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The Final Fiduciary Rule: A Plan Sponsor's Perspective

On April 8, 2016, the Department of Labor published a new regulation (the "Fiduciary Rule") that greatly expands the activities that make one a fiduciary under Employee Retirement Income Security Act of 1974, as amended ("ERISA"), by providing "investment advice."¹ Although targeted primarily at providers of retirement plan products and services, the Fiduciary Rule will have an impact on plan sponsors. Thus, it is important for employers, investment committees, and other plan fiduciaries to understand how the Fiduciary Rule impacts their fiduciary responsibilities and the relationships they have with plan service providers. This client alert identifies some of the key issues for plan sponsors that arise from the Fiduciary Rule.

Key Takeaways

- The Fiduciary Rule largely allows employers to continue to provide plan information and educational materials to participants without taking on additional fiduciary responsibility.
- The Fiduciary Rule treats many common sales practices as fiduciary investment advice, so plan services providers will need to either accept fiduciary responsibility or modify their practices to fit within an exception to fiduciary status.
- Plan sponsors should expect to see material changes to both the procurement process (e.g., RFPs) and their ongoing relationship with service providers.

Brief Overview of the Fiduciary Rule

The Fiduciary Rule provides that one is an ERISA fiduciary if, for a fee, he makes a "recommendation" to a plan, plan fiduciary (e.g., an investment committee), or plan participant or beneficiary regarding, among other things, the purchase of investment products or services, whether to take a distribution from the plan, and whether a plan distribution should be rolled over to an IRA to. A "recommendation" is "a communication that, based on its context, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." The definition of "recommendation" is broad and intended to cause more product and service providers to be fiduciaries, particularly in the sales context, unless certain exceptions apply.

¹ For more information, please see our client alert on the Fiduciary Rule [here](#).

The Fiduciary Rule is accompanied by several new or amended prohibited transaction class exemptions that allow investment advice fiduciaries to continue to receive compensation that would otherwise be prohibited under ERISA and the Code. The most important new exemption is the Best Interest Contract Exemption (the “BIC Exemption”), which allows advice fiduciaries to continue to receive commissions and other forms of compensation, provided the fiduciary makes an enforceable commitment to, among other things, ensure that its recommendations are in the best interest of the plan or participant.

For a more comprehensive summary of the Fiduciary Rule and related exemptions, please see our client alerts available on our [website](#).

Top Five Issues for Plan Sponsors

1. *What employee benefit plans are covered by the Fiduciary Rule?*

The Fiduciary Rule applies to ERISA-covered employee benefit plans with an *investment component*. Thus, it will cover recommendations with respect to retirement plans (*e.g.*, 401(k)), including recommendations for participants to roll out of a plan and into an IRA, and certain health plans (*e.g.*, Health Savings Accounts). However, the Fiduciary Rule generally does not apply to most insurance policies sold to health and welfare plans.

2. *How does the Fiduciary Rule affect participant education?*

The Fiduciary Rule generally allows plan sponsors and service providers to continue to provide investment education to participants without becoming investment advice fiduciaries. It specifically states that non-fiduciary education includes providing general information about a plan; general financial, investment and retirement information; hypothetical asset allocation models; and interactive investment materials. In many respects the Fiduciary Rule codifies the existing guidance that plan sponsors and providers currently rely (Interpretive Bulletin 96-1), but DOL did make a significant change.

The Fiduciary Rule expands prior guidance to allow plan sponsors and providers to make available to participants and beneficiaries asset allocation models or interactive investment materials that identify the specific products or investment alternatives available under the plan. Such models may only identify designated investment alternatives (as that term is defined in the participant disclosure regulation) offered by the plan that are overseen by a plan fiduciary who is independent from the person who developed or marketed the investment alternative and the model. When identifying specific designated investment alternatives, the model or interactive materials must also (i) identify any other designated investment alternatives offered under the plan that have similar risk and return characteristics, (ii) include a statement indicating that those other designated investment alternatives have similar risk and return characteristics, and (iii) identifying where a plan participant can obtain additional information regarding those other designated investment alternatives.

3. *How does the Fiduciary Rule affect plan sponsors' employees?*

Employees working in a plan sponsor's human resources or financial departments who provide recommendations directly to the plan's named fiduciaries (*e.g.*, the plan's investment committee) are generally not investment advice fiduciaries under the Fiduciary Rule because they do not receive a fee or other compensation in connection with their recommendation (other than their normal compensation). Additionally, the Fiduciary Rule generally clarifies that employees of a sponsor who communicate information about the plan and distribution options to participants are generally not considered investment advice fiduciaries.

4. ***What service providers will become fiduciaries?***

The Fiduciary Rule greatly expands the types of activities that constitute fiduciary investment advice, including many marketing and sales communications. However, DOL has clarified that there are a number of types of interactions between service providers and plan sponsors that are not fiduciary in nature, including (but not limited to) the following:

- **Transactions with Independent Plan Fiduciaries.** There is an exception to the Fiduciary Rule for recommendations made to plan fiduciaries who are both “independent” of the adviser and have financial expertise (*e.g.*, the fiduciary is a registered investment adviser or holds, or has under management or control, total assets of at least \$50 million). The service provider relying on the exception must make a number of factual determinations (*e.g.*, that the independent fiduciary is capable of evaluating investment risks independently).
- **Marketing Platforms.** The Fiduciary Rule provides that marketing retirement plan “platforms” is not a fiduciary recommendation, provided the marketing of that platform is without regard to the plan’s individualized needs and the provider confirms that it is not providing impartial advice or acting as a fiduciary. Similarly, the platform provider can provide certain information about the investment options on the platform if certain requirements are met.
- **RFP Responses.** In responding to an RFP, a service provider may identify investment alternatives or sample lineups based on the size of the plan or its current investment alternatives (or both) without becoming an investment advice fiduciary, provided the service provider discloses its financial interest in any of the investments.

A detailed discussion of the various exceptions to fiduciary status is available [here](#).

5. ***How will the Fiduciary Rule affect service provider relationships?***

Many providers will prefer to adapt their sales and servicing practices to avoid fiduciary status by utilizing one of the exceptions above, and in some cases, it will be impossible for them to operate without falling into an exception.² Given that, plan sponsors should expect to receive from service providers new disclosures, and plan sponsors will be asked to make new representations and warranties in connection with particular transactions.

Other service providers may elect to accept fiduciary status and comply with the new BIC Exemption, particularly for smaller plan sponsors or in certain situations involving plan participants and beneficiaries. In those cases, the service provider will be required to make a number of disclosures to plan sponsors, including that the provider is adhering the “best interest” standard of care (*i.e.*, ERISA’s duties of prudence and loyalty), a description of the provider’s policies on “material conflicts of interest,” as well as information on the provider’s fees and compensation.

A detailed discussion of the BIC Exemption and its requirements is available [here](#).

² The BIC Exemption is unavailable for investment advice fiduciaries who hold or control \$50 million or more (and certain other parties), and absent the BIC Exemption (other exemptive relief), service providers would be prohibited from entering into a sales transaction resulting from their provision of a fiduciary recommendation as part of the sales process.

Concluding Thoughts

DOL's publication of the Fiduciary Rule is a watershed moment for the retirement system, and it will result in significant changes in virtually all corners of the industry. Although the most drastic effects of the rule will be felt by financial institutions, plan sponsors will likely see material changes to their service provider relationships, and they may be asked to, among other things, amend existing contracts or make novel representations or warranties. Thus, it will be important for plan sponsors to work with their counsel to identify potential risks and limit their overall exposure.