Summary of the Department of Labor's Re-Proposed Fiduciary Rule

CecilCo
Managed Solutions

I. Who Is a Fiduciary Adviser Under ERISA?

Under the Department of Labor (DOL)'s proposed definition, a "fiduciary adviser" is any individual receiving compensation for providing advice that is individualized or specifically directed to a particular plan sponsor (e.g., an employer with a retirement plan), plan participant, or IRA owner for consideration in making a retirement investment decision.

Such decisions can include, but are not limited to, what assets to purchase or sell and whether to rollover from an employer-based plan to an IRA. The fiduciary adviser can be a broker, registered investment adviser, insurance agent, or other type of adviser. It is important to note that the DOL will determine who is a fiduciary based not on the adviser's title, but rather on the advice provided to the client.

II. Activities That Do Not Trigger Fiduciary Obligation

- ***General education on retirement savings***: The DOL proposal excludes education from the definition of retirement investment advice so that advisers and plan sponsors can continue to provide general education on retirement saving for employment-based plans and IRAs without triggering fiduciary duties.
- ***Order-taking***: The proposed rule distinguishes "order-taking" as a non-fiduciary activity.
- ***Seller's carve-out***: Brokers who pitch to large plans with a degree of sophistication are not deemed to be fiduciaries.

III. Proposed Rule Accommodates a Broad Range of Business Practices

The DOL's proposed rule includes new, broad, principles-based Prohibited Transaction Exemptions (PTEs) that can accommodate a range of evolving business models. For example:

- ***Best Interest Contract Exemption***: To qualify for the "best interest contract exemption" advisers and firms must enter into a contract with their clients that:
  - commits the firm and adviser to providing advice in the client's best interest;
  - warrants that the firm has adopted policies and procedures designed to mitigate conflicts of interest; and
  - clearly and prominently discloses any conflicts of interest that may prevent the adviser from providing advice in the client's best interests.

The exemption would allow firms to continue to set their own compensation practices so long as they, among other things, commit to acting in their client's best interest first and disclosing any conflicts that may prevent them from doing so. Common forms of compensation in use today in

the financial services industry, such as commissions and revenue sharing, would be permitted under this exemption.

- ***Principal Transaction Exemption***: This exemption would allow advisers to recommend certain securities and sell them to the customer directly from the adviser's own inventory, as long as the adviser adheres to the exemption's consumer-protective conditions.
- ***Pre-existing Transaction Exemption***: This exemption would allow advisers to receive on-going compensation payments in connection with a prohibited transaction that was completed before the enactment of the proposed rule, as long as the adviser does not provide additional advice to the plan or IRA regarding the same asset after enactment of the proposed rule.

Additionally, the proposal asks for comment on whether the final package should include a new streamlined "low-fee exemption" that would allow firms to accept payments that might otherwise be deemed "conflicted" when recommending the lowest-fee products in a given product class.

IV. Enforcement of Proposed Rule

Under the proposed rule, enforcement actions could include:

- ***DOL***: The agency could bring enforcement actions against fiduciary advisers to plan sponsors and plan participants who do not provide advice in their clients' best interest.
- ***IRS***: For IRA accounts, the IRS could impose excise taxes on conflicted advice transactions that are not eligible for an exemption.
- ***Consumers***: A plan sponsor or plan participant harmed by bad advice could bring an action against a fiduciary adviser, per current law. Under the "best interest contract exemption," customers (both plan participants and IRA owners) could hold fiduciary advisers accountable through a private right of action for breach of contract. The proposed rule would expand the scope of enforcement from current regulations under which neither the DOL nor the client can hold an adviser accountable for advice to IRA owners.

A contract can require that individual disputes be handled through arbitration but must give clients the right to bring class action lawsuits in court if a group of people is harmed.

V. Update June 8, 2017

Back in May the DoL Secretary announced that the effective date of the fiduciary rule was delayed from April 9, 2017 till June 9, 2017.
The U.S. Labor Department this week took preliminary steps toward potentially re-crafting the fiduciary rule, which requires brokers who offer retirement advice to act in their customers' best interest. The White House's Office of Management and Budget website posted a notice by the Labor Department saying it plans to solicit information from the public and other interested parties about the rule. On June 1, the SEC announced it was wading into the fiduciary debate again by asking for public comment on how it could coordinate with the DOL on the rule.
Such a step marks the very early part of a formal rulemaking process. However, it does not guarantee a new rule will ultimately be crafted.