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BENEFITS BRIEF

January 17, 2017 www.groom.com

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DOL Releases Second Set of FAQ Guidance on Fiduciary Rule

On January 13, 2017, the Department of Labor ("DOL") issued a second set of Frequently Asked Questions ("FAQs") providing guidance on DOL's rule re-defining who is a fiduciary as a result of providing investment advice for a fee (the "Fiduciary Rule"). Although the first set of FAQs (released in October 2016) focused on the prohibited transaction exemptions accompanying the Fiduciary Rule, this second set of FAQs addresses interpretive questions about the Fiduciary Rule itself, including several of the important exceptions to fiduciary status included in the rule. The FAQs were accompanied by a guide (the "Guide") for consumers to better understand their rights and the role of financial advisers.

The FAQs include a number of helpful clarifications in response to issues raised by Groom on behalf of our clients, and they are important because they address major areas of ambiguity relevant to retirement plan service providers, including recordkeepers and insurers. Specifically, DOL provided clarity regarding –

- what constitutes a fiduciary recommendation, particularly with respect to advice related to certain distributions (section I below);
- the safe harbor exception for the provision of educational information, including statements made to participants regarding the benefits of plan participation (section II below);
- when a statement is a general communication and/or falls within the "hire me" exception (section III below);
- how to determine whether the "independent fiduciary exception" applies and the types of representations on which a service provider can rely (section IV below); and
- the contours of the "platform exception" and how a service provider may provide investment selection and monitoring information to plan fiduciaries (section V below).

Although the incoming Trump Administration will likely delay the applicability date of the Fiduciary Rule (and possibly make changes), they have not yet made an official announcement. Thus, most financial institutions appear to be continuing their implementation efforts.

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I. Covered Investment Recommendations

FAQ 1 clarifies when a communication will be viewed as a "recommendation." Under the FAQ, a recommendation is a "call to action" or a communication that a reasonable person would view as a recommendation.[1] In contrast, DOL noted that describing product features and attributes to a potential customer without a "specific recommendation" would not be investment advice. This guidance is consistent with the language of the Fiduciary Rule and the preamble, but the clarification may be particularly helpful to financial institutions that want to permit employees to explain retirement products to potential retail customers without acting as investment advice fiduciaries.

FAQs 2 and 3 address "internal wholesaling" – an important issue for entities that communicate information about their investment products and ideas to employees who may act as a fiduciary to plans in recommending those products. Because the Fiduciary Rule covers recommendations to a fiduciary, many in the industry were concerned about such internal communications. To address this concern, DOL noted that the Fiduciary Rule excepts certain communications between an employer and its employees and from one employee to another. Importantly, the FAQs do not address communications to employees of *affiliated* companies, though we believe DOL did not intend for internal wholesaling communications, including among affiliates, to be covered by the Fiduciary Rule.

Because "advice" under the Fiduciary Rule specifically includes a recommendation with respect to plan distributions, a variety of questions have arisen as to communications about mandatory distributions. In FAQ 4, DOL concluded that an explanation of the fact that a participant will receive a minimum required distribution is not investment advice, but recommending a specific investment option for assets that will be distributed in the future is investment advice. It is important to note that the FAQ does not compel the conclusion that advice provided to a person who has already received a distribution should be covered by the Fiduciary Rule. FAQ 5 addresses forced distributions from a plan and provides that communications "required by the Code and ERISA" about such required distributions would not involve a recommendation. Although the answer is helpful, communications beyond those required under applicable law are not directly addressed by the FAQ, leaving some remaining uncertainty.

Many financial services firms are considering how to document instances in which a client may take action that is against an adviser's advice or where the adviser has not provided any advice. FAQ 6 clarifies that an adviser or financial institution is not responsible for client actions that are inconsistent with the advice provided.

In FAQ 7, DOL reiterated the principles outlined in Advisory Opinion 97-15A (the "Frost Opinion"), noting that a financial institution which charges a fee to a plan to provide ongoing advice may receive and retain revenue sharing from the plan's investments as long as the institution offsets its fees against such revenue sharing on a dollar-for-dollar basis. Some financial institutions had requested that DOL address whether an offset of the type described in the Frost Opinion could be used by a fiduciary intending to operate as a "Level Fee Fiduciary" under the Best Interest Contract Exemption. However, FAQ 7 does not address that question, leaving many providers with a great degree of uncertainty about the availability of the exemption.

[1] Question 13 of the Guide describes a "recommendation" as a communication that most people think suggests a course of action.

II. Investment Education

DOL published eight FAQs exploring distinctions between nonfiduciary investment education and fiduciary investment advice. For the most part, these FAQs reaffirmed what was already suspected or understood about the education exception. Importantly, DOL confirmed that a factual explanation of the guaranteed life income feature of a group annuity product would be nonfiduciary investment education. Regarding interactive investment materials, DOL appeared to confirm that the investment education exception covers an interactive planning tool that uses participant-provided data solely to estimate the participant's post-retirement income needs without also assessing the impact of various asset allocations on meeting those needs (FAQ 11). Moreover, DOL confirmed that charging a fee to the plan for the provision of participant investment education would not, by itself, convert an education provider into an advice fiduciary (FAQ 12). Notwithstanding his role as a fiduciary, an adviser's provision of rollover education to an existing client would not be considered fiduciary advice absent a specific rollover recommendation (FAQ 14). Nonetheless, DOL also cautioned that referring a participant to an unaffiliated fiduciary investment advice provider, and receiving a referral fee in exchange, would, in and of itself, be fiduciary investment advice (FAQ 13).

DOL dedicated a single question (FAQ 15) to one of the most popular provisions of the education safe harbor – the provision sanctioning the population of asset allocation models. Specifically, DOL confirmed that, because the funds offered through a plan's brokerage window are not "designated investment alternatives," they need not be referenced in the presentation of the asset allocation model as funds with "similar risk and return attributes." Only designated investment alternatives must be identified.

Finally, DOL appears to have carefully worded two FAQs in a way that may limit the scope of the education exception. In FAQ 9, DOL clarified that it would be mere "investment education" for a *call center representative* to *inform* a participant that he is not contributing enough to fully take advantage of his plan's employer match and to calculate the amount of the contribution percentage that would be sufficient to obtain the full match. However, in response to the next question (FAQ 10), DOL explained that an *employer* could actually *recommend* that a participant increase his contribution to a specified percentage to take full advantage of the plan's match without becoming an advice fiduciary. DOL's approach to these two questions suggests that a "recommendation" to an individual participant to increase contributions so as to maximize the employer match could be fiduciary advice if the recommending party receives a fee. It further suggests that very similar unsolicited "information" may be provided to a participant regarding the percentage contribution necessary to maximize the employer match, regardless of whether there is a related fee, as long as no explicit "recommendation" is made.

III. General Communications

The Fiduciary Rule provides that certain communications at "widely attended speeches or conferences" will not be considered investment advice, provided that a reasonable person would not view the statements as a recommendation. In FAQ 16, DOL provided clarification as to what would constitute a widely attended event. In particular, DOL stated that a wholesaler would not be deemed to have provided investment advice if the wholesaler touted the benefits of a life insurance product and recordkeeping services to "many" (but presumably not all) 401(k) plans at a conference with 300 attendees open to retirement professionals (*i.e.*, consultants, other service providers, plan sponsors, and plan fiduciaries) but not individual retirement investors. In contrast, DOL expressed the view in FAQ 17 that free meal seminars offered for the purpose of marketing services or investments are *not* "widely attended speeches or conferences." DOL stated that a reasonable person attending a free meal seminar could view statements made to all attendees as an investment recommendation to each attendee, thereby negating the availability of the exception for general communications. DOL notes, however, that whether any particular

communication delivered at a free meal seminar would rise to the level of an investment recommendation ultimately turns on the attendant facts and circumstances.[2]

FAQ 18 reiterates DOL's position that the recommendation of a recordkeeping services provider does not, in and of itself, give rise to a fiduciary recommendation where no accompanying recommendation is made as to the appropriateness for the plan of the investment alternatives available through the recordkeeper's investment platform. The discussion accompanying FAQ 18 is generally consistent with the preamble discussion accompanying the Fiduciary Rule's "platform provider" exception.

FAQ 19 describes a financial institution that makes four different of rollover service offerings available: (a) self-directed brokerage, (b) an investment advice program, (c) a discretionary managed account program, and (d) a robo-advice program. DOL indicates that a mere description of the available offerings, even when coupled with a statement by a company representative that the financial institution itself is an industry leader featuring high-quality, low-cost services, is non-fiduciary in nature. The institution's self-promoting statements would be excepted under the "hire me" principle. If, however, the financial institution were to recommend a particular account type or service from among the four that it makes available, DOL would view that recommendation as fiduciary because it would involve a recommendation on the selection of an investment arrangement type (*e.g.,* brokerage versus advisory).

IV. Independent Fiduciary Exception

Nearly a third of the new FAQs address the application of the Fiduciary Rule's exception from the definition of investment advice for certain recommendations provided to an independent fiduciary of a plan or IRA in connection with an arm's-length transaction related to the investment of securities or other investment property (the "Independent Fiduciary Exception"). In order for the Independent Fiduciary Exception to apply, the person making the recommendation must, among other requirements, know or reasonably believe that the independent fiduciary is either a regulated financial services provider *(i.e.*, a bank, insurance company, registered investment adviser or registered broker-dealer) or a plan fiduciary, such as an investment officer or committee, that has at least $50 million in total assets under its management or control.

DOL confirmed in FAQ 26 that an IRA owner with more than $50 million in personal and IRA assets cannot act as an independent fiduciary with respect to his or her own IRA for purposes of the Independent Fiduciary Exception. In reaching this conclusion, DOL noted that the definition of "plan fiduciary" under the Fiduciary Rule expressly provides that an IRA owner is not a plan fiduciary with respect to his or her own IRA. This suggests that an independent broker dealer or representative of a registered investment adviser would likewise be precluded from acting as an independent fiduciary with respect to his or her own IRA for purposes of this exception.

FAQ 25, however, makes clear that the Independent Fiduciary Exception is available for a transaction involving an IRA if the IRA owner has retained an outside registered investment adviser to exercise independent judgment in evaluating the transaction. Although the definition of "plan fiduciary" under the Fiduciary Rule also excludes plan participants, DOL confirmed in FAQ 27 that a plan participant who serves as a member of the plan's investment

[2] DOL's Guide includes a consumer warning about free meal events. In Question 4, DOL contrasts general investment or financial education that consumers might hear from their favorite financial talk show hosts, which would be non-fiduciary in nature, with free meal retirement seminars. DOL indicates that statements made at such seminar events may start out as non-fiduciary general investment or financial education but could evolve into an individualized fiduciary investment recommendation to attendees.

committee can act as an independent fiduciary for the plan for purposes of the exception if his or her job responsibilities include managing at least $50 million in assets and the individual receives advice as a fiduciary of the plan and not merely with respect to his or her own individual account. It also appears from FAQ 27 that a plan committee would not be precluded from acting as an independent fiduciary merely because its members include plan participants.

With regard to the $50 million in assets requirement, FAQ 20 clarified that the Independent Fiduciary Exception allows both plan and non-plan assets (including corporate assets under the control of a corporate officer who is also a fiduciary), as well as assets of multiple plans, to be taken into account. Despite this guidance, there remain several open questions regarding the application of the $50 million in assets requirement. For example, it is unclear whether, for purposes of determining whether a plan committee has at least $50 million in assets under management, you could count assets over which discretionary authority has been delegated to an outside investment manager. In addition, DOL has not addressed whether a plan officer's personal investment portfolio may be counted for purposes of meeting the $50 million in assets requirement, although the answer to FAQ 25 (discussed above) could be read to suggest that only assets managed in a professional capacity can be taken into account.

The uncertainty surrounding the $50 million in assets under management requirement suggests the importance of obtaining representations from counterparties that are plan committees or plan officers. DOL confirmed in FAQ 21 that a financial institution's "reasonable belief" may be based upon representations from the independent plan fiduciary, so long as those representations are in place when the transaction in question occurs and cover the period during which investment advice is provided. DOL helpfully noted that service providers can rely on contractual representations from independent plan fiduciaries that require the *plan fiduciaries* to notify the service provider if their assets under management drop below $50 million. Thus, once a service provider establishes "reasonable belief," the service provider can effectively shift the ongoing monitoring burden to the independent fiduciary. In FAQ 25, however, DOL determined that the fact registered investment adviser is a fiduciary under the Internal Revenue Code with respect an IRA is not sufficient to satisfy the requirement that a counterparty knows or reasonably believes that the adviser is responsible for exercising independent judgment in evaluating the transaction for the IRA. This answer underscores the importance in certain circumstances of obtaining representations that comprehensively address the requirements under the Independent Fiduciary Exception.

The Independent Fiduciary Exception is only available for recommendations directed to an independent plan fiduciary. In FAQ 24, DOL addressed the application of the exception in circumstances where additional plan fiduciaries are present when a recommendation is made. DOL clarified that a financial institution may rely on the Independent Fiduciary Exception when making sales presentations to a plan committee that is accompanied by a registered investment adviser, provided that the financial institution knows or reasonably believes that the registered investment adviser is acting as a plan fiduciary responsible for making fiduciary recommendations to the plan committee with respect to the transaction at issue and that the other conditions of the Independent Fiduciary Exception are satisfied. DOL went on, however, to note that ongoing communications between the financial institution and plan committee would not fall within the Independent Fiduciary Exception unless the registered investment adviser participated in the ongoing communication with the service provider and it was clear that the registered investment adviser had continued responsibility for evaluating the transaction subject to the subsequent communication. This narrow interpretation suggests that each individual communication with a plan fiduciary will need to be scrutinized to determine whether the Independent Fiduciary Exception is available. The result of DOL's interpretation is that it will not be enough for service providers to know that a plan committee will rely upon the advice of a registered investment adviser, but it will also be required to work through the registered investment adviser when communicating with the plan committee.

The Fiduciary Rule does not define what it means to be "independent" for purposes of the Independent Fiduciary Exception, and there are many different definitions in other DOL guidance, including a definition in the Best Interest Contract Exemption. FAQ 28 clarifies that a broker that receives indirect compensation in connection with a plan's investment in selected mutual funds on a recordkeeper's platform will be considered independent of the recordkeeper if it complies with the conditions of the Best Interest Contract Exemption. There was some concern that DOL could take the position independence could be compromised where, for example, an adviser receives a significant portion of its revenue from a single wholesaler. DOL's answer to FAQ 28 is helpful in allaying that potential concern.

FAQ 29 provides further relief for wholesalers by clarifying that the requirement under the Independent Fiduciary Exception that the party making the recommendation not receive direct compensation for the provision of investment advice is not violated when a financial institution receives a fee for providing model portfolio (including asset allocation) services to advisers so long as the fee is not paid directly or indirectly by the plan, plan participant, or IRA.

V. Marketing Platforms, Selection and Monitoring Assistance

Although the Fiduciary Rule makes clear that you can offer a "platform" without providing fiduciary investment advice, the Fiduciary Rule left many questions unanswered about what qualifies as a platform and how platforms can be promoted without crossing the fiduciary line. In FAQs 30 through 34, DOL provides guidance clarifying what qualifies as a platform and how platforms can be promoted.

FAQs 30 and 31 relate to what qualifies as a platform. In FAQ 30, DOL clarifies that a group annuity contract can be a platform as described under the platform exclusion. Further, DOL confirms that, under the platform exception, the inclusion of proprietary products, including a single proprietary product representing a single asset class (*e.g.*, capital preservation), does not result in a loss of the exclusion. In reaching this conclusion, DOL assumed the group annuity contract or other platform otherwise offers a range of investment alternatives. FAQs 30 and 31 are helpful in that they confirm that a financial institution has considerable flexibility in creating a platform made available or marketed to an ERISA-covered plan without making a recommendation.

FAQs 32 through 34 provide narrow but helpful interpretations on how platforms can be marketed. In FAQ 32, DOL recognized that a service provider, such as a recordkeeper, may rely on the platform provider exception when marketing or making available a third party's platform of investment alternatives. In FAQ 33, DOL made clear that a recordkeeper would not be providing a recommendation if, upon request of the plan sponsor and having received the plan's investment policy statement ("IPS") describing various investment criteria (*e.g.,* asset classes and risk/return characteristics), the recordkeeper provides a list of *all* the investment alternatives available on its platform that meet the requirements of the IPS. DOL cautioned, however, that if the recordkeeper, in responding to the request, exercised discretion in providing a narrow, selective list of investment alternatives and a reasonable person would view its response as a recommendation regarding investments from the selective list, it could be considered to have provided a recommendation. Taken more generally, DOL's response in FAQ 33 could be interpreted as supporting the conclusion that a recordkeeper can provide a list of investments that fit any set of objective characteristics specified in a request from a plan fiduciary without becoming an investment advice fiduciary.

FAQ 34 relates to automated cash sweep services offered by financial institutions that automatically place uninvested client account funds into short-term investment vehicles. DOL advised that a communication merely offering the cash sweep service and describing its features would not constitute a recommendation, but a communication recommending a particular cash sweep service may constitute a recommendation. DOL further advised that the fact

the cash sweep service offers a limited list of short-term investment vehicles "would not by itself" constitute a recommendation that the investment vehicles were appropriate for a plan or IRA. Moreover, DOL advised that the investment education exclusion could be available for describing information regarding the short-term investment vehicles, such as "product features, investor rights and obligations, fee and expense information, applicable trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses." Although DOL focused its answer on sweep vehicles, DOL's reasoning in FAQ 34 could apply to a financial institution merely making available other proprietary products and services and providing information about such products and services to plan fiduciaries and IRA owners.

Finally, FAQ 35 provides that the platform provider exclusion is available for a platform that includes recordkeeping and other optional services, including connectivity with one or more investment advisory firms that a plan sponsor or plan participants may use to assist in selecting investment alternatives. DOL clarified that merely offering or making the investment advisory firm's services available as an elective option would not necessarily constitute a recommendation, but the context in which the investment advisory firm's services are presented may give rise to a recommendation.