
“They’re Here!” – Department of Labor Issues Final ERISA Fiduciary and Conflict of Interest Regulations

By Edward C. Hammond / Apr 06, 2016

After receiving and reviewing extensive feedback on its earlier proposals, the Department of Labor (“DOL”) has issued final regulations expanding the definition of a fiduciary under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and detailing pertinent conflict of interest rules. According to the DOL, highlights of the final regulations and exemptions include:

- expansion of the definition of fiduciary to include any individual receiving compensation for providing advice/recommendations with the understanding it is based on the particular needs of the person being advised or that it is directed to a specific plan sponsor, plan participant, or IRA owner; such decisions can include, but are not limited to, what assets to purchase or sell and whether to rollover from an employment-based plan to an IRA;
- clarification of the standards for determining whether a person has made a “recommendation” covered by the final regulations;
- clarification that a person or firm can recommend that a customer hire an advisor (or its affiliate) for advisory or asset management services without the recommendation counting as a fiduciary recommendation;
- clarification of the types of information and activities that constitute non-fiduciary investment education;
- clarification that marketing oneself or one’s service without making an investment recommendation is not fiduciary investment advice;
- removing all appraisal issues, not just those involving ESOPs, from the final regulations and reserving them for separate rulemaking projects;
- allowing asset allocation models and interactive materials to identify specific investment products or alternatives for ERISA and other plans (but not IRAs) without being considered fiduciary investment advice, subject to conditions;
- clarification that advice regarding “investment property” does not include health, disability, and term life insurance policies and other assets that contain an investment component.

Also, the DOL has revised its “Best Interest Contract Exemption” (sometimes referred to as the “BIC” or “BICE”) in the final regulations. As explained by the DOL in its fact sheet, under ERISA and the Internal Revenue Code individuals providing fiduciary and investment advice to plan sponsors, plan participants, and IRA owners are not permitted to receive payments creating conflicts of interest without a prohibited transaction exemption (“PTE”). The “Best Interest Contract Exemption” is intended to permit firms to continue to rely on many current compensation and fee practices as long as they meet specific conditions intended to ensure that financial institutions mitigate conflicts of interest. In addition, firms and their individual advisors must provide investment advice that is in the best interest of their customers. The exemption requires the financial institution to acknowledge fiduciary status for itself and its advisors, to adhere to basic standards of impartial conduct, including giving prudent advice that is in the customers’ best interest, to avoid making misleading statements, and to receive no more than reasonable compensation. The financial institution also must have reasonable procedures designed to mitigate harmful impacts of conflicts of interest, and must disclose basic information about the conflicts of interest and the cost of their advice. There are also substantial disclosure requirements applicable to service providers under the “Best Interest Contract Exemption” with respect to conflicts of interest, fees or charges paid by the investor, and disclosure of the types of compensation a firm expects to receive from third parties in connection with the recommended investments. In addition, there are website maintenance requirements.

The regulations have just been issued, and we expect that they will be the subject of much analysis and commentary over the next few weeks. They will not begin to take effect until April of 2017 (and there are some transition rules). The link below is to frequently asked questions (“FAQs”) on the DOL website regarding these final regulations.

<http://www.dol.gov/protectyoursavings/faqs.htm>

If you have any questions regarding the new fiduciary rules, please contact Ed Hammond at ehammond@clarkhill.com | (248) 988-1821; Doug Ellis at dellis@clarkhill.com | (412) 394-2367; Nancy Farnam at nfarnam@clarkhill.com | (248) 530-6222; or Kristi Gauthier at kgauthier@clarkhill.com | (480) 684-1300; or another member of Clark Hill’s Labor and Employment Practice Group.