an investment recommendation for direct or indirect compensation. If the mix of products and services utilized by HSA participants can affect the fees paid by the employer or received under a revenue sharing agreement, it is possible that recommendations given by employees from the employer's benefits or human resources departments to other employees, even if acting outside the scope of their authority, could be construed as indirect compensation for investment advice and thus subject the employer to the Final Rule if the effect of such advice lowers the fees owed to the HSA service provider or increases the employer's revenue share. Employers should consider revising their financial arrangements with HSA service providers and also discourage employees associated with the employer's benefits administration from providing investment recommendations that should be left to financial advisors.
- On a related note, existing DOL guidance excepts most HSAs facilitated by employers from the definition of "employee welfare benefit plan" under ERISA. It is possible that a pattern of recommendations given by employees from the employer's benefits or human resources departments (or from other employees associated with administering the employer's benefit plans) could be viewed as the employer making or influencing employee HSA investment decisions and thus cause the HSA to become subject to ERISA.

View our prior [blog post](#) on the Final Rule. View the [DOL guidance](#) on HSAs referenced above. View our [previous comments](#) on the Final Rule's impact on private investment funds.