



401 (k) Plan Sponsors Not Only Ones Affected By “Adviser” / “Advisor” Fiduciary Confusion

A WHITE PAPER BY

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Is it as simple as “toe-MAE-toe” vs. “toe-MAH-toe” and “poe-TAE-toe” vs. “poe-TAH-toe” and, if so, can we call the whole thing off? Or is there a real difference between the terms “adviser” vs. “advisor”? “This is a pain and I’m glad someone is actually writing about it,” says Layton Cox, Director of Retirement Plan Consulting at Pathways Financial Partners in Tucson, Arizona. Ask any 401k plan sponsor, specifically, the C-level executives with the fiduciary responsibility for managing the plan, whether there’s a difference between the two terms, and, chances are, they’ll roll their eyes in apathy.

Indeed, this is a question publishers and editors, let alone 401k plan sponsors, must regularly address. Pete Swisher, Senior Vice President, National Sales, at Pentegra Retirement Services, headquartered in White Plains, New York and author of *401(k) Fiduciary Governance: An Advisor’s Guide*, 3rd Edition, says, “As I use the terms, ‘adviser’ always implies that I am referring specifically to a Registered Investment Adviser or RIA, whereas ‘advisor’ refers more generally to any sort of financial advisor.” [Ed. Note: This is the same rule used by [FiduciaryNews.com](#).]

This may surprise more people than you think, but the difference between the two terms extends well beyond the language preferences of editors. “The distinction is more than just a letter. An ‘adviser’ who offers investment advice under the Investment Advisers Act of 1940 is an ‘adviser.’ A broker who does not serve in a fiduciary capacity can only be called an ‘advisor.’ Someone who designates themselves as an ‘adviser’ is essentially offering services under the Investment Advisers Act of 1940, the SEC, and FINRA because they are offering investment advice to their clients which means they are serving in a fiduciary capacity. It’s the beauty and the richness of the English language that one letter can mean so much. The problem is that plan sponsors don’t know the difference,” says Ary Rosenbaum, an ERISA attorney at The Rosenbaum Law Firm located in Garden City, New York”

But it’s more than plan sponsors who don’t know the difference. “There is no ‘real’ difference between the two,” says Layton Cox. “I’ve never been asked does your title end in ‘-er’ or ‘-or’? I highly doubt that would make a difference in the court room.”

Among financial professionals, this assessment is not unusual. “Quite frankly,” says Leonard P. Raskin, of Raskin Global in Hunt Valley, Maryland, “each is simply a different way to spell the same word. Neither has any different connotation or context with regards to the job the person does. They are identical.

Additionally, nowhere in the law is there any differentiation as to the fiduciary duty of either one. It’s simply a spelling gimmick and nothing more. Sorry it’s not more profound than that.”

For some, it merely comes down to a question of preference. “‘Adviser’ seems to be more commonly used. We like ‘advisor.’ They both work,” says Tim Shanahan, Founder & Director at Compass Securities Corporation located in Braintree, Massachusetts.





Todd Kading, Managing Director at LeafHouse Financial Advisors in Austin, Texas, says, “There is no difference between ‘adviser’ and ‘advisor.’ Other than the popular publication *PLANADVISER Magazine*, it is rare to see ‘adviser.’ [Ed. Note: *The New York Times* editorial policy is to use the term ‘adviser’ exclusively.] LeafHouse Financial Advisors, a trademarked name, is our firm’s name and is spelled, as you can see, with the ‘-or.’” Kading agrees “there is confusion in the interchangeability of ‘adviser’ and ‘advisor,’” but goes on to say, contrary to Rosenbaum’s explanation, “that neither spelling is associated with a fiduciary designation or any kind of merit. The lack of a consistent spelling does not have a terribly adverse effect. All in all, a standardized spelling would be beneficial for the purpose of consistency, but only marginally.”

While Kading’s statement may not be consistent with the legal facts, it does bring up a very valid point – one that further complicates the matter. Russell Campbell, CEO of Your Second Opinion, LLC in Las Vegas, Nevada says, “Clients can’t even differentiate between fiduciary and non-fiduciary – they would have no clue about how to correctly spell the title of the person who gives them advice, and would not care either.”

“While there may exist a technical difference between the terms ‘adviser’ and ‘advisor,’” says Greg Lessard, Founder & President at Aspen Leaf Partners in Golden, Colorado, “it’s important to consider the big picture impact on consumers no matter which spelling is used. When someone who isn’t a fiduciary 100% of the time uses either ‘adviser’ or ‘advisor,’ it creates the assumption for consumers that the individual is a fiduciary. Unlike the medical and legal professionals, anyone can call themselves a financial ‘advisor,’ even if they sell products or earn commissions. That’s unfair to consumers as well as those financial advisors who are actual fiduciaries 100% of the time. Most financial ‘advisors’ want to charge fees (as a fiduciary does) as well as earn commissions (like a salesperson does), and they switch when it’s convenient for their compensation. This is insanely confusing for the public.”

It may be confusing for the public, but is it “insane” or is it deliberate? “Sales brokers have been permitted for decades to mislead investors – law professor Arthur Laby calls it deceptive communications – by saying they’re a ‘trusted adviser’ when they follow brokerage rules. Mixing ‘adviser’ with ‘advisor’ is yet another strain of this same deadly virus,” says Knut A. Rostad, regulatory and compliance officer at Rembert Pendleton Jackson, a Registered Investment Adviser in Falls Church, Virginia.

Paul Cox, CEO of Business Compliance Partners, a regulatory consulting firm specializing in the financial services industry located in San Diego, California, explains the derivation of the “adviser”/“advisor” debate. He says, “The Investment Advisers Act of 1940 established the statutory basis for the term ‘Registered Investment Adviser’ with the ‘-er’ spelling. However, ‘advisor’ is the version that is preferred by many. The term ‘Investment Adviser Representative’ came later and describes an individual who provides advisory services on behalf of a Registered Investment Adviser. Prior to 2000, regulators cited firms that allowed their registered persons to use variations of the term ‘Advisor,’ ‘Adviser,’ or ‘Consultant’ unless they were performing those activities. Until the passage of the Gramm Leach Bliley Act, firms that performed certain financial activities had to keep the activities separate, a holding companies structure with separate entities was common.”

Paul Cox doesn't hold out much hope we can solve the dilemma anytime too soon. "When firms began to offer multiple services under single entities (dually registered)," he says, "the terminology became interchangeable. I am not sure you can do much at this point because it is a competition between the common and preferred spelling in 1940 versus the preferred spelling today."

Still, this doesn't moot the legal precedence of the terms. Paul Cox says, "Advisory firms and their associated persons are fiduciaries. The formal descriptions 'Registered Investment Adviser' and 'Investment Adviser Representative' refer to and can only be used by persons associated with advisory firms. Other word combinations do not have the same standing. An individual might have the title of 'Financial Advisor,' be dually registered with a broker dealer that is also an advisory firm and could be acting in either capacity but using the same title. Broker dealers are not fiduciaries."

Yes, there remains confusion in the marketplace, but the greater danger may be the confusion within the financial services industry. A source intimately familiar with the subject matter, speaking to *FiduciaryNews.com* on background, says "The 1940 law governing US advisers is the Investment Advisers Act, (see: <http://www.sec.gov/about/laws.shtml#invadvact1940>). So when the SEC and its staff discusses matters involving advisers, typical usage is 'adviser.' Regardless of spelling, all advisers that register with the SEC are fiduciaries." As Rosenbaum says, it's not simply semantics, it's the law. 401k plan sponsors be warned: An "adviser" is a fiduciary; an "advisor" may or may not be a fiduciary.

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