Distinction Between Investment Advice and Investment Education Under the DOL Fiduciary Rule

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I. Introduction

The U.S. Department of Labor Fiduciary Rule (the "Fiduciary Rule" or the "Rule") draws an important distinction between (a) recommendations, which can become fiduciary investment advice under the Rule; and (b) non-fiduciary investment education. This memorandum illustrates this distinction.

II. Recommendations

A communication must first be a "recommendation" before it may rise to the level of investment advice that is subject to the fiduciary standards of the Rule. A “recommendation” is a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion to engage in or refrain from taking a particular investment-related course of action. A communication that a reasonable person would view as making a suggestion that relates to buying, holding, or selling a particular investment, or to managing investments or investment accounts, will constitute a recommendation. Providing a list of securities to an individual that the individual may then use to select particular investments may be considered to be a recommendation. This may be true even if no suggestion is made with respect to any one security. In other words, the provision of the list itself may be viewed as advice about acquiring securities. The more tailored the communication may be to a specific individual, the more likely the communication will be viewed as a recommendation.

III. Fiduciary "investment advice"

Fiduciary "investment advice" is a recommendation that is (a) related to certain types of advice; (b) provided by a particular type of individual or entity; and (c) given in exchange for a fee or other compensation. If a recommendation provides any of the following types of advice, it may rise to the level of "investment advice":

- Advice related to acquiring, holding, disposing of, or exchanging, securities or other investment property;
- Advice concerning how securities or other investment property should be invested after being rolled over, transferred, or distributed from a plan or IRA;
- Advice concerning the management of securities or other investment property, including, among other things, advice on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage versus advisory); or
- Advice concerning rollovers, transfers, or distributions from a plan or IRA, including whether such action should be taken, the amount, the form, and the destination to which the rollover, transfer, or distribution should be made.

Additionally, in order to constitute fiduciary investment advice, the recommendation must be made, either directly or indirectly, by a person or entity who:

- Represents or acknowledges that it is acting as a fiduciary within the meaning of ERISA or the Internal Revenue Code;
- Renders the recommendation pursuant to a written or verbal agreement, arrangement, or understanding that such recommendation is based on the particular investment needs of the recipient; or
- Directs the advice to a specific recipient.

IV. Non-fiduciary "investment education"

While the Fiduciary Rule subjects investment advice to certain fiduciary standards, it does not do the same for investment education. The Fiduciary Rule separates non-fiduciary investment education into four categories of information and materials. These four categories are described in detail below.

- 1) **Plan and investment information** – Investment education includes the provision of information and materials that describe investments or plan alternatives without specifically recommending particular investments or strategies. For example, an advisor would not act as a fiduciary merely by describing the investment objectives and philosophies of plan investment options, mutual funds, or other investments; their risk and return characteristics; historical returns; the fees associated with the investment; distribution options; contract features; or similar information about the investment.
- 2) **General financial, investment, and retirement information** – Investment education also includes the provision of information on standard financial and investment concepts. These concepts may relate to diversification, risk and return, and tax deferred investments; historic differences in rates of return between different asset classes; effects of inflation; estimated future retirement needs and investment time horizons; assessments of risk tolerance; or general strategies for managing assets in retirement. All of these concepts will be considered as non-fiduciary education as long as the advisor does not recommend a specific investment or investment strategy.
- 3) **Asset allocation models** - Advisors can provide non-fiduciary information and materials on hypothetical asset allocations as investment education, as long as the models are based on generally accepted investment theories. In that context, the advisors must explain the assumptions on which the models are based and may not make specific investment recommendations. In the case of ERISA-covered plans, the models may reference specific designated investment alternatives on the plan's menu as hypothetical examples to aid participant understanding, as long as the examples meet the Rule's protective conditions.
- 4) **Interactive investment materials** – Investment education also includes the provision of certain materials to assist participants in making investment decisions. For example, advisors can provide a variety of questionnaires, worksheets, software, and similar materials that enable workers to estimate future retirement needs and to assess the impact of different investment allocations on retirement income. That said, the advisor must meet the conditions described above for asset allocation models.

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David Nows is a Business and Corporate attorney focusing his practice on general corporate law, start-up ventures, mergers and acquisitions, employee benefits, and tax law. He works in Foster Swift's Lansing office. Since joining the firm, two of David's focal points in his practice have been: (1) matters relating to the far-reaching fiduciary duty regulations under ERISA that were issued by the U.S. Department of Labor in April 2016; and (2) helping entrepreneurs begin their own start-up ventures, and helping international entrepreneurs navigate special issues related to owning a start-up business.

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