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## DOL Fiduciary Rule Explained

Earlier this spring, the Department of Labor (DOL) issued a much anticipated Final Rule (Final Rule) defining who is a “fiduciary” of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) and updated the conflict of interest rules applicable to such a “fiduciary.” The Final Rule is applicable to a “fiduciary” of a plan (including an Individual Retirement Account (IRA) under the Internal Revenue Code of 1986 (Code)).

### Effective and Applicability Dates

The Final Rule became effective June 7, 2016, however, it is being phased in and is not fully **applicable** until April 10, 2017 (for the revised definition of fiduciary investment advice and new and amended exemptions) and January 1, 2018 (for the “best interest contract” and “principal transactions” exemptions).

This alert summarizes various high points of the Final Rule, however we intend to issue a follow-up alert outlining practical action items for plan sponsors.

### Investment Advice

An individual falls within the Final Rule’s purview if he or she provides “investment advice” for a fee or other compensation (direct or indirect) and (i) represents or acknowledges that they are acting as a fiduciary within the meaning of ERISA or the Code; (ii) provides advice rendered pursuant to a written or verbal agreement, arrangement, or understanding that the advice is based on the particular investment needs of the recipient; or (iii) provides recommendations directed to a specific recipient or recipients regarding the advisability of a particular investment or management decision.

Under the Final Rule, “investment advice” is defined to include:

A **recommendation** as to the advisability of acquiring, holding, disposing of, exchanging, rolling over, transferring, or distributing securities or other investment property of the plan or IRA; or

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A **recommendation** as to the management of securities or other investment property including, among other things, **recommendations** on investments (policies or strategies), portfolio composition, selection of investment account arrangements, selection of persons to provide investment advice or management services, or **recommendations** with respects to rollovers, transfers, or distributions.

### **Definition of “Recommendation”**

A communication is considered a “recommendation” when its content, context, and presentation would reasonably be viewed as a suggestion that the recipient of that communication engage in or refrain from taking a particular course of action. The rule states that the standard is intended to be objective, not subjective. As a practical matter, the more client-specific the communication, the more likely it will be considered a “recommendation.”

The Final Rule sets forth the following examples (not exclusive) of what **would not** constitute a recommendation:

- Marketing or making available to a plan fiduciary a platform of investments without regard to the individualized needs of the plan or its participants;
- Providing selection and monitoring assistance, such as identifying investment alternatives that meet objective criteria specified by the plan fiduciary (provided that the person identifying the investment alternatives discloses in writing whether the person has a financial interest in any of the identified investment alternatives and the precise nature of such interest);
- Providing objective financial data and comparisons with independent benchmarks to the plan fiduciary;
- Furnishing or making available general communications to a plan, plan fiduciary, plan participant, beneficiary, IRA, or IRA owner; and
- Furnishing or making available investment education to a plan, plan fiduciary, plan participant, beneficiary, IRA, or IRA owner.

### **Investment Education Exception**

Under the Final Rule, several items did not change. In general, advice in the nature of investment education is still not considered to be investment advice. Investment education’s four groupings (1. plan information, 2. general financial/investment information, 3. asset allocation models, and 4. interactive investment materials) still exist. Further, the Final Rule makes clear that using asset allocation models and interactive investment materials to identify the specific designated investment alternatives available in a plan can be done without such activity being considered fiduciary investment advice, provided certain additional disclosures and protections are observed.

### **Other Exceptions**

Other exceptions may also apply, including the Employee Advice Exemption, the Best Interest Contract Exemption (BICE), an exception to transactions with independent fiduciaries with financial expertise, an exception for swap and security-based swap transactions, and the Principal Transactions Exemption. In an abridged manner, the two most likely applicable exemptions, the Employee Advice and BICE exemptions, provide as follows:

**Employee Advice:** Investment advice provided by an employee to a plan fiduciary, other employee, or an independent contractor if the advice is provided in connection with the individual's role as an employee, and provided the person receives no direct or indirect fee or other compensation in connection with the advice beyond the employee's normal compensation for that work

**Best Interest Contract Exemption:** Reflects an effort to align an investment advisor's interests with client interests and, in doing so, requires a written contract with certain elements, conflict of interest policies and mandates, and precludes certain other activities

### **Plan Sponsors**

If a plan sponsor designates a service provider to provide investment advice to plan participants, the plan sponsor is engaging in an exercise of fiduciary authority and must act prudently and solely in the interest of plan participants. Furthermore, the plan sponsor has a duty to monitor the service provider.

The Final Rule also states that a plan sponsor's designation of an investment advisor may result in co-fiduciary liability with the investment advisor. If, however, a plan sponsor merely provides education materials and does not receive a fee or other compensation for those communications, the plan sponsor is not acting as a fiduciary.

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