GROOM LAW GROUP

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<u>Fiduciary Rule – Advice Definition</u>

On April 6, 2016, the U.S. Department of Labor ("DOL") made available its much-anticipated final regulation on the definition of "fiduciary" under section 3(21)(a)(ii) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The new rule will have a profound impact on the retirement system and how services are provided throughout the industry. The package of materials released by DOL includes the following:

- A final regulation re-defining who is a "fiduciary" by reason of providing investment advice to a plan or an IRA (the "Final Regulation");

- Final versions of the Best Interest Contract Exemption (the "BIC Exemption"), related supplemental exemptions, and the new prohibited transaction class exemption for principal transactions in certain investments (the "Principal Transactions Exemption"); and

- Final amendments to several existing prohibited transaction class exemptions, including prohibited transaction class exemption ("PTE") 84-24, currently the primary source of prohibited transaction exemptive relief for the sale of insurance and annuity products to plans and IRAs.

The Final Regulation, changes to existing class exemptions, and certain elements of the BIC Exemption will be effective 60 days from the date of their publication in the Federal Register (*i.e.*, June 7, 2016). Despite this relatively early effective date, the terms of the rules generally delay their applicability until April 10, 2017. In the case of the BIC Exemption, special transition relief further delays the applicability of most conditions until January 1, 2018.

This client alert provides an overview of the Final Regulation. For an analytical summary of the BIC Exemption, the Principal Transactions Exemption, and changes to PTE 84-24 and other existing exemptions, please see our client alerts covering those subjects.

I. Executive Summary

The Final Regulation generally adopts the same, broad, definition of fiduciary advice proposed by DOL in April 2015 (the "2015 Proposed Regulation"). In an effort to address criticisms and provide more clarity, DOL has revised the categories of advice covered under the rule ("covered advice") and provided more specific guidance on what qualifies – and does not qualify – as a "recommendation" for purposes of the Final Regulation.

In keeping with DOL's stated consumer protection goals, the Final Regulation is clearly focused on ensuring that recommendations regarding rollovers and plan distributions are fiduciary in nature. As a result, after April 10, 2017, most IRA rollovers will require the BIC Exemption.

DOL responded to a key criticism of the proposed rule by clarifying in the Final

Regulation that a recommendation of oneself or an affiliate to provide investment advisory or management services is not, without more, a fiduciary recommendation. However, this ("Hire me") clarification does not apply to any accompanying rollover or investment recommendation, which will still result in fiduciary status.

II. Overview of the Final Regulation

The Final Regulation substantially expands the universe of entities and persons who will qualify as fiduciaries by reason of the provision of investment advice under ERISA section 3(21)(A)(ii) and section 4975(e)(3) of the Internal Revenue Code of 1986, as amended, (the "Code"). It is the most significant change to the laws governing retirement plans since ERISA was passed over 40 years ago. Under the current regulatory definition that has applied since 1975, a non-discretionary investment adviser could become a fiduciary subject to ERISA's fiduciary and prohibited transaction rules only if the adviser met each prong of a five-part test. Under the current regulation, fiduciary status would be triggered only if such an adviser (1) rendered advice to the plan as to the value of, or advisability of investing in or holding, securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement or understanding, (4) that the advice would be a primary basis for decision making, and (5) that the advice would be individualized based on the particular needs of the plan. Like the 2015 Proposed Regulation, the Final Regulation effectively eliminates the "regular basis," "mutual understanding," and "primary basis" requirements of existing law, subjecting a far more expansive universe of activities to ERISA's strict fiduciary rules.

Clearly one of DOL's key objectives in writing the Final Regulation is to capture any person or entity that makes recommendations with respect to taking (or not taking) a rollover distribution from a plan or IRA, or making any distribution or transfer from a plan or IRA, and subject them to fiduciary standards. In doing so, DOL has rescinded a 2005 advisory opinion in which it stated that advice with respect to taking an otherwise permissible plan distribution did not amount to fiduciary advice. *See* DOL Adv. Op. 2005-23A (Dec. 7, 2005).

While DOL did make many refinements to its 2015 Proposed Regulation in response to literally thousands of comments received in letters, meetings, and public hearings, many issues remain unresolved. To this end, DOL has publicly committed to working with the regulated community through the transition to compliance with the new regulatory regime.

Key changes to the fiduciary definition in the Final Regulation include:

- "Covered advice" has been distilled down to two categories: (1) recommendations as to the advisability of purchasing or holding securities or other investment property, including recommendations as to how proceeds from rollovers and distributions should be invested, and (2) advice with respect to the management of securities or other investment property, including, but not limited to recommendations:
    - of *other* persons to provide advice or management services,
    - as to whether to select a brokerage or advisory account arrangement,
    - with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, and in what form, and to what destination, the rollover, transfer, or distribution should be made.

- Valuations and appraisals are not included in the Final Regulation as a category of covered advice. DOL has reserved valuation issues for further consideration in a future DOL rulemaking.

- Guidance as to what will qualify as a covered "recommendation" has been enhanced, incorporating principles DOL has adopted from FINRA suitability pronouncements and SEC guidance under the Investment Advisers Act.

Unlike the 2015 Proposed Regulation, the Final Regulation is not organized to include "carve-outs." Rather, under the Final Regulation, certain activities are included within a "safe harbor" category of activities deemed not to involve a "recommendation" and therefore, not to give rise to advice fiduciary status. These activities include:

- Providing a platform to a plan fiduciary of an individual account, participant-directed plan, provided certain conditions are met;

- Certain selection and monitoring activities, including, in response to an RFP, providing a sample investment menu, provided certain conditions are met;

- General communications not reasonably viewed as an investment recommendation, including, among other things, commentary on television or radio and prospectuses; and

- Investment Education (discussed further, below).

The Final Regulation also includes certain exceptions for activities that would involve a "recommendation," but are nevertheless deemed not to give rise to fiduciary status. These activities were characterized as "carve-outs" in the 2015 Proposed Regulation, but are simply described as exceptions under the Final Regulation. They include:

- A Seller's Exception – dramatically rewritten from the 2015 Proposed Regulation, the seller's exception in the Final Regulation eliminates the reference to 100 or more participant plans and applies to IRAs and ERISA plans represented by investment professionals and financial institutions; and

- A revised Swap Transaction Exception.

III. Discussion and Observations

A. Covered Advice

Under the Final Regulation, a person will be deemed to be rendering investment advice as to the assets of a plan or IRA, and therefore subject to ERISA's fiduciary standards, if the person provides to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner, for a fee or other compensation one of two types of "covered advice" —

- recommendations as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA; or

- recommendations as to the management of securities or other investment property, including, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage versus advisory); or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made.

In order to be deemed to be rendering fiduciary investment advice, a person making a recommendation described in either category must also (1) represent or acknowledge that it is acting as a fiduciary, (2) render the advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is based on the particular needs of the recipient, *or* (3) with regard to the advisability of a particular investment or management decision, direct the advice to a specific recipient or set of recipients (the "additional conditions"). The preamble to the Final Regulation makes clear that DOL intended that virtually any recommendation regarding the decision to rollover assets to an IRA, *even absent a recommendation on how to invest the assets*, would still be deemed to be rendering fiduciary investment advice.

B. Definition of Recommendation

As a threshold matter, in order to be fiduciary advice, the communication must be a "recommendation" as defined under the Final Regulation. The Final Regulation includes a new provision devoted to providing additional clarity around when a communication will be deemed a "recommendation." This provision first defines the term "recommendation" as "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." This definition is identical to the language in the 2015 Proposed Regulation.

DOL explained in the preamble that rather than directly incorporating FINRA guidance, which could be changed in the future, the Final Regulation is consistent with FINRA's current approach. Thus, the Final Regulation incorporates several principles included in current FINRA and SEC guidance. These principals are incorporated in the form of examples and statements describing the contours of the term "recommendation" for purposes of the definition, and include the following:

- Determining whether a recommendation has occurred involves an "objective" rather than a "subjective" inquiry;

- The more individualized a communication is to the recipient, the more likely it will be a recommendation;

- Providing a list of securities deemed, "appropriate" for the recipient will be deemed a recommendation, even if no security from the list is individually recommended;

- Actions and communications can be aggregated to form a recommendation, even if individually, such actions or communications would not constitute a recommendation; and

- Communications initiated by a person or by a computer (e.g., robo-advice) can both give rise to a recommendation.

Because of the breadth of the fiduciary definition, it seems likely that the question of whether a communication involves a "recommendation" will be a critical issue for firms as they evaluate risks and approaches going forward.

In addition to these principals, the Final Regulation includes four specific types of communications which will not be deemed "recommendations" for purposes of the rule. These are discussed, in section D., below.

C. Covered Recipients of Advice and Welfare Plan Issues

Under the Final Regulation**,** a covered recommendation may give rise to fiduciary status if it is presented to any one of the following recipients: a plan, a plan fiduciary, plan participant or beneficiary, IRA, or IRA owner. The term "plan" is defined to include ERISA-covered plans in addition to qualified plans subject to section 4975 of the Code. The term "IRA" is defined to include IRAs, HSAs, Archer Medical Savings Accounts ("MSAs") and Coverdell education Savings Accounts. As a recipient of advice, the term "fiduciary" is expressly defined to include any fiduciary within the meaning of ERISA section 3(21)(A) of ERISA. This broad definition pulls in recommendations made to named fiduciaries, members of the plan's fiduciary committee(s), trustees, professional investment advisers, and managers (whether or not appointed as 3(38) investment managers) as well as managers of ERISA-covered investment funds (including collective investment trusts and insurance company separate accounts).

A significant issue raised by commenters concerned whether it was appropriate to extend fiduciary status to recommendations made to professional fiduciaries such as financial institutions and investment advisers who may lack discretion to act on behalf of the plan or IRA. DOL addressed this issue by providing a conditional exclusion for recommendations provided to certain investment professionals. That exclusion is described in more detail below in section IV.B.1.

Under the 2015 Proposed Regulation, commenters were concerned that a recommendation of an insurance contract to provide benefits under a fully or partially insured welfare plan could have qualified as a fiduciary recommendation. This is because the 2015 Proposed Regulation included within fiduciary status any recommendation with respect to "securities or other property" of the plan. DOL resolved this issue in two ways. First, DOL has revised the operative language of the definition piece to cover advice with respect to the advisability of purchasing (etc.) "securities or other *investment* property." Moreover, DOL added a new definition that makes clear that health, disability, or term life insurance policies and other property *that does not contain an investment component* would not give rise to fiduciary status. While this language is not a wholesale carve-out for welfare plans, this language should give relief to brokers and agents who market, and earn commissions in connection with many of the insurance contracts customarily purchased by fully or partially insured group welfare plans.

In addition, although many commenters argued that HSAs should be carved out of the rule for various reasons, DOL determined that investment advice provided in connection with an HSA should retain the potential to yield fiduciary status. As a result, HSAs, including MSAs and Coverdale Education Savings Accounts remain covered by the Final Regulation. We note that although recommendations of investments to HSAs could create fiduciary status under DOL's rule, that DOL's refined threshold test refers to recommendations with respect to "securities or other *investment* property" suggests that a recommendation of an HSA product itself would not be a fiduciary activity, provided no recommendations with respect to the investment of HSA assets are made.

D. Exclusions from Fiduciary Status

The 2015 Proposed Regulation contained a number of so-called "carve-outs" from fiduciary status. DOL's use of the term "carve-out" was in itself problematic, and many commenters questioned whether failing to meet the technical terms of one of the carve-outs meant that the activity necessarily would yield fiduciary status. DOL made a very helpful change to the Final Regulation by eliminating the term "carve-out" from the rule. Instead, DOL has restructured the former carve-outs and instead presented them as two separate categories of non-fiduciary activities. The first category is several activities that DOL has determined are not fiduciary in nature because DOL does not view them as "recommendations" within the meaning of the Final Regulation. The second category of non-fiduciary activities includes three activities that will not be considered fiduciary activities, except where the person acknowledges fiduciary status in connection with the activity.

1. Activities Deemed not to Involve a "Recommendation"

Under the Final Regulation, the following activities are not considered "recommendations:"

a. Platform Providers

The 2015 Proposed Regulation contained a carve-out from fiduciary status for "platform providers." While DOL did not significantly change the platform provider exclusion in the Final Regulation, DOL has provided a number of important clarifications concerning the scope of the exclusion in the preamble. This exclusion applies to making available to a plan fiduciary of a plan, without regard to the plan's individualized needs, a platform of investment alternatives into which participants and beneficiaries may direct their accounts, provided a disclaimer is provided making clear that the person is not providing impartial advice or acting as a fiduciary.

First, contrary to requests from many commenters, DOL has made clear that it did not intend to extend the platform provider exception to IRAs because, unlike ERISA plans, they generally have no independent fiduciary to represent them. As a result, DOL has made clear that the exclusion applies only to platforms offered to ERISA-covered plans (including ERISA-covered 403(b) plans) and qualified plans subject to section 4975 of the Code, but not IRAs or non-ERISA HSAs. Moreover, the platform exception would not apply to the offering of a platform to individual participants and beneficiaries of an ERISA plan, such as in the context of marketing brokerage window products to 401(k) plan participants.

The exclusion retains a condition that the platform provider must make the platform available "without regard to the individualized needs of the plan or its participants." In helpful preamble discussion, DOL made clear that providers can offer some variation among the platforms presented to potential plan customers without running afoul of the requirement to avoid individualizing the platform to a particular plan. For example, DOL clarified that offering platforms that vary based on market segments or industries would be permitted, as well as offering different platforms for small, medium, and large plans. Finally, DOL received a number of requests to further specify what would constitute a "platform," including whether a variable annuity contract could itself qualify as a platform. On this issue, while DOL largely sidestepped further defining the term "platform," it did make clear that in developing the final platform exclusion, it did not intend to limit the types of investment alternatives available, exclude lifetime income products, mandate any specific number of investment alternatives, or exclude platforms consisting solely of proprietary products. DOL cautioned that any specific recommendation of an underlying investment alternative on a platform would continue to be fiduciary advice, so those that communicate sample platforms to plan sponsors may need to exercise care in presenting platforms to their customers.

b. Selection and Monitoring Assistance

Like the 2015 Proposed Regulation, the Final Regulation retains an exclusion for selection and monitoring assistance provided in connection with offering a platform, but it has been revised in several significant ways. First, consistent with the platform exclusion, DOL made clear that the exclusion applies only to ERISA-covered plans (including ERISA-covered 403(b) plans) and qualified plans subject to section 4975 of the Code, but not IRAs or non-ERISA HSAs. The exception still covers identifying investment alternatives that meet objective criteria specified by the plan fiduciary (i.e., expense ratios, type of asset, credit qualify). However, DOL has added a new condition requiring that the person who identifies investment alternatives must disclose any financial interest the person has in any of the identified options and the precise nature of that interest.

Second, the exception has been expanded to explicitly cover RFP responses. The exception now explicitly covers responses to RFPs and RFIs (or similar solicitations) that involve identifying investment alternatives or sample lineups based only on the size of the plan or its current investment alternatives (or both), provided the response is written and discloses any financial interest that the person has in any of the investment alternatives. This exception will be very helpful in providing sample lineups and alternatives for a fund mapping transactions, provided the required disclosures are provided.

c. General Communications

The Final Regulation now contains guidance clarifying DOL's view that certain generalized communications about investments do not qualify as "recommendations" within the meaning of the Final Regulation. Specifically, the Final Regulation makes clear that making available "general communications that a reasonable person would not view as an investment recommendation" such as newsletters, commentary in public broadcast talk shows, remarks in widely attended conferences, research reports prepared for general circulation, general market data, price quotes, performance reports, or prospectuses. To explain this exclusion, DOL stated that the Final Regulation was not intended to regulate the media or the entertainment industry and made clear that in developing this exception, DOL relied on FINRA guidance addressing similar issues under the broker suitability rules. Nonetheless, DOL included a potentially problematic caution, stating that any labels placed on the communication will not determine whether the communication would constitute a fiduciary "recommendation." DOL made clear that the requirement that a reasonable person would not view the materials as a recommendation must be met in each case, regardless of any labels placed on the communication. DOL advised that there could be circumstances where the communication "clearly" meets the requirements to be a fiduciary "recommendation" regardless of any labels suggesting otherwise.

d. Investment Education

As in the 2015 Proposed Regulation, DOL attempted to exclude the provision of investment education ("Investment Education") from the definition of fiduciary advice. The Final Regulation would supersede and replace the commonly used Interpretive Bulletin 96-1, 29 CFR 2509.96-1 ("IB 96-1"). IB 96-1 generally permits the furnishing of (i) plan information, (ii) general financial, investment and retirement information, (iii) asset allocation models, and (iv) interactive investment material by a plan sponsor to its participants (but has been widely understood to apply more broadly to other persons, an understanding that was confirmed in the Final Regulation). Notably, in a departure from IB 96-1, the 2015 Proposed Regulation precluded investment allocation models, used for "education" purposes, from referring to a specific investment product available under the plan or IRA.

For the most part, the Final Regulation adopted the 2015 Proposed Regulation's provisions on Investment Education. DOL still considers the furnishing of information or materials related to the four categories of Investment Education delineated in IB 96-1 as falling short of a "recommendation," provided the conditions of the Final Regulation are satisfied. This is true regardless of (i) who furnished the information or materials, (ii) the frequency with which the information is provided, (iii) the form in which the information is provided, or (iv) whether an individual category of information is provided alone or with other categories of information. DOL also continues to make clear that the distinction between non-fiduciary education and fiduciary advice applies equally to information or materials provided to plan fiduciaries, plan participants, and IRA owners.

However, the Final Regulation establishes different rules for providing education in the plan and IRA markets. Specifically, under the Final Regulation, an asset allocation model or interactive investment material may not identify any specific product or investment alternative available under an IRA but may identify a designated investment alternative (a "DIA"), as that term is defined in the participant disclosure regulation, offered under a participant directed plan that is subject to oversight by a plan fiduciary that is independent from the person who developed or marketed the investment alternative and the model. When identifying specific DIAs, the model or interactive materials must also identify any other DIAs offered under the plan that have similar risk and return characteristics and must include a statement indicating that those other DIAs have similar risk and return characteristics and identifying where a plan participant can obtain additional information regarding those other DIAs. DOL's stated rationale for this disparate treatment is that IRAs lack an independent plan fiduciary to review and prudently narrow the universe of possible options and therefore, identifying a specific investment product to an IRA owner would rise to the level of a "recommendation."

The preamble to the Final Regulation contained several helpful clarifying pieces of guidance regarding Investment Education. Importantly, DOL stated its view that an employer or plan sponsor would generally not become an investment advice fiduciary merely because the employer or plan sponsor engaged a service provider to provide investment advice or because a service provider engaged to provide Investment Education crossed the line and provided investment advice in a particular case. Additionally, DOL stated that it did not believe that an employer would be receiving a fee or compensation under the rule merely because the plan is structured so the employer does not pay plan expenses that are paid out of an ERISA budget account funded with revenue sharing generated by investments under the plan. Finally, DOL expressly confirmed that merely providing information to IRA and plan investors about features, terms, fees and expenses, and other characteristics of investment products available to the IRA or plan investor falls within the "plan information" category of Investment Education under the Final Regulation.

2. Other Non-Fiduciary Activities

Under the Final Regulation, the following activities are not considered fiduciary activities unless the person acknowledges fiduciary status in connection with the activity.

a. Transactions with Independent Plan Fiduciaries

In response to comments that the thresholds for the seller's or counterparty carve-out set forth in the 2015 Proposed Regulation were impractical, DOL replaced the carve-out with an exception for transactions with independent fiduciaries with financial expertise. The exception includes the provision of any advice to a fiduciary of a plan or an IRA or a "plan asset" entity within the meaning of section 3(42) of ERISA who is independent of the adviser with respect to an arm's length sale, purchase, loan, exchange, or other transaction related to the investment of securities or other investment property. An independent fiduciary is either a U.S. bank or insurance company, a U.S. registered adviser or broker-dealer, or a fiduciary that holds, or has under management or control, total assets of at least $50 million. The $50 million threshold includes both plan and non-plan assets. The conditions of the exception, which can be fulfilled by written representations, are:

- The person knows or reasonably believes that the independent fiduciary is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies;

- The person fairly informs the independent fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction, and fairly informs the independent fiduciary of the existence and nature of the person's financial interests;

- The person knows or reasonably believes that the independent fiduciary is a fiduciary under ERISA, the Code, or both, with respect to the transaction, and is responsible for exercising independent judgment in evaluating the transaction; and

- The person does not receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner for the provision of investment advice (as opposed to other services in connection with the transaction).

This exception could alleviate concerns related to "wholesaling" activities or "daisy chain" relationships if product manufacturers and other financial service providers receive assurances or representations that the financial intermediaries with direct relationships to plans and participants qualify as independent fiduciaries. The wholesale service providers may also need to disclose their financial interests and disclaim any intent to provide impartial investment advice.

One lingering uncertainty is whether the exception extends to sales of services, including asset management services. Despite numerous requests for clarification on this point, DOL replaced the words "bilateral contract" with "exchange or other transaction related to the investment of securities or other investment property." Further, while the exception has been extended to smaller plans and IRAs, there remains an issue if those investors are not represented by an independent fiduciary. For example, hedge and private equity fund managers or placement agents who engage with plans or IRAs that qualify as "accredited investors" under the securities laws but are not represented by an independent fiduciary can, depending upon the context, face exposure with respect to the communications and materials they provide to smaller plans and IRAs. While alternative investments can be offered under the BIC Exemption, the conditions of the BIC Exemption are impractical in the private investment fund context. Representations in subscription documents and disclaimers in offering materials should be reviewed and if necessary, revised. Moreover, in our experience, most IRAs, even sizable accounts, are not represented by an independent investment professional such that this exclusion could be used.

b. Swap Transactions

The Final Regulation retains an exception from fiduciary investment advice in respect of communications in connection with swap transactions subject to Dodd-Frank's Business Conduct Standards. Specifically, the exception applies to communications by a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, or a swap clearing firm ("Swap Dealer/Clearing Firm") to an employee benefit plan in connection with a swap or security-based swap, as defined in the Commodity Exchange Act and Securities Exchange Act, respectively, if certain conditions are met. The conditions are:

- the plan is represented by an ERISA fiduciary independent of the Swap Dealer/Clearing Firm;

- in the case of a swap dealer or security-based swap dealer, it is not acting as an advisor (under Dodd-Frank) to the plan in connection with the transaction;

- the Swap Dealer/Clearing Firm does not receive a fee or other compensation directly from the plan or plan fiduciary for the provision of investment advice (as opposed to other services) in connection with the transaction; and

- in advance of providing any recommendations with respect to the transaction, the Swap Dealer/Clearing Firm obtains a written representation from the independent fiduciary that the independent fiduciary understands that the Swap Dealer/Clearing Firm is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity, in connection with the transaction, and that the independent fiduciary is exercising independent judgment in evaluating the recommendation.

We note that the third prong is newly-added.

DOL clarified a number of aspects of this exception. First, the exception applies to both cleared and non-cleared swaps. Second, clearing firms (i.e., members of a clearing agency, but not the clearing agency or derivatives clearing organization itself) are expressly included to account for certain services they may provide in swap transactions. Third, the exception does not change the conclusions set forth in DOL Advisory Opinion 2013-01A (on the basis that such Advisory Opinion did not involve interpretations of section 3(21)(A)(ii) of ERISA). Fourth, IRAs are not covered under this exception. Fifth, DOL was not inclined to broaden this exception to cover other classes of investments such as alternatives or futures that are not subject to the Business Conduct Standards. DOL explains that transactions with IRAs or that involve other classes of investments could use the "independent fiduciary with plan expertise" exception.

3. Employees of the Plan Sponsor

DOL has retained the fiduciary exclusion for employees of the plan sponsor, but the exception has been refined significantly by DOL to prevent potential abuses. The exclusion now covers two distinct activities by employees of the sponsor (or of an affiliate). First, the exclusion applies to employees who provide advice to the plan sponsor or an employee, other than in the recipient's capacity as a participant in the plan, provided the employee receives no fee or other compensation in connection with the advice other than the employee's normal compensation. This rule is intended to cover employees working in a company's human resources or financial departments who provide recommendations directly to the plan's named fiduciaries (i.e., the plan's investment committee), or to the CFO who then communicates the recommendations to the plan's fiduciary decision-makers.

In addition, the exception covers employees of the sponsor (or an affiliate) who communicate information about the plan and distribution options to participants, subject to certain conditions designed to prevent the exclusion from covering employees who are in fact employed to provide investment recommendation to plan participants. This exclusion requires that the person who communicates with participants must not have specific job responsibilities for the provision of investment advice, the person must not be registered or licensed under federal or state securities or insurance laws, and the advice must not require such registration or licensing. DOL explained this provision as covering a situation where an employee of the plan sponsor inadvertently gives investment advice to plan participants. It is also designed to block a financial institution from sharing its employees with the plan sponsor under a "dual employment" structure, whereby the financial institution attempts to evade the rule by having its employees or registered representatives provide fiduciary advice under a ruse of employment by the plan sponsor. Importantly, the employee must not receive any direct or indirect compensation in connection with the advice beyond the employee's normal compensation from the employer.

IV. Temporary Definition of Fiduciary Rule – Paragraph (j)

The new definition of fiduciary investment advice legally applies to conduct beginning on April 10, 2017, one year from the date of publication. However, because DOL views this as a major rule, and likely because DOL wants to avoid any challenge under the Congressional Review Act, the Final Regulation will replace DOL's 1975 definition of fiduciary investment advice in the formal Code of Federal Regulations within 60 days of publication. Given that the Code of Federal Regulations will be amended prior to April of 2017 with the Final Regulation, DOL has added a special new paragraph, paragraph (j), to make clear to the regulated community the DOL's 1975 definition of fiduciary regulation still applies in the interim. New paragraph (j) is identical to the five-part definition of fiduciary investment advice that has applied since 1975, and should not cause any persons who avoid fiduciary status under the current regulation to become a fiduciary before April 10, 2017.