CLIENT MEMORANDUM

DOL Publishes Final Fiduciary "Conflict of Interest" Regulations and Related Exemptions

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Today, the Department of Labor (the "DOL") issued its long-anticipated final regulations (the "Final Regulations") clarifying the standards for becoming a "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA") by virtue of giving investment advice to a plan or its participants and beneficiaries. The Final Regulations also apply to the definition of "fiduciary" for purposes of IRAs under the Internal Revenue Code of 1986. The DOL also finalized certain other exemptions, including the Best Interest Contract ("BIC") exemption, the class exemption for principal transactions in certain debt securities, and amendments to existing exemptions including PTE 86-128 and PTE 75-1, which permit fiduciaries to receive fees in connection with certain securities transactions.

In its Fact Sheet that was published with the Final Regulations and exemptions, the DOL highlighted several provisions of the final rules that were revised in response to comments from interested parties through written comments, the formal hearing process and meetings with the DOL. These changes include (i) extending the implementation period to April 2017, one year after the Final Regulations are published, with a phased implementation of the BIC exemption and principal transaction exemption until January 1, 2018, (ii) elimination of the list of eligible assets under the BIC exemption, (iii) clarifying how firms that offer proprietary products can satisfy the "best interest" standard, and (iv) reducing certain contract and disclosure requirements.

The DOL highlighted some of the changes, as follows:

- “The rule includes examples of communication that would not rise to the level of a recommendation and thus would not be considered [fiduciary] advice. It specifies that education is not included in the definition of retirement investment advice so advisers and plan sponsors can continue to provide general education on retirement saving without triggering fiduciary duties.”
- “The final rule defines a variety of investment education activities that fall short of fiduciary conduct, and makes clear that advisers do not act as fiduciaries merely by recommending that a customer hire them to render advisory or asset management services. The final rule also expressly provides that investment advice does not include communications that a reasonable person would not view as an investment recommendation, including general circulation newsletters, remarks in widely attended speeches and conferences, research reports prepared for general circulation, general marketing materials, and general market data.”
- “The final rules also revise existing exemptions, including limiting the so-called ‘insurance exemption’ to recommendations of ‘fixed rate annuity contracts.’ To sell other insurance products like variable and indexed annuities, firms can use the BIC exemption. New preamble language emphasizing that fees are not the only factor in making investment decisions and giving firms more flexibility on how to comply with disclosure provisions should also make it easier for insurance firms to recommend their products.”
- “Comments expressed concerns that advisers and firms could not take advantage of the BIC exemption if they were recommending proprietary products. Additionally, commenters asked the Department to expand the proposed exemption to apply to products not listed in the exemption. In response, the Final Regulations and exemptions reflect the following changes:
    - Advisers recommending any asset—not just those on an asset list included in the proposal—can take advantage of the BIC exemption to continue receiving most common forms of compensation.
    - The BIC exemption includes special provisions clarifying how it can be used for recommendation of proprietary products, including a requirement that firms determine that the limitations are not so severe that the adviser will generally be unable to satisfy the exemption’s best interest standard and other requirements.
    - The Final Regulations eliminate the contract requirement for ERISA plans and their participants and beneficiaries. Firms must acknowledge in writing that they, and their advisers, are acting as fiduciaries when providing investment advice to the plan, participant, or beneficiary, but no contract is required.
    - Some commenters expressed concerns that advisers would need to present a contract as soon as someone walks in the door – before they’ve even decided whether to hire that adviser. The final exemption makes clear that is not the case. Rather, the contract can be signed at the same time as other account opening

documents. However, any advice given before the contract was signed must be covered by the contract and also meet a best interest standard. The exemption also permits existing clients to agree to the new contractual protections by 'negative consent.'

- While the proposal required the firm, advisers, and client to be parties to the contract – which could be difficult in situations like call centers where the customer speaks to multiple advisers at a firm – the final exemption simplifies the contract requirement so that it is only between the firm and the client. There does not have to be a new contract for each interaction with a different employee of the same firm, minimizing the burden on firms."

- "Commenters expressed concerns about their ability to comply with the rule in the eight-month implementation period suggested by the proposal. To give firms more time to come into full compliance, the final rule and exemptions adopt a 'phased' implementation approach. One year after the rule's publication, in April 2017, the broader definition of fiduciary will take effect, but to take advantage of the BIC exemption, firms will only be required to comply with more limited conditions, including acknowledging their fiduciary status, adhering to the best interest standard, and making basic disclosures of conflicts of interest. The other requirements of the exemption will only go into full effect on January 1, 2018."

While we wanted to alert you promptly to the DOL's publication of the Final Regulations, which you can find here, we also intend to prepare a more detailed summary of this important rulemaking in due course.

Our firm Client Memorandum summarizing the implications of the DOL's proposed regulations, which were published in April 2015, can be found here.

If you have any questions about this memorandum or would like additional information, please contact Peter E. Haller (212) 728-8271, phaller@willkie.com, Barry P. Barbash (202) 303-1201, bbarbash@willkie.com, Margery K. Neale (212) 728-8297, mneale@willkie.com or the Willkie attorney with whom you regularly work.

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