

The DOL's Final Fiduciary Rule Released: Plan Sponsor's Perspective

Wednesday, the Department of Labor (DOL) issued its highly-anticipated final regulation (Final Rule) that, once effective, will make sweeping changes to the fiduciary definition under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code). Investment professionals working with employer-sponsored retirement plans (such as 401(k) plans) and IRAs (including, for example, an individual retirement account or annuity or a health savings account) must evaluate and, if necessary, alter their current practices or risk significant legal exposure.

Background

Nearly a year ago, the DOL released a proposed regulation (Proposed Rule) (for a summary of the Proposed Rule see [Department of Labor Revises "Investment Advice" Definition](#)) that would significantly expand the definition of investment advice for purposes of ERISA and the Code and, as a result, would impose fiduciary status on many service providers not considered fiduciaries under the current regime. At the same time, the DOL proposed new prohibited transaction exemptions and modifications to existing prohibited transaction exemptions to coordinate with the Proposed Rule.

The DOL received more than 3,500 written comments and held four days of public hearings on the Proposed Rule.

The Final Rule

While much of the language of the Proposed Rule was carried forward unchanged, the Final Rule incorporates several material modifications that address many of the issues and concerns raised by the industry, including:

- Clarification regarding the types of communications and activities that would not be considered a recommendation (i.e., would not constitute fiduciary investment advice), such as:
 - Communications regarding investment education
 - Use by ERISA-covered plans (but not IRAs) of asset allocation models and interactive investment materials that identify specific investment alternatives
- Removal of appraisals and fairness opinions as investment advice pending separate future rulemaking
- Expansion of available relief from fiduciary status for investment professionals in arm's length transactions with sophisticated plan fiduciaries

The DOL also made several material modifications to the related Best Interest Contract prohibited transaction exemption (BICE) which provides relief from prohibited transactions for investment professionals that receive otherwise prohibited types of compensation for their investment advice, including:

- Expansion of the types of assets that may be covered by the BICE
- Elimination or relaxation of various disclosure, contract and record retention obligations
- Streamlining compliance for advisers making recommendations to plan participants to move into level-fee investment advisory arrangements
- Grandfathering relief for investments made prior to the applicability date

Additional details regarding the material changes made by the Final Rule are described in a chart prepared by the DOL that can be found at www.dol.gov/ebsa/pdf/conflict-of-interest-chart.pdf.

Next Steps

The applicability date for the final Rule is April 10, 2017, with certain provisions of the BICE and other prohibited transaction exemptions applicable January 1, 2018. Given the sweeping changes made by the Final Rule and the expected impact on many current arrangements and business models, investment professionals should review the guidance carefully and consider engaging knowledgeable advisers to navigate through the new requirements.

Our Employee Benefits and Investment Management groups are analyzing the Final Rule and will publish additional substantive commentary in the days to come. In the meantime, do not hesitate to reach out to one of our professionals to begin working through the implications of this rule to your practices.

FOR MORE INFORMATION

For more information, please contact any member of our [Employee Benefits](#) or [Investment Management](#) groups.

This advisory bulletin may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions.

© 2016 THOMPSON HINE LLP. ALL RIGHTS RESERVED.