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Final DOL Fiduciary Rule – Q&As for Employers and Plan Sponsors on Investment Education

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On April 6, 2016, the U.S. Department of Labor (Department) issued its final rule defining who is a fiduciary of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) as a result of giving investment advice to a plan or its participants and beneficiaries. The final rule (available **here**) offers a definition of fiduciary investment advice that expands the group of people who would be considered fiduciaries.

In our April 19, 2016 client alert (available **here**), we provided a summary of the final rule. In this client alert, we address many of the questions employers/plan sponsors have about the new rule and whether they or their employees may be deemed to be investment advice fiduciaries in connection with providing investment information to plan participants and beneficiaries.

As discussed below, employers and plan sponsors should consider reviewing their policies and procedures for providing investment information to make sure they have not crossed the line into providing investment advice, thus becoming "investment advice" fiduciaries under ERISA.

Q1. What is investment advice?

A1. The rule emphasizes that investment advice must be in the form of a recommendation. Investment advice is a recommendation: (i) 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 they are rolled over, transferred, or distributed from a plan; or (ii) as to the management of securities or other investment property, including 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, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made.

Q2. What are the categories of investment education?

A2. Investment education includes: (i) information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option or a particular plan participant or beneficiary, describe the terms or operation of the plan, or inform plan fiduciaries, or participants or beneficiaries about various features of the plan; (ii) general financial, investment and retirement information that does not address specific investment products, specific plan investment alternatives or distribution options available to the plan or specific investment alternatives or services outside the plan; (iii) information and materials that provide a plan fiduciary, or plan participant or beneficiary with models of asset allocation portfolios of hypothetical individuals with different time horizons (provided certain conditions are met); and (iv) interactive investment materials, *i.e.*, questionnaires, worksheets, software, and similar materials that generally provide a plan fiduciary, or plan participant or beneficiary the means to, among other things, estimate and evaluate future retirement income needs and assess the impact of different asset allocations on retirement income.

With respect to employee benefit plans and their participants and beneficiaries, asset allocation models and interactive investment materials can identify a specific investment product or specific alternative available under plans if: (i) the alternative is a designated investment alternative under an employee benefit plan; (ii) the alternative is subject to fiduciary oversight by a plan fiduciary independent of the person who developed or markets the investment alternative or distribution option; (iii) the asset allocation models and interactive investment materials identify all the other designated investment alternatives available under the plan that have similar risk and return characteristics, if any; and (iv) the asset allocation models and interactive investment materials are accompanied by a statement that identifies where information on those investment alternatives may be obtained.

Q3. Does investment education constitute investment advice?

A3. The furnishing of certain educational information and materials will not constitute the provision of investment advice, regardless of who provides the information, the frequency with which the information is shared, the form in which it is provided (*e.g.*, on an individual or group basis, in writing or orally, via a call center, or by way of video or computer software), and whether an identified category of information and materials is provided or made available alone or in combination with other categories identified, or the type of plan involved.

Q4. Does investment education apply past retirement?

A4. The provision of certain general information that helps an individual assess and understand retirement income needs past retirement and associated risks (*e.g.*, longevity and inflation risk), or explains general methods for the individual to manage those risks both within and outside the plan, would not result in fiduciary status.

Q5. Do employees of a plan sponsor provide investment advice?

A5. The definition of investment advice excludes advice from employees of an ERISA plan sponsor or an affiliate of such plan sponsor, employees of an employee benefit plan, employees of an employee organization, and employees of a plan fiduciary, as long as they do not receive compensation, direct or indirect, in connection with the advice beyond their normal compensation for work performed for their employer.

Q6. Can a plan sponsor become an investment advice fiduciary by engaging a service provider to provide investment advice?

A6. An employer or other plan sponsor would not be considered to provide investment advice 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. However, whether the service provider renders investment advice or investment education, the final rule does not change the fiduciary obligations that arise in connection with the selection and monitoring of plan service providers.

Q7. How certain can an employer be that educational communications do not constitute investment advice?

A7. In the preamble to the final rule, the Department noted that since only investment advice for a fee or compensation falls within the fiduciary definition, the fact that employers do not generally receive compensation in connection with their educational communications provides employers with a "high level of confidence" that their educational activities would not constitute investment advice under the final rule. The Department also stated that it does not believe that incidental economic advantages that may accrue to the employer by reason of sponsorship of an employee benefit plan would constitute fees or compensation within the meaning of the rule.

Q8. When is the final rule applicable?

A8. The final rule applies April 10, 2017.

Q9. As a plan sponsor, is there anything I should be doing now?

A9. Employers and plan sponsors should consider reviewing their policies and procedures for providing investment information to make sure they have not crossed the line into providing investment advice for a fee, thus becoming ERISA fiduciaries.

The final rule incorporated much of Interpretive Bulletin 96-1 (IB 96-1), including the provision stating that there may be other examples of information, materials and educational services which, if furnished, would not constitute investment advice or recommendations within the meaning of the final rule and that no inference should be drawn regarding materials or information which are not specifically included in the rule.

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