Expanding the definition of a fiduciary: What you need to know

Scott Conking: Hi, I'm Scott Conking, and you're watching a replay of a previously recorded webcast on the Department of Labor's final rule on the definition of a fiduciary. We hope you enjoy it.

Scott Conking: Hello, and welcome. On behalf of Vanguard, thank you for joining us for this live webcast. I'm Scott Conking, a principal in Vanguard's Institutional Investor Group. In April, the Department of Labor released its final rule updating the definition of fiduciary investment advice under ERISA. As we discussed during our webcast just last fall on the DOL's proposal, Vanguard had a few concerns about the breadth and operational challenges associated with this proposal. And we're happy to talk with you today about the improvements the DOL has made to the rule.

This rule is important to all of us, and that's why we're pleased to host another live discussion featuring two experts on retirement plans, Stephanie Napier, senior counsel in Vanguard's Legal Department and Frank Nessel, a senior consultant in Vanguard's Strategic Retirement Consulting Group. They're going to discuss what's in the DOL's final rule, how it differs from earlier proposals, and how it impacts plan sponsors and participants. Stephanie and Frank, thanks for joining us today. It's so good to be back together with you.

Frank Nessel: Sure, thanks, Scott.

Stephanie Napier: Thanks, Scott.

Scott Conking: We'll get started by chatting with our panelists, but we'll spend most of our broadcast answering your questions. To help you get the most out of this session, let me point out some helpful widgets at the bottom of your screen. The blue one allows you to access real-time technical help. The red one is for your questions, and the green one is a widget that gives you access to Vanguard's thought leadership on today's topic. Now, let's get started.

So I'm going to start with some broad questions to provide our viewers with a foundation, some context around where the rule has gone. So, Stephanie, you first. Why does DOL want to expand the current definition of a fiduciary?

Stephanie Napier: Thanks, Scott. Before we jump into their rationale, I think it might be helpful for us to talk about what it means to be a fiduciary under ERISA. So, much like trust law or securities law, when you're a fiduciary under ERISA, you have an obligation to act prudently and in your client's best interest. Under ERISA, providing investment advice is one of the ways that you can become a fiduciary, and the Department has had this same test for the last 40 years in determining how you become a fiduciary because of giving investment advice.

The Department has taken a look at the landscape and has recognized that people are investing through defined contribution plans and IRAs, and they have more responsibility for their own investment decisions. And, as a result, they wanted to expand the universe of people who would be considered fiduciaries as a result of giving investment advice.

This has been a six-year process, but now we have a final rule that is going to go into effect in April of 2017. Vanguard has supported the idea that when you provide investment advice, you should be considered a fiduciary and we're really pleased that the Department has made some important changes to this final rule. They more narrowly tailored the definition of what is considered investment advice to really better match up with investor expectations. And they also changed the rules when you become a fiduciary so that it's easier to operationalize some of the compliance requirements under the final rule.
Scott Conking: And, Frank, maybe this one is a good one for you. So many people in our audience today already act as fiduciaries. So, I'm curious as what do they need to do differently because of this rule.

Frank Nessel: Sure, Scott. So fiduciaries, obviously, are required to act for the exclusive benefit of plan participants and beneficiaries, and as Stephanie mentioned, to do so in a prudent manner. That prudence extends not only to the initial selection of an investment or a service like investment advice but also to the ongoing monitoring of either that investment or service. So the guidance really hasn't changed the fiduciary rules but instead expands the universe of people that are going to be subject to these fiduciary requirements.

The good news is, for the people in our audience that are already plan fiduciaries, your fiduciary obligations really haven't changed. However, you're still going to have a responsibility to oversee the services provided by these additional new fiduciaries.

For example, once your committee chooses an investment advice provider, that's not the end of their duties. They still have an ongoing obligation to monitor that advice provider to make sure it was a prudent choice. Some of that monitoring might include making sure that the provider is licensed, checking on complaints by your participants about that investment advice provider, and understanding any changes in the methodology used by that investment advice provider to make recommendations of investments to your participants.

So to sum up, just because you hire a consultant who is now a plan fiduciary under these new rules doesn't mean you're off the hook in terms of either your responsibility or liability. You're still responsible, as a plan committee member, to make sure that the services provided by the investment providers and other advisors are prudent.

Stephanie Napier: Right. And, as our plan sponsors know, the fiduciary obligations here can be fairly stringent. Under existing law, you have the responsibility to act with due diligence and to document the decisions that you reach as a committee or as a fiduciary. One key difference under ERISA compared to things like trust law or securities law is that there's also an additional set of rules that are designed to prevent conflicts of interest.

Unlike under securities law, in this space, disclosure alone isn't enough to mitigate those conflicts. So from a provider perspective more so than from a plan sponsor perspective, the compliance standard for being a fiduciary, because of these additional prohibited transaction rules, is so high that it may not make sense to act as a fiduciary in all cases.

You know, that said, I think we're going to want to be really clear on where the line is between fiduciary status and nonfiduciary status because the risk of accidentally becoming a fiduciary is so high. If you don't have the infrastructure to really manage those conflicts of interest, you can be in trouble as a service provider.

Scott Conking: Stephanie, one of the concerns you mentioned for the DOL was the expanding rollover marketplace. Frankly, I hear this a lot from plan sponsors when I'm out talking to them about the fact that they might be encouraged to roll over money into, say, IRAs or other instruments that might be a higher cost. How does this rule address that?

Stephanie Napier: The Department of Labor was definitely very concerned about the rollover market in general when they proposed this rule in the first place. Here, what they've done has been to expand the definition of fiduciary to apply to more conduct, particularly in the rollover space. So, historically, investment recommendations have led to fiduciary status; but, under this rule, rollover recommendations or distribution recommendations, even if they're not paired with an investment recommendation, can also lead to fiduciary status.

This is really new ground for the Department of Labor. So they've talked a little bit about what kind of due diligence a provider or an advisor might need to go through when providing a rollover distribution recommendation. There, you really need to look into the cost and benefit of services in an IRA or in a plan and compare them across the board to make sure that the guidance you're providing to your clients is really in their best interest.

We've talked about recommendations a lot so far. So one of the things that it might be important to mention is what a recommendation is under this guidance. It's a fairly broad definition. It's when you're suggesting that someone do something or if they not do something. Either way, it's really considered a recommendation. And, as those discussions get more individualized,
it's more likely that your kind of conversation is going to lead to fiduciary status.

*Scott Conking:* Frank, do you have anything you wanted to add?

*Frank Nessel:* Yeah, Scott. So by making more advisors fiduciaries in these types of discussions, the role's going to require more people to prove that their recommendations were prudent, that is, well researched, as well as in the client's best interest taking into account their investment horizons, objectives, and costs.

This is really good news for our plan sponsors because they're generally concerned that a single rollover transaction could undo all the years of work they had in helping people save for an adequate retirement security.

*Scott Conking:* So far, the questions that I've been asking have been a lot around the impact on service providers, but there's probably some impact to plan sponsors as well. What do they need to be concerned about, or what do they need to worry about?

*Frank Nessel:* Sure. So plan sponsors are not likely to be directly affected in their day-to-day operations. One key change from the proposal is a great win for our plan sponsors, and that is the Department of Labor clarified that, in most cases, communications between the plan sponsor and its employees are not going to be considered fiduciary investment advice. This holds true whether the employee is acting at the behest of the plan committee or is merely communicating information about the plan to employees. This was an issue we were really concerned about in the proposed regs, and the Department of Labor provided a really good result here.

*Stephanie Napier:* Yeah, absolutely. This is definitely a very practical result. And I think, in the end, this means that the areas of greater impact for plan sponsors are more likely to be indirect. So the extent that the rule affects services that we provide through our call centers or in sales conversations or through investment lineup conversations, that may be the area of greater impact for plan sponsors. It's indirect but not direct.

*Frank Nessel:* That's right.

*Scott Conking:* So we received a lot of questions from plan sponsors, over 50 as a matter of fact, prior to this webcast. And one question that is a theme throughout over and over is about providing advice and investment services within the plans. What does this mean for that?

*Frank Nessel:* Well, we have good news on that front. Going back to the beginning of the discussion, remember that I said that the Department of Labor's primary goal was to expand the universe of fiduciaries. Fortunately, Vanguard already acts as a fiduciary when it comes to providing advisory services. As a result, this final rule does not directly impact either third-party advice or Pension Protection Act advisory programs such as our Personal Online Advisor, Vanguard Managed Account Program, or Vanguard Financial Plan. Plan sponsors do not need to worry that these services will require significant changes going forward.

*Scott Conking:* Thanks, Frank. So, Stephanie, calls centers. You had mentioned earlier there might be an impact of this rule on call center conversations. Can you elaborate a little bit more on this because it's something that probably, in every conversation, the call center is a point of curiosity?

*Stephanie Napier:* If you think back to the definition of investment advice now under this rule, it covers a recommendation, which is a suggestion to do something or not do something any time you’re talking about an investment or a distribution decision. And call centers aren’t given a free pass under this rule. They're subject to the rule just like everyone else. And so, you know, we're really digging into what this means for the kinds of conversations that we have when clients are thinking about rollovers or when they're thinking about distributions in particular.

We're only a month out now from the release of the final rule, a thousand pages to really look through. And I think we're digging into this rollover question in particular because it's a really new area of focus for the Department. We're encouraged that they're interested, the Department is, in giving some additional guidance; and I think this is going to be an area that the industry's really going to want to focus on.
Scott Conking: Absolutely.

Stephanie Napier: But the good news is that, you know, we've been giving information about investments for a long time, investment education for a long time; and there really hasn't been a lot of change in the kinds of investment education that we can deliver through call centers or other means. Is that right, Frank?

Frank Nessel: That's exactly right, Stephanie. The final rule does exclude some important categories of communication from the definition of fiduciary investment advice. As a result, many of the communications that our plan sponsors have come to expect from Vanguard will continue.

One of the most important in this context is the treatment of participant education materials and interactive educational services. The final rule retains the Department of Labor's historical position that participant education materials can mention specific investments within the context of an asset allocation model.

This aspect of the rule is only available for retirement plan participants and only with regard to the investment options offered under the plan. For example, the investment allocation pie charts that you might be familiar with when you log onto your account at Vanguard.com will be considered educational in nature and not fiduciary investment advice.

Scott Conking: But this begs a secondary question, why wouldn't a firm—and, Stephanie, you can answer this one—why wouldn't a firm decide to be a fiduciary for all discussions?

Stephanie Napier: That is a good question. And, you know, it's one that I think we've thought about. The challenge here is that, as our plan sponsors know from personal experience, the fiduciary obligations are very high; and they require a lot of due diligence and conversations and a lot of documentation. And this rule has layered on some additional infrastructure around that in terms of compliance with additional rules when you're talking about your own investments.

So, in some cases, fiduciary status makes a lot of sense. I think, if you're talking to someone about a rollover and you actually reached the point where you're giving a recommendation for them to do one thing or another with their distribution, then it makes sense that we should act as a fiduciary in that recommendation and subject the conversation to the additional layers of compliance that would be required.

Other conversations that we have, you know, it doesn't make as much sense to layer that additional complexity on top of it. If you think about being a participant and calling in and asking for help in deciphering a fact sheet, you know, the kind of due diligence that we would have to do to provide that information in a fiduciary way and make sure that we understand all of the reasons they might be asking for information about a fact sheet and provide additional disclosures and layer additional compliance on top of that, can make that conversation take a lot longer than the participant anticipated. And, at the end, it doesn't really provide them much additional protection; and they're getting the same answer, the same result, really, for the participant with a lot of additional cost and complexity.

And so I think, our job in Legal and Compliance and with the business over the next 11 months—the next year—is to dig into all of the different cases where we talked to clients, we talked to participants, and figure out what makes sense in the context of the information we're providing with respect to fiduciary status. I think we want to make sure that we're able to continue providing a high level of service to our clients but doing so in a way that's cost effective and reasonable.

Scott Conking: Absolutely, absolutely. Frank, investment lineup discussions of plan sponsors. You know, our extended teams are out constantly talking about the lineups within plans and assisting through some of their decisions and all of that. How does this rule affect those decisions, those discussions?

Frank Nessel: Yeah, if our discussions about investments turn into a recommendation about an action that a client should or should not take, it could certainly lead to a fiduciary status on the part of the person giving that recommendation. The rule does allow for discussions with sophisticated fiduciaries without that fiduciary status.

For example, if we're speaking to a consultant that's been hired by a plan to act for the plan fiduciaries and they work for a
regulated financial institution, our discussions with that consultant will not be fiduciary in nature. In addition, if we're speaking to a committee and that committee is responsible for $50 million or more in plan assets that also will be exempted from the fiduciary-status category.

There's also some flexibility with regard to common sales practices like, for instance, when we answer RFP questions and we provide a sample plan investment lineup that will not be considered fiduciary in nature as well.

And, for ongoing relationships where a service provider provides information that's been specifically requested by a plan fiduciary based on their criteria, that won't be fiduciary in nature either. Answering questions such as information about fees, investment manager tenure, etc., that will not be considered fiduciary as well.

Stephanie Napier: Yeah, this is, as with a few other aspects of the rule, it's an area where we're really digging into the kinds of services that we provide today and trying to evaluate, you know, if we change nothing, would we be a fiduciary under the rule? If that's the case, are we comfortable with that and the layer of additional cost and complexity? Does that make sense?

You know, you talked about investment-lineup reviews and kind of responding to client questions about, you know, if they identified a criteria that we're using to screen funds, and that's fine, and we wouldn't be considered a fiduciary there under the new rule. I think, in many cases, clients turn to us for information or kind of input into what factors they might look into to evaluate the funds for their lineups. And so, under the new rules, that could lead to fiduciary status. I think that's something that we're going to really need to dig into over the next few months, and perhaps the Department can provide some additional clarity here too to help us evaluate what we want to do.

Scott Conking: Yeah, one of several areas we want clarification.

Stephanie Napier: Exactly.

Scott Conking: Okay, good. Okay, small plans and plan-sponsored communications. And, Stephanie, you could take this one; but you mentioned earlier about the $50 million cutoff for communications. Can you talk a little bit more about what that means?

Stephanie Napier: Sure, in this rule, the Department was particularly interested in protecting smaller plan sponsors almost in a way that was similar to sort of individual investor protections that they were providing. And so the Department treated small plan sponsors, those with control of less than $50 million in their plans, more like individual investors than they did larger plan sponsors, those with over $50 million in assets.

If a provider wants to remain on the nonfiduciary side of the line in communications with a plan sponsor under $50 million, then they really have to limit their investment communications with that plan sponsor to really more educational stuff, even less than they can talk about with a large-plan sponsor there.

And so we're really going to need to dig into this area—I feel like a broken record a little bit—with respect to small plan sponsors just in the same way we are with call centers and with sales conversations to make sure that we understand what we're providing today. We can do as much as we can to help clients fulfill their responsibilities, but we're doing so in a way that's cost effective and makes sense over the long term for all of our clients.

Scott Conking: Great. So, to wrap up these foundational questions here, what's next? When will the final rule go into effect, and how much time do we have to get ready?

Stephanie Napier: The new rules are not effective until April of 2017. So I know what I'm going to be doing for the next year. It's nice that the Department gave us a little bit longer timeframe to kind of comply here. There's a lot to dig into. The more complex requirements, for entities that decide to become fiduciaries, there's some additional requirements they have to comply with. Those are phased in between April of 2017 and January of 2018.

Now, some clients may have heard in the press about potential challenges to the rule. I can say, from our perspective, we don't feel like legislative challenges or kind of litigation efforts are going to necessarily cause any slippage in the deadlines for
implementation on this rule. With respect to legislative proposals, the administration is very supportive of this effort. And so, even if something got through both the Senate and the House, the President would likely veto any legislation that would roll back this reform.

With respect to litigation, you know, it’s harder to predict what’s going to happen with litigation. But, you know, that process takes a number of years; and so we would likely reach the date of implementation for this rule before something actually wound its way all through the courts.

You know, in the end, I think we believe this is a good rule and we’re moving forward toward implementation. We’re not looking to delay any sort of implementation or effective date on this.

**Scott Conking:** Good. Well, Frank and Stephanie, that's a great setup. So, as I mentioned before, we received over 50 questions prior to the webcast starting. And so I'm going to turn to them and have a series of them. And, Frank, I think this one is best one for you to answer, and it has to do with investment committees and how they operate. Again, this is a question that I get out on the road. Does this require a committee to adopt new procedures?

**Frank Nessel:** Well, as we stated earlier in the webcast, the good news is the final guidance that was provided by the Department of Labor doesn't impose any new duties on investment committee members since the committee members were already fiduciaries. However, as I mentioned before, the investment committee will still be responsible for the initial choice and the ongoing monitoring of the service providers that are now going to be considered fiduciaries under this new rule.

**Scott Conking:** Good. Stephanie, I think I'll turn this one to you, and it has to do with consultants. And our client asked: Does this provide a reason why someone should go out and get a consultant?

**Stephanie Napier:** It really will depend on each individual client's circumstances. It is, I will recognize, another complex rule in an already complex environment for retirement plans. And so a consultant's perspective here could be very beneficial for a plan sponsor to have their industry perspective as well.

You know, it's really going to depend on your resources and your comfort as a plan committee with the fiduciary obligations that you have and with your resources as an employer whether you want to actually go out and hire a consultant to help you here.

One area where it could be helpful, and maybe some clients will want to think about this a little bit more carefully, is with respect to smaller plans, those plans under $50 million where they're working with providers who want to avoid fiduciary status for plan lineup discussions. Those discussions can go further when the small plan sponsor under $50 million has a consultant in the mix because providers can talk to consultants if they're acting as a fiduciary for the plan without actually becoming fiduciaries as early in the process. So that involvement could be helpful there.

**Scott Conking:** Good clarification. Here's a question. We're going to take one more; and I see that there are actually some coming in live, so we'll turn to them in just a minute. This one, it came in from a plan sponsor from Minneapolis, Minnesota, and it says: Will the new rules likely cause companies currently offering recordkeeping and participant education to stop offering education if the companies want to continue to offer recordkeeping services?

**Frank Nessel:** Good question.

**Scott Conking:** So it's a long one; but, Frank, why don't you take that one?

**Frank Nessel:** Sure. So the final Department of Labor guidance is much more inclusive with regard to the types of communications that will be considered education versus advice. In fact, the Department of Labor's position on this is very similar to their prior position in Interpretive Bulletin 96-1.

We think the final guidance should provide sufficient leeway for recordkeepers to continue to provide the current communication and education materials in the future under the final rule. We don't think there's going to be a need for plan sponsors to have to go out and hire a third-party communication consultant to provide the types of education materials that are currently provided by
their plan recordkeepers.

Now, maybe a different result with regard to discussions involving a rollover to an IRA. In that context, the provider that speaks to an individual that's interested in an IRA rollover would become a fiduciary. It's really too early to tell whether or not recordkeepers are going to want to assume that fiduciary status with regard to those rollover discussions.

*Scott Conking:* I'm going to turn, for a minute, to the monitor here, some live questions coming in. Let me see here: Do you think we'll need to change our distribution paperwork to terminate participants that provide instructions about how to roll money over to Vanguard IRAs, but only a Vanguard IRA and not others? Should the language be more general?

*Stephanie Napier:* We have working teams that have been stood up with the business to really pull all of the documentation that we have that talks about rollovers today and really dig into it to figure out if we feel like we need to make changes there. I think that is a question that we're going to be digging into more.

If you think back to the definition, again, then, are we making a recommendation that someone take a particular action with respect to their retirement accounts there in a way that's individualized to them? You know, there, I think, if the distribution paperwork has different options on it, the fact that a Vanguard IRA is one of those options may not be enough to be considered a recommendation that someone do something in particular with that money. They have choices, and we're talking about the choices.

On the flip side, if that paperwork is sort of omitting kind of other choices, that may be something that we want to add. That's really a long way of saying we don't know yet, and we need to dig into it a little bit more, but that's absolutely something we're going to look into.

*Scott Conking:* Great. Like you said, a lot of work left to do. It's a good clarification. Okay, Frank, this is for you. Sherry asks, and thank you, Sherry, for your question: If in a Vanguard review meeting with the plan sponsor and the sponsor asks Vanguard for information about potential investments, where there is a gap in the sponsor's lineup, is Vanguard's response covered by the fiduciary rule?

*Frank Nessel:* I'm going to say maybe. So, for instance, if the Vanguard advisor that was in the room with the committee only and it might depend on how much assets that committee represents. So, more than $50 million, they're sophisticated fiduciaries. In theory, you know, that could be a discussion that we could have, right, and not necessarily fall into fiduciary status.

But let's say it's somebody under $50 million. If we offer one fund or two funds or three funds, that might morph into being a fiduciary, right, because we haven't offered a lot of alternatives. If, for the gap analysis, we provide something more, maybe a half dozen funds, then perhaps it does not.

I think this is one of those gray areas, Stephanie, that I suppose maybe we're hoping that the Department of Labor might provide some specific examples as to maybe when you cross the line.

*Stephanie Napier:* Yeah, you know, I think that's a great point. We are working with the Department of Labor and industry groups in general to kind of collect questions that we have. It's hard to believe with 1,000 pages of rules that there could be open questions; but I think we want to dig deeper into kind of hypothetical situations that we can present to the Department and say, just like our clients are saying, "What if this happens? Can this be the answer? Where do you cross the line into fiduciary? How do you apply the rules?"

I think, you know, in the past, we've thought that maybe if you provided a list of options in response to a gap analysis, that was fine as long as you weren't saying fewer than three. I don't think those rules of thumb necessarily are still valid. We just don't know what the new rules of thumb are yet. Whether that means we have to respond to questions from a plan sponsor with all of the funds in the universe that could possibly fit into the category that they're looking into or if we can winnow it down at all, those are still open questions to answer.

*Scott Conking:* I have a feeling we're going to have to have another webcast in early 2017 when these things all go into [effect].
Stephanie Napier: We'll look at the hypotheticals at that point.

Frank Nessel: Right.

Scott Conking: Right, yes. Okay, we have more questions coming, which is great; but I'm going to go back to the questions that were submitted ahead of time. And this is one that we hear a lot from clients: Are there any changes for investment advisors already subject to the fiduciary rule? Stephanie, do you want to take that one?

Stephanie Napier: Yeah, absolutely. So where you're a registered investment advisor, you're already operating, as you said, under a fiduciary standard, under securities law. And those fiduciary, and maybe under ERISA as well, those fiduciary obligations don't change. What this rule does change for those advisors is that rollover conversations that may not have previously been considered fiduciary in nature are now subject to those rules. And depending on how your compensation works as a registered investment advisor, you may need to comply with additional rules that you didn't have to worry about before.

So, for advisors who are in that spot who are listening to this webcast today, I would encourage them to go over to the FAS website on Vanguard's site, advisors.vanguard.com. In about a week, we're going to have a recording up of a webcast that we did last week that was really more focused on kind of advisor-specific questions and that may provide some additional information.

Scott Conking: Okay, great, good. Here's a question that's come in from a plan sponsor in Michigan. We have a few questions about implications of particular types of plans. This is going to get a little technical. This one is from a client with a SEP plan at Vanguard for their employees: Does the new DOL rule change any of our responsibilities with respect to the SEP; and, if it does, what must we do differently? So Frank, you want to take that?

Frank Nessel: Good question. Sure, I'd be happy to. So, for those in the audience that might not be familiar with the concept, a SEP-IRA or SEP plan is a traditional IRA that permits employer contributions to be made to a simplified employer plan or SEP. So the employer's portion of the contribution is governed by the SEP rules, but the employee's contribution is covered by traditional IRA rules. So it seems like these arrangements, by nature, are IRAs. And because of that, that may lead to some limitations on the communications that are permitted if the SEP provider doesn't want to fall into fiduciary status.

So, for instance, if we were to provide specific investment recommendations with regard to an asset allocation model in a SEP-IRA context, that might mean that we would become fiduciaries with regard to providing that investment information different than in an employer retirement plan setting under ERISA where just providing the plan's investment lineup with the asset allocation model wouldn't necessarily cause fiduciary status. The IRA rules are different.

So, in my view, because these are very close to IRAs, there may be some additional implications that there wouldn't be for an employer plan. But, apart from that, the DOL rules apply to SEP-IRAs as they would for any other U.S.-based retirement plan.

Stephanie Napier: Right, I mean, I think it's important to emphasize here, while, today, we're focused on implications for employer-sponsored plans, just as Frank is saying, the Department was very concerned about IRA investments as well. Kind of back to the purpose of the rule, they wanted to make sure that as money is rolling out of plans, participants continue to be protected. Those investments, as they're in IRAs, are protected too. And so these rules do apply to IRAs and kind of expand the fiduciary obligations for advisors there, too.

Scott Conking: Okay. So, Frank, plan design, near and dear to our heart.

Frank Nessel: Yes.

Scott Conking: Talk more, you spend a lot of time on it, and our team. Could the new rule affect plan design?

Frank Nessel: So, the final DOL guidance is meant to address recommendations regarding plan transactions that are available to participants like rollovers, withdrawals, and distributions. So plan designs such as automatic enrollment, automatic increase, a default investment, or reenrollment are not recommendations; but they're more like settlor functions. They're embedded within the
plan and, as such, aren't recommendations; and they wouldn't be subject to the new rule.

**Scott Conking:** Okay, good. Thank you. Now, are you guys ready for some more live questions?

**Stephanie Napier:** Sounds good!

**Frank Nessel:** Sure, yeah!

**Scott Conking:** They're coming in. Let's see, we're going to start with you, Frank. Randy asks, thank you, Randy: If a sponsor has multiple plans, each of which is under $50 million but, in total, over $50 million. This is a good question. Is that sponsor considered a small plan sponsor?

**Frank Nessel:** That's a great question. I would think that it's but I guess it depends if the committees are separate or if they're in the aggregate.

**Stephanie Napier:** The Department did look to sort of what you have under control in general.

**Frank Nessel:** Okay, and if they're within the control.

**Stephanie Napier:** Yeah, exactly. If you've got control over multiple plans, they all total more than $50 million together, in aggregate, then you're considered sophisticated because you have responsibility for that much. And, you know, in this respect, even nonplan assets like corporate assets can count toward that $50 million number. I think the Department just wants to be sure that or, in their view, if you have control over $50 million or more, sort of whatever the reason, then you're treated as sophisticated compared to under $50 million in the aggregate.

**Scott Conking:** Okay, interesting, good. Okay, this one, Stephanie, is for you. Ellen asks: What if there's a fiduciary consultant for a plan less than $50 million, could you talk to the consultant without being a fiduciary?

**Stephanie Napier:** Based on the rule as we interpret it now, if the consultant is acting as a fiduciary to the plan and the consultant is involved in that, sort of is acting as a consultant for that plan, then our conversations with the consultant about that plan, even if it's under $50 million would not be considered fiduciary in nature.

And so I think, you know, where a service provider is trying to be sure that it's staying on one side of the line versus another, knowing that a consultant is involved in a smaller plan relationship makes it look and feel a little bit more like we would treat a large plan over $50 million.

**Scott Conking:** Okay, good, thank you. And, Frank, I have another one for you. Robert asks: What is the role of a plan sponsor with respect to monitoring services provided by the recordkeeper?

**Frank Nessel:** Okay. So a recordkeeper, like any other service provider, is subject to ERISA rules. So, for instance, one of the big areas that they need to look at are things like plan fees, right? So under 408(b)(2), fees need to be reasonable. So the committee has a responsibility, at least annually, to take a look at the fees and determine reasonableness, make sure that the fees are reasonable in comparison with the services provided. So if it's a complex plan, the fees might be higher; but they could be justified because that's reasonable for a more complex plan. So, typically, it's the services coupled with the fees that the committee needs to determine whether there's reasonableness there.

In addition, just to make sure that the recordkeeper, I guess, is providing adequate services for the employees in terms of all the different aspects whether it's accounting, educational, maybe investment advisory, etc. So all those aspects are the responsibility of the committee, and they need to look at that periodically. I always say at least annually.

**Scott Conking:** Okay, that's a good question. Okay, we're going to wrap up the questions here; but, of course, I have one last one for you. And this has been a very informative webcast, so thank you both. But what are your final thoughts? What's on your
mind? What's the last thoughts you might have for our audience today around the rule? So, Stephanie, why don't you start?

_Sophia Napier:_ Sure. You know, this is a really big change. It's one of the biggest, certainly, in the last 10 years but some are saying even in the last 40 years. But I think we think it's a very positive change, especially for those participants who are nearing retirement and nearing that really critical kind of rollover decision.

We are working hard to analyze the rule and to really evaluate and dig into the services that we provide under the rule. But, you know, we are excited about the opportunity that we have here to continue to help you and your participants plan for retirement.

_Scott Conking:_ Okay, great. Frank?

_Frank Nessel:_ Well, we've heard from a number of plan sponsors that they're very interested in understanding any changes that we make to the services that we provide as a result of the new rule. There's a lot more information to come on the final rule, and Vanguard's going to be with our clients every step of the way.

Rest assured that we'll communicate any changes to service processes as soon as we come to some conclusion as to what those changes might be. We're going to continue to keep our plan sponsors posted as we learn more developments in this important area.

_Scott Conking:_ Okay, good, good. Hey, I saw, out of the corner of my eye that another question came through. You okay answering it, going for another one?

_Sophia Napier:_ Sure, sounds good.

_Frank Nessel:_ Yeah, yeah.

_Sophia Napier:_ Let's go!

_Scott Conking:_ Okay. It's for Stephanie. Kevin asks, "I'm a trustee for a small company ERISA plan. We currently use an investment advisor who is paid by a 12b-1 fee. Will this arrangement be permitted going forward?"

_Sophia Napier:_ That's a good question. You know, I think I'd look at that question in two ways. First, I'd see if your investment advisor is, today, acting as a fiduciary for you. I think, under the new rule, if they're providing investment recommendations about the lineup or some investment advice to participants, then it is very likely that they will be considered a fiduciary.

The next thing that I'd look at is those 12b-1 fees. How does that get paid to the investment advisor, and does it vary based on the investment advice that the person provides? If that's the case, then that advisor is going to need to comply with something called the best-interest contract exemption, which are these additional kind of prohibited transaction rules that are intended to mitigate the conflicts of interest that an advisor might face if they're recommending investments that pay them different levels of compensation.

So, you know, I'm sure that there's more to come from the advisor on those questions; but if there are additional specific questions that Kevin has, then I think we can maybe work together to provide some additional information after the webcast.

_Scott Conking:_ Okay, great, great. Thank you both so much. That's all the questions we have for today, and we're going to wrap things up. Are you willing to come back in early 2017 and give an update?

_Sophia Napier:_ Absolutely!

_Frank Nessel:_ Sure, be happy to.

_Scott Conking:_ Okay, great, good. That concludes our webcast for today. From all of us here at Vanguard, we'd like to thank you
for joining us. If you submitted a question and we didn't have time to address is—like I said, there was about 50—we encourage you to contact your relationship manager, and we'll do our very best to get you an answer.

In a few weeks, we'll send you an email with a link to view highlights of today's webcast along with a transcript for your convenience. If we could just have a few more seconds of your time, please select the red survey widget—it's the second from the right at the bottom of your screen—and respond to a short survey. We really appreciate your feedback and welcome any suggestions about topics you'd like us to cover. Have a fantastic rest of your day.
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