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Client Alert

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"Last Minute" Fiduciary Rule Check-In: What Plans and Arrangements Are Covered

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With the June 9 applicability date of the DOL Fiduciary Rule (Rule) just a few days away, there may still be confusion about exactly which plans and other arrangements are subject to the Rule. Some plans are not subject to the Rule, and some arrangements that are not actually IRAs are treated as if they were IRAs and therefore subject to the Rule. So, how are "plans" and "IRAs" defined?

The purpose of this Alert is simple – to describe which plans and arrangements are covered, and which are not. The following chart provides a summary. This is followed by a brief discussion for those who want more explanation.

SUBJECT to the Rule – Treated as Plans	
√ 401(k) plans – all types	√ Money purchase plans (other than governmental and non-electing church plans)
√ Individual ("solo") 401(k)s	√ Defined benefit plans (other than governmental and non-electing church plans)
√ 403(b) plans (other than governmental and non-electing church plans, and payroll deduction only 403(b)s)	√ SEPs, including SARSEPs
√ Profit-sharing plans	√ SIMPLEs
√ ESOPs, including KSOPs	√ Keogh plans

SUBJECT to the Rule – Treated as IRAs	
√ IRAs – all types	√ Health savings accounts (HSAs)
√ Payroll deduction only IRAs	√ Archer medical savings accounts (MSAs)
√ Individual retirement annuities	√ Coverdell education savings accounts (ESAs)

NOT SUBJECT to the Rule	
x Governmental plans – all types	x Non-electing church plans – all types
x Payroll deduction only 403(b)s	x Non-qualified deferred compensation plans
x 457 plans – both 457(b) and 457(f)	x Rabbi trusts
x Non-qualified equity compensation, such as stock options and restricted stock units	x 529 plans
	x Uniform Gifts/Transfers to Minors Accounts

Covered Plans

Under the Rule, covered plans include (1) all "plans" as ERISA defines the term, and (2) all plans that are tax-qualified under Section 401(a) of the Internal Revenue Code (Code). Many plans fall under both categories, but only one is required. To illustrate:

- 401(k) plans (benefiting employees of an employer) are both ERISA plans and qualified plans. The same is true of profit-sharing plans, ESOPs, and most money purchase and defined benefit plans, unless they fall into one of the excluded categories from our chart (more on excluded categories later).

- Individual 401(k) plans (benefiting a self-employed individual) are not ERISA plans, but are qualified.
- SEPs and SIMPLEs are ERISA plans, even though they are IRA-based, and thus are not qualified plans. This is because both SEPs and SIMPLEs require employer contributions. 403(b) plans that are subject to ERISA are also covered – this includes 403(b) plans sponsored by private tax-exempt entities that are not churches.

Covered IRAs

Covered IRAs include all arrangements that are not "plans" under the above definition, but are treated as plans under the Code's excise tax rules – this includes both "actual" IRAs and other similar arrangements like HSAs (an HSA may also be part of an ERISA plan, although this is the exception).

Also, under ERISA, employers are permitted to take payroll deductions from employees and remit them to IRAs, without being deemed to sponsor a plan. In these cases, the employer can have only limited involvement and cannot make employer contributions. These "payroll deduction only" IRAs are subject to the Rule as IRAs, but are not plans.

Excluded Plans and Arrangements

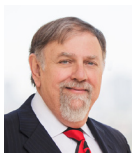
The Rule does not affect arrangements that are neither plans nor IRAs, as defined above. Here are some specifics:

- ***Governmental Plans.*** Governmental plans may be qualified under the Code but are not subject to the Code's excise tax provisions, and are entirely excluded from ERISA. This means the Rule does not apply to investment advice given to governmental plans, though similar state laws may apply.
- ***Non-Electing Church Plans.*** Churches and certain affiliated tax-exempt employers may sponsor "church plans." Church plans are not subject to ERISA unless the plan sponsor affirmatively elects ERISA coverage. And, even though "non-electing" (non-ERISA) church plans may be qualified, like governmental plans they are not subject to the Code's excise tax provisions. Thus, the Rule likewise has no application to non-electing church plans. (Though beyond the scope of this Alert, one way advisers can check on a plan's "ERISA status" is to see whether the plan has filed Forms 5500 with the DOL. If so, it is subject to ERISA.)
- ***Payroll Deduction Only 403(b)s.*** Tax-exempt employers that take payroll deductions from employees and remit them to 403(b) tax-deferred annuities, but otherwise have limited involvement and do not make employer contributions, are not treated as sponsoring a plan subject to ERISA. Also, 403(b) plans are not subject to the Code's prohibited transaction excise taxes. Thus, payroll deduction only 403(b)s are not subject to the Rule at all.
- ***Non-Qualified Deferred Compensation Plans.*** "Top hat" deferred compensation plans that cover only a select group of management or highly compensated employees are not treated as plans so long as they are "unfunded" (*i.e.*, to the extent assets are set aside, they are in a "rabbi trust" or similar vehicle where the assets are subject to the employer's creditors). These plans are not subject to ERISA or to the Code's excise tax provisions, and the Rule does not affect them. The same is true for non-qualified equity-based compensation arrangements.
- ***457 Plans.*** 457(b) and 457(f) plans are non-qualified deferred compensation plans that can be sponsored by governmental and private tax-exempt employers. 457 plans of tax-exempt entities are excluded from ERISA as either "top hat" or non-electing church plans and are not subject to the Rule. "Non-top hat" 457 plans of a private sector employer could be subject to ERISA and the Rule, though this is rare.
- ***Other Arrangements.*** Other arrangements such as 529 plans and UGMA/UTMA accounts are neither plans nor IRAs. They may, however, be similar to certain arrangements that are subject to the Rule. For example, 529 plans (excluded) and Coverdell ESAs (covered) are both used for college savings. Thus, advisors and financial institutions will need to be careful to differentiate between them.

Given this complexity, we understand why confusion may persist about what plans and arrangements are subject to the Rule. If you have any questions or concerns, do not hesitate to contact your Drinker Biddle attorney.

Employee Benefits and Executive Compensation Team

Primary Contacts



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