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Employee Benefits and Compensation

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Department of Labor Issues Final Fiduciary Rules

On April 6, 2016, the U.S. Department of Labor (DOL) issued its long-awaited final conflict of interest rule defining the term "fiduciary" for retirement investment advice purposes. The final regulations and accompanying exemptions are contained in approximately one thousand pages of guidance. While subjecting a myriad of new financial market participants to strict fiduciary requirements under the Employee Retirement Income Security Act of 1974 (ERISA), the final rule also provides greater latitude than was initially predicted in what constitutes "investment advice." In connection with the final rule, the DOL also released related exemptions from certain transactions prohibited under ERISA.

The DOL first proposed changes to the fiduciary rule in 2010 but withdrew the proposal in 2011 in the face of strong opposition from members of both parties of Congress and the financial services industry. The DOL subsequently reproposed the fiduciary rule last April. Following the release of the reproposed rule, the DOL conducted two comment periods, which generated thousands of letters, and held four days of hearings in August 2015.

The final rule broadly defines a fiduciary as any individual receiving a fee or other compensation (whether direct or indirect) for providing investment advice to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner. This is a significant departure from existing rules, which created large loopholes that allowed broker-dealers to avoid adherence to ERISA's fiduciary standard and investment recommendations. Although the final rule does not materially alter the structure and scope of the April 2015 reproposal, it does make a number of modifications, including the following:

- clarifies the types of information and activities that constitute nonfiduciary investment education
- removes appraisals from the rule, reserving that issue for a separate future rulemaking
- eliminates the requirement that a formal contract be required for participants in ERISA-covered plans
- provides an expanded seller's exception whereby recommendations to plan sponsors managing more than $50 million in assets (versus $100 million in the re-proposed rule) will not be considered "investment advice" if certain conditions are met
- expands the Best Interest Contract Exemption (see below) to cover all asset types
- reduces the disclosure requirements and eliminates the requirement to show one-, five-, and ten-year projections

- significantly reduces the disclosure requirements with respect to situations involving level fee arrangements
- with respect to existing arrangements, permits the use of opt out contracts instead of requiring that parties execute a new contract
- extends the first phase of implementation from eight months to one year after publication of the final rule

In conjunction with the final rule, the DOL also issued new prohibited transaction exemptions. The Best Interest Contract Exemption allows firms to continue using certain compensation arrangements that might otherwise be ERISA-prohibited transactions as long as they, among other things, commit to putting their client's best interest first, adopt anticonflict of interest policies and procedures, and disclose any conflicts of interest that could affect their best judgment as a fiduciary rendering advice. The Principal Transactions Exemption allows advisers to recommend investments, such as certain debt securities, and sell them to the customer directly from the adviser's own inventory or purchase investment property from the customer as long as the adviser adheres to the exemption's consumer-protective conditions.

Although the DOL created a grandfathering rule for certain existing arrangements, the final rule will become effective in April 2017; however, compliance with the Best Interest Contract Exemption and the Principal Transactions Exemption will be phased in from April 2017 to January 1, 2018.

Robinson+Cole's Employee Benefits and Compensation Group is available to assist clients in reviewing their service agreements and in satisfying the requirements under the final fiduciary rule. If you have any questions about the applicability dates or the final rule, or exemptions in general, please contact any of the following attorneys:

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