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The DOL's New Fiduciary Rule: The Thin Line Between Education and Advice

Following the release in 2015 of the US Department of Labor's proposed fiduciary rule, many commentators feared that communications that had previously been characterized as "investment education" would now constitute "investment advice," thereby giving rise to fiduciary status and potential liability under ERISA. The DOL incorporated into the final rule,[1] almost without change, an Interpretative Bulletin issued by the DOL in 1996 ("IB 96-1"), which drew a thin line between advice and education in four areas: (1) plan information, (2) general financial and investment information, (3) asset allocation models, and (4) interactive investment materials.[2] The incorporation of the principles of IB 96-1 into the final rule is helpful but limited, as the final rule leaves a number of interactions between financial institutions and retail retirement clients in a gray zone, particularly when it comes to information provided on web sites and call centers where specific funds or investment products may be mentioned by name. This publication provides a description of non-fiduciary education under the final rule.

Under the final rule, information generally will not fit within the investment education categories if it includes advice or recommendations as to specific investment products or specific investment managers. This limitation was already a requirement of compliance with IB 96-1,[3] but most advisers were arguably not subject to the limitation because they took the position that they were not rendering advice to retail investors "on a regular basis" and, therefore, they were not fiduciaries.

The final rule departs from IB 96-1 by excluding from the various investment education categories those asset allocation models and interactive materials that identify specific investment alternatives. The only exception to this prohibition is for asset allocation models and interactive materials that incorporate the designated investment

1 The final rule is available at: https://www.dol.gov/ebsa/regs/conflictsofinterest.html. For a complete overview of the final rule, you may wish to refer to our client publication: "The US Department of Labor's Final "Fiduciary" Rule Incorporates Concessions to Financial Service Industry but Still Poses Key Challenges," available at: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/04/The-US-Department-of-Labor-Final-Fiduciary-Rule-Incorporates-Concessions-to-Financial-Service-Industry-CGE-041416.pdf. For a discussion of the disclosure requirements of the new prohibited transaction exemptions, you may wish to refer to our client publication: "The DOL's New Fiduciary Rule: The Details on Disclosure," available at: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/05/The-DOLs-New-Fiduciary-Rule--The-Details-on-Disclosure-CGE-05052016.pdf.

2 The final rule supersedes IB 96-1.

3 The DOL characterized this as a departure from IB 96-1 in the proposed release.

alternatives in an ERISA plan,[4] but only to the extent that the plan is subject to oversight by a plan fiduciary who is independent from the person who developed or marketed the investment alternative and the model or materials. Therefore, investment models and interactive materials available to IRAs and other non-ERISA plans, and to plan participants with self-directed brokerage accounts, generally will constitute investment advice if they refer to specific investment funds, securities or products.

The following chart provides a description of the four categories of non-fiduciary education under the final rule.

[4] Designated investment alternatives are defined in 29 CFR 2550.404a-5(h)(4).

Categories of Investment Education

Plan Information	General Financial, Investment and Retirement Information	Asset Allocation Models	Interactive Investment Materials
Information and materials that: Describe the **terms or operation of the plan** or IRA; Inform a plan fiduciary, plan participant, beneficiary or IRA owner about the **benefits** of plan or IRA participation; Describe the benefits of **increasing** plan or IRA **contributions**; Describe the **impact of** preretirement **withdrawals** on retirement income; Describe varying forms of **distributions** and their advantages, disadvantages and risk; and Describe **product features**, investor rights and obligations, fee and expense information, applicable trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of investment alternatives available under the plan or IRA. ***May not reference the appropriateness of any individual investment alternative or benefit distribution option.***	Information and materials on: **General financial and investment concepts**, such as risk and return, diversification, dollar cost averaging, computed return and tax deferred investment; Historic differences in **rates of return between different asset classes** (e.g., equities, bonds or cash) based on standard market indices; Effects of **fees and expenses** on rates of return; Effects of **inflation**; Estimating future retirement income needs; Determining **investment time horizons**; Assessing **risk tolerance**; **Retirement-related risks** (e.g., longevity risks, market/interest rates, inflation, health care, etc.); and **General methods** and strategies for **managing assets** in retirement, including those offered outside the plan or IRA. ***May not address specific investment products, investment alternatives or distribution options.***	Information and materials that: Provide **models of asset allocation portfolios** with different time horizons and risk profiles where: ▪ The models are based on generally accepted investment theories taking into account the historic returns of different asset classes; ▪ All material facts and assumptions accompany the models; ▪ There is a statement that plan participants should consider their other assets, income and investments when applying a particular model to their individual situation; and ▪ ***The models do not include reference to particular investment products or alternatives available under the plan unless (1) it is a designated investment alternative, (2) subject to oversight by a plan fiduciary independent from the person who developed or marketed the alternative, (3) the model identifies all other designated investment alternatives available under the plan with similar risk and return characteristics and (4) the model indicates where information on those investments could be obtained.***	Questionnaires, worksheets, software and similar materials that provide the ***means to estimate future retirement income needs and assess the impact of different asset allocations*** on retirement income, evaluate distribution options, products or vehicles or estimate a retirement income stream where: ▪ The materials are based on generally accepted investment theories taking into account the historic returns of different asset classes; ▪ The asset allocations and income stream generated objectively correlate to the information supplied by the plan participant; ▪ All material assumptions that may affect an assessment of the different asset allocations or income streams accompany the materials or are supplied by the plan participant; ▪ The materials take into account other assets, investments or income or there is a statement that plan participants should consider these items; and ▪ ***References to Investment alternatives or distributions available under the plan that are not specified by the participant must adhere to the same restrictions as asset allocation models that include reference to particular investment products or alternatives.***

Beyond the Line

The line between investment education and investment advice will pose special challenges for broker and plan-specific call centers, where call center personnel have been specifically trained to know the details of a plan's investment options and the products and services available by the provider. This may result in separate call centers dedicated to IRA customers that provide less information about investment options than to retail customers generally. Similar limitations may also apply to plan specific web portals and the web sites of fund sponsors and broker dealers.

The prohibition on presenting asset allocation models and interactive materials that identify specific investment products or alternatives may be unduly limiting for participants in plans with self-directed accounts. Further, many asset managers and advisers, in reliance on IB 96-1, have invested in the development of sophisticated and innovative tools designed to enable investors to make informed decisions, and the use of these products may be curtailed or eliminated by some providers to avoid fiduciary status.

Obviously, many interpretive issues will surface over the next several months as financial organizations struggle with aligning their retail practices to the new DOL paradigm, and we anticipate that the DOL will be under considerable pressure to make good on the commitment to provide both flexibility during the transition period and additional clarifications and guidance.

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