

Department of Labor's Final Rule Defining Fiduciary Investment Advice and Conflicts of Interest

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On April 6, 2016, the U.S. Department of Labor (the “**DOL**”) issued final regulations expanding the definition of a “fiduciary” with respect to pension and retirement plans, IRAs and other accounts under ERISA and the Internal Revenue Code. The regulatory package (collectively, the “**Final Rule**”):

1. significantly expands the definition of who is a “fiduciary” under ERISA by reason of providing “investment advice” to ERISA plans or IRAs;
2. introduces two new DOL “prohibited transaction” class exemptions that may be used by financial institutions that fall under the expanded definition of “fiduciary”, including the Best Interest Contract Exemption (the “**BIC Exemption**”); and
3. amends six existing DOL prohibited transaction class exemptions that are commonly used in the financial sector to limit their availability in certain circumstances and to impose additional conditions on the use of the exemptions.

If a firm is deemed to be a fiduciary, it will become subject to the prohibited transaction provisions of ERISA and the Internal Revenue Code, which would limit its ability to receive commissions, fees and other compensation. On a going forward basis, firms will need to consider whether their product and service offerings will (i) utilize a business model under which they will not be considered a fiduciary under the Final Rule (e.g., by providing only general educational information) or (ii) cause them to become an ERISA fiduciary, in which case they will need to adjust their business model to receive only a fee from the customer (and not revenues from products purchased) or comply with onerous requirements of the BIC Exemption or another prohibited transaction exemption.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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