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This article was a collaborative effort between partners of the law firm Winget, Spadafora & Schwartzberg, LLP.

Michael Schwartzberg *can be reached at Schwartzberg.M@WSSLLP.com.*

Lou Spadafora *can be reached at Spadafora.L@WSSLLP.com.*

Benjamin J. Biard *can be reached at Biard.B@WSSLLP.com.*

Brandon S. Reif *can be reached at Reif.B@WSSLLP.com.*

Brian J. Palmeri *can be reached at Palmeri.B@WSSLLP.com.*

Derek C. Anderson *can be reached at Anderson.D@WSSLLP.com.*

Department of Labor's Fiduciary Rule

by Michael Schwartzberg, Lou Spadafora, Benjamin J. Biard, Brandon S. Reif, Brian J. Palmeri & Derek C. Anderson

The Department of Labor ("DOL") recently issued its long-anticipated rule amending the regulatory definition of fiduciary investment advice.[1] The Rule replaces the previous five-part test used to determine whether an individual is rendering investment advice for a fee with a new definition of "fiduciary" that, according to the DOL, better comports with the statutory language in the Employee Retirement Income Security Act of 1974 ("ERISA") and the IRS Code. The DOL promulgated the Rule due to its perception that the market for retirement advice has changed dramatically since ERISA was enacted. According to the DOL, individual advisers, rather than large employers and professional managers, have become increasingly responsible for managing retirement assets as IRAs; and participant-directed plans, such as 401(k) plans, have supplanted defined benefit pensions.

At the heart of the change is the DOL's belief that financial products have become too complex for individuals managing retirement assets, and that retirement advice is potentially conflicted due to various compensation structures. The DOL believed advisors have been recommending investments based on their own self-interest (e.g., products that generate higher fees for the adviser even if there are identical lower-fee products available), giving imprudent advice and engaging in transactions that otherwise would be prohibited by ERISA and the IRS Code. The DOL attributes the advisers' conduct, in part, to the outdated definition of fiduciary.

In contrast to the multipart test set forth in the 1975 regulation, the Rule now explicitly describes the kinds of communications and the types of relationships that constitute investment advice that give rise to fiduciary responsibilities. The DOL's stated goals are to guarantee that investment advice be in the consumers' best interest, and eliminate excessive fees and substandard performance.

This paper outlines the new definition of fiduciary; explains what types of communications are considered recommendations covered by the Rule; addresses the effect of the fiduciary duty standard; and summarizes the various exemptions promulgated by the DOL, including the Best Interest Contract Exemption ("BICE"). The paper is meant to assist broker-dealers, registered investment advisers and their insurers better understand the Rule and its implementation.

The Definition of "Fiduciary" Under the Rule

The Rule provides that recommendations regarding the investment of plan or IRA assets, including recommendations regarding the investment of assets that are rolled over or otherwise distributed from plans to IRAs, renders the adviser a fiduciary. In addition, recommendations regarding investment management of plan or IRA assets also renders the adviser a fiduciary. More specifically, a person renders investment advice if they provide–for a fee or other direct or indirect compensation–the following enumerated categories of advice:

- A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging securities or other investment property, or a recommendation as to how securities or other

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PLUS Perspective: **Focusing on the Future**

Heather Fox *2016 PLUS President.*

Leadership Assembly 2016

It seems like just yesterday that I was given the gavel as president of PLUS, but we are now officially more than halfway through my tenure in the role. It is an often used cliché but very true–time flies when you're having fun. Ultimately, we are all involved with PLUS to advance our careers, make key industry connections and stay current on the industry, but of course we hope to have a bit of fun as well.

One of the PLUS highlights for me each year, and certainly a "fun" event, is the annual Leadership Assembly. This year's event, May 16 in Denver, was among the best yet… it was certainly one of the biggest! Almost 70 PLUS volunteers and staff spent an afternoon discussing the future of PLUS through the lenses of our newly-formed Task Forces. Each Task Force presented their findings to date and led small group discussions on their topic of interest–from the PLUS website and webinar series to the association's publications and whether or not PLUS should be an industry research organization. The results of these discussions were provided to the Task Forces to assist them as they continue to work toward formal recommendations to the PLUS Board in November. Based on the ideas presented and enthusiastic discussion in the room, I am definitely looking forward to seeing the recommendations from the Task Forces this fall.

One great addition to the Leadership Assembly this year was the inclusion of our LAMP participants. LAMP, or Diversity, Leadership and Mentoring Program, helps to cultivate future leaders in our industry from traditionally under-represented populations. The program participants are incredibly engaged members of the PLUS community, and their contributions to the discussions at the Leadership Assembly brought great perspectives and insights to the event.

With July's arrival, we are officially halfway through summer, meaning fall is just around the corner. Of course, fall brings about two very important events for PLUS… the Cyber Liability Symposium and the annual PLUS Conference.

First up, on September 27, is our annual Cyber Liability Symposium in New York City. The cyber market is rapidly evolving, and cyber risk is now interwoven with many other professional lines of coverage. Staying current on this market and connecting with other professionals and thought leaders in the space are vitally important, so be sure to reserve your seat now as this event sold out last year and we anticipate it will again in 2016. Registration is available now on the PLUS website.

Leadership Assembly 2016

Of course, the big event on the PLUS calendar each year is the annual PLUS Conference. This year, PLUS' flagship event returns to Chicago, and we have some tremendous sessions and keynote presenters lined up. Renowned comedian Jim Gaffigan will get us off to a great start, and former HP CEO and political candidate Carly Fiorina will undoubtedly have some fascinating stories and observations as our luncheon keynote. And our closing day breakfast will be out of this world, with a speech from record-setting astronaut Scott Kelly. The PLUS Conference is always a can't-miss event, and I hope to see you in Chicago this November!

Finally, I want to highlight the great content being created as part of PLUS' 8-part webinar series on transactional risk insurance. These webinars are available exclusively for PLUS members, and provide an in-depth look at this growing market. If you've missed any of the webinars to date I encourage to check them out in the PLUS Multimedia Library, and make sure to register now for the remaining installments… *Tax Opinion Insurance* on July 27 and *Market Standards; Unique and Hard to Place Risks and Exposures* on August 10.

There are definitely a lot of exciting things going on with our Society presently, and I hope that you are taking full advantage of the many benefits of being a PLUS member. Thank you for your involvement, and I hope to see you at a PLUS event in the coming months.

Panama Papers–The Implications for Financial Institutions, Professional Advisers and Directors

by William Allison & Francesca Muscutt

William Allison *is a partner in DAC Beachcroft's Global Insurance group and heads up the firm's Financial Institutions and D&O team. He can be reached at wallison@dacbeachcroft.com.*

Francesca Muscutt *is a professional support lawyer at DAC Beachcroft LLP. She has significant experience in professional indemnity claims, insurance and reinsurance disputes, claims against directors and officers, banking disputes, and commercial litigation. She can be reached at fmuscutt@dacbeachcroft.com.*

The leak of confidential data from the Panamanian law firm Mossack Fonseca has highlighted the potential reputational risks that businesses face if they arrange their affairs in off-shore jurisdictions and the general data security risks that all businesses face today.

In the largest ever recorded data leak, an anonymous source forwarded over 11.5 million lawyer-client documents dating from as far back as the 1970s to a German newspaper. The documents were then forwarded to the International Consortium of Investigative Journalists and thereafter distributed to media centres across the world.

The Panama data contains the identities of prominent public officials, national leaders, company directors and shareholders, and high net-worth individuals that have used opaque off-shore structures and shell companies to hide their wealth and, in some instances, to avoid paying tax. Many have received adverse media attention since news of the data leak first broke on 3 April 2016.

Possible claims following the Leak

Claims relating to the Panama data leak have the potential to be very significant and are likely to involve criminal, regulatory and civil actions.

Regulatory investigations

The Panama data leak has prompted worldwide regulatory investigations, and banks and financial institutions are already being directly implicated in these investigations.

Whilst Mossack Fonseca is maintaining that it has done nothing illegal (because tax avoidance is not illegal), its possible involvement in the use of off-shore companies to circumvent international trade sanctions in Iran, Syria and North Korea, and other illicit activities including money laundering and bribe payments, are now being investigated by the U.S. Department of Justice.

In the UK, the Financial Conduct Authority has asked 64 financial services firms and banks to disclose details of any accounts handled by Mossack Fonseca and explain what they are doing internally to assess their exposure. The FCA has not yet reached any conclusions from its preliminary analysis, but given the allegations of breaches of sanctions, money-laundering offences and other crimes published in the media, the FCA has said that it will be considering whether the banks' anti-money-laundering controls should have raised "red flags".

Banks, investment houses, accountants, law firms, tax advisers and other professional advisers that played a role in off-shore transactions involving Mossack Fonseca should be prepared to assist with these regulatory investigations, possibly by attending interviews and producing documents for regulatory scrutiny. The costs of these investigations may sound in claims for the recovery of "defence costs" under D&O, professional indemnity, E&O and cyber policies.

Civil actions

Data security experts have noted that Mossack Fonseca was not encrypting its emails and it was using a computer programme with known vulnerabilities and out of date plug-ins. If it is established that the data leak was caused by the firm's failure to implement adequate security measures, then claims by former clients of Mossack Fonseca for breach of confidence, loss of privacy and reputational damage are likely.

The UK tax authority, HMRC, has confirmed it is clamping down on tax avoidance schemes and will impose tougher penalties on off-shore evaders. It is conceivable that clients or former clients of Mossack Fonseca will bring claims if the tax authorities find that the tax structures set up by Mossack Fonseca were illegal or amounted to tax evasion. Allegations of negligent tax advice/planning may not be confined to Mossack Fonseca, but may also be directed against any professional involved in setting up the tax structure.

Under English law, the success of such claims would depend on whether former clients could show that, if advised differently, they could and would have invested in a different structure which would not have resulted in additional tax liabilities. Each case will turn on its own facts, but professional advisers and their insurers should consider their possible exposure in respect of such claims.

Claims may potentially extend beyond professional advisers. Company directors who pursued secret, aggressive tax strategies with Mossack Fonseca's assistance may see their company's reputation tarnished by negative media attention and (possibly) an irrecoverable fall in share price. Whilst the use of off-shore tax structures is not "illegal" per se, their use is perceived by many as "unethical" and "immoral", and it could be argued that by using such structures, the directors were not promoting the best interests of the company. We may see action groups pursue derivative claims in the future under the Companies Act 2006, if appropriately funded. These claims may potentially fall for consideration under any applicable D&O policy.

Evaluation of Tax Planning Practices

The FCA acting Chief Executive,

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investment property should be invested after the securities or other investment property are rolled over, transferred or distributed from the plan or IRA;

- A recommendation as to the management of securities or other investment property, including, among other things, recommendations 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 recommendations with respect to rollovers, distributions, or transfers from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made.

Of particular note, the Rule specifically includes recommendations concerning the investment or management (or selection of an investment manager) of securities or other investment property rolled over, transferred or distributed from the plan or IRA. This includes recommendations regarding how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred or distributed from the plan or IRA.

A) When a Communication is a Recommendation

The Rule sets forth the types of relationships that must exist for any recommendation to constitute fiduciary advice. In particular, the Rule is applicable to: (1) recommendations by person(s) who represent or acknowledge that they are acting as a fiduciary within the meaning of the Act or the Code; (2) advice rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient; and (3) recommendations directed to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of a plan or IRA.

The DOL notes that advisers should not be able to specifically direct investment recommendations to individual persons, but then deny fiduciary responsibility on the basis that they did not, in fact, consider the advice recipient's individual needs or intend that the recipient base investment decisions on their recommendations. Moreover, advisers will not be able to continue the practice of advertising advice or counseling that is one-on-one or tailored to the investor's individual needs by using boilerplate language to disclaim their investment recommendations as fiduciary investment advice.

A "recommendation" in turn is a communication that, based on its content, context, and presentation, will reasonably be viewed as a suggested course of action that the advice recipient actively engage in or refrain from taking. Thus, the determination of whether a "recommendation" is made is an *objective* rather than a *subjective* inquiry under the Rule. The DOL explains that the more individually tailored the communication is to a specific advice recipient or recipients about, for example, a security, investment property or investment strategy, the more likely the communication will be viewed as a recommendation.

Furthermore, communications requiring the adviser to comply with suitability requirements under applicable securities or insurance laws will be viewed as a recommendation. Also, providing a selective list of securities as appropriate for an advice recipient will be a recommendation as to the advisability of acquiring securities, even if no recommendation is made with respect to any one security. The DOL states that a series of actions, directly or indirectly (e.g., through or together with any affiliate), that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate.

In this latter scenario, there is no difference whether the communication is initiated by a person or a computer software program.

B) Service and Platform Providers Are Not Fiduciaries Under The Rule

Under the Rule, service providers such as record keepers and third-party administrators that offer a "platform" or selection of investment alternatives to participant-directed individual account plans and plan fiduciaries who choose the specific alternatives that will be made available to participants for investing their individual accounts will not be treated as fiduciaries. The Rule does not treat communications by such persons as recommendations simply by making available, without regard to the individualized needs of the plan or its participants and beneficiaries, a platform of investment vehicles from which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The plan fiduciary, however, must be independent of the person who markets or makes available the investment alternatives and the person discloses in writing to the plan fiduciary that they are not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

The Rule also sets forth certain common activities that platform providers may carry out to assist plan fiduciaries in selecting and monitoring the investment alternatives they make available to plan participants without being treated as recommendations. For example, offering investment alternatives meeting objective criteria specified by the plan fiduciary; responding to RFPs; or providing objective financial data regarding available alternatives to the plan fiduciary will not be construed as recommendations.

C) General Marketing Is Not Investment Advice

The Rule also specifically excludes from the definition of investment advice the furnishing of general communications that a reasonable person will not view as an investment recommendation. Examples include general circulation newsletters; television, radio, and public media talk show commentary; remarks in widely attended speeches and conferences; research reports prepared for general distribution; general marketing materials; general market data, including data on market performance, market indices, or trading volumes; price quotes; performance reports; or prospectuses.

D) Investment Education Is Not Investment Advice

With respect to investment education, in particular, the Rule identifies four broad categories of non-fiduciary educational information and materials: (a) plan information, (b) general financial, investment and retirement information, (c) asset allocation models, and (d) interactive investment materials.

The Rule ensures the distinction between non-fiduciary education and fiduciary advice applies equally to information provided to plan fiduciaries as well as information provided to plan participants and beneficiaries, and IRA owners, and that it applies equally to participant-directed plans and other plans. The Rule draws no distinction based on whether information is provided by a plan sponsor, fiduciary or service provider.

Additionally, in response to comments to the proposal, the Rule allows educational models and materials to reference specific investment alternatives under conditions designed to ensure such communications are presented as hypothetical examples. The hypothetical examples include, but are not limited to, asset allocation models and interactive investment materials identifying all other designated investment alternatives available under the plan with similar risk and return characteristics. Importantly, the hypothetical examples must only provide educational information and not investment recommendations. However, the DOL notes a "responsible" plan fiduciary will have, as part of the ERISA obligation to monitor plan service providers, an obligation to evaluate and periodically monitor the asset allocation model and interactive materials made available to the plan participants and beneficiaries as part of any education program. The evaluation shall include whether the models and materials are biased and designed to influence investment decisions towards particular investments resulting in higher fees or compensation paid to parties providing the investments or investment-related services to the plan. Assuming compliance with the foregoing, the DOL affirms that presentation of a specific designated investment alternative will not rise to the level of a recommendation within the meaning of the Rule.

The DOL also described and clarified conduct and activities that should not be considered investment advice activity, even if the communications meet the regulation's definition of "recommendation." While the Rule does not use the term "carve-outs," as in the 2015 proposal, the various provisions recognize circumstances in which plans, plan fiduciaries, plan participants and beneficiaries, IRAs and IRA owners may receive recommendations the DOL does not believe should be treated as fiduciary investment advice notwithstanding the general definition. For example, a person shall not be deemed to be a fiduciary within the meaning of ERISA solely because of the provision of any advice (including the provision of asset allocation models or other financial analysis tools) to an "independent" person who is a fiduciary of the plan or IRA with financial expertise with respect to an arm's length sale, purchase, loan, exchange, or other transaction involving the investment of securities or other property.

The DOL also stated that a person seeking to avoid fiduciary status has the burden of demonstrating compliance with all applicable requirements of the Rule. In the absence of a recommendation, nothing in the Rule makes a person an investment advice fiduciary by selling a security or investment property to an interested buyer. Accordingly, such "purchase and sales" transactions do not include an investment advice component.

E) Swap Transactions Are Not Covered by the Rule

Persons acting as swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants do not become investment advice fiduciaries as a result of communications and activities conducted during the course of swap or security-based swap transactions regulated under the Dodd-Frank Act, provisions in the Commodity Exchange Act, or the Securities Exchange Act of 1934 and applicable CFTC and SEC implementing rules and regulations.

F) Employees Carved Out from the Definition of Fiduciary

Under the Rule, a person is not an investment advice fiduciary simply by virtue of his or her employment by a plan, sponsor of a plan, affiliate of such plan sponsor, or employee benefit plan, or as an independent contractor of such plan sponsor, affiliate or employee benefit plan, *provided* the person receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee's normal compensation for work performed for the employer.

G) Appraisals Left for Later Rulemaking

Unlike the 2015 rule proposal, the Rule does not directly address appraisals, fairness opinions, or similar statements concerning the value of securities or other property in any way. However, the DOL recognizes that employers and participants could benefit from the imposition of fiduciary standards on appraisals when they value assets in connection with investment transactions and states that it intends to broadly address appraisal issues in a separate project so that it can ensure consistent treatment of appraisers under ERISA's fiduciary provisions.

Effect of the Fiduciary Duty–Prohibited Transactions

Advisers making fiduciary recommendations under the Rule will be subject to existing ERISA Prohibited Transactions rules, and will need exemptive relief to avoid the consequences of engaging in a Prohibited Transaction. The purpose of the Prohibited Transactions Rules is to prevent dealings with parties who may be in a position to exercise improper influence over plan assets, and to prevent plan fiduciaries from taking actions with respect to a plan which involve self-dealing and conflicts of interest.

To this end, the DOL simultaneously published a new Best Interest Contract Exemption ("BICE") and a new Exemption for Principal Transactions, along with revising other exemptions from the Prohibited Transaction rules of ERISA and the Code. The DOL explained that the exemptions and amendments will allow, subject to appropriate safeguards, certain broker-dealers, insurance agents and others acting as investment advice fiduciaries to continue to receive a variety of forms of compensation that would otherwise violate Prohibited Transaction rules and trigger excise taxes. BICE is specifically designed to address the conflicts of interest associated with the wide variety of payments advisers receive in connection with retail transactions involving plans and IRAs. The Principal Transactions Exemption, in turn, permits investment advice fiduciaries to sell or purchase certain debt securities and other investments out of their own inventories to or from plans and IRAs.

Best Interest Contract Exemption ("BICE")

BICE permits advisers to receive common and beneficial forms of compensation–commissions paid by the Plan or a participant, and commissions, sales loads, 12b-1 fees, revenue sharing or other forms of payment from a third-party providing the product–*provided* they adhere to the requirements of the exemption. This exemption will apply to certain investments by participants and beneficiaries, IRAs and plans if certain conditions are satisfied.

Generally, BICE requires firms and advisers to enter into a written contract acknowledging their fiduciary status, their compliance with the Impartial Conduct Standards (discussed below), and implement policies and procedures designed to mitigate conflicts of interest, with disclosure of information regarding their conflicts of interest and the costs of their services.

BICE *does not* apply if: (1) The Plan is covered by Title I of ERISA (most private-sector employee benefit plans) and (i) the adviser, financial institution or any affiliate is the employer of employees covered by the plan, or (ii) the Adviser and Financial Institution is a named fiduciary or plan administrator with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the plan by a fiduciary who is not independent; (2) the compensation is received as a result of a principal transaction; (3) the compensation is received as a result of investment advice to a retirement investor generated solely by an interactive web site in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the web site without any personal interaction or advice from an individual adviser (*i.e.,* "robo-advice") unless the robo-advice provider is a level fee fiduciary that complies with the conditions applicable to level fee fiduciaries; or (4) the adviser has or exercises any discretionary authority or discretionary control with respect to the recommended transaction.

Key Changes from 2015 Proposal:

The Rule contains several key changes from the 2015 rule proposal. Some of the notable changes are as follows:

- ✔ Elimination of the "asset list" such that BICE is available for any asset type, provided the requirements of the Exemption are met;
- ✔ The contract may be entered into between the customer and the firm without requiring the individual adviser to sign;
- ✔ The contract may be provided at the time of execution of the recommended investment;
- ✔ The contract may be incorporated into the account opening documents; and
- ✔ Negative consent letter for existing clients are permitted.

A) Implementation

The Rule adopts a phased implementation timeline. This means the Rule becomes effective on April 10, 2017, with a transition period to implement the full requirements of BICE and Principal Transaction Exemptions. Full implementation is required by January 1, 2018.
From April 10, 2017 to January 1, 2018, fiduciaries may satisfy BICE by adhering to the Best Interest standard by *not receiving more than reasonable compensation* and *not make materially misleading statements*. Additionally, during this period firms and advisers must provide notice to investors that, among other things, affirmatively acknowledges their fiduciary status, describes material conflicts of interest and identifies the designated person to address material conflicts and monitor advisers' adherence to the impartial conduct standards.

B) Record Retention and DOL Notification

Prior to utilizing BICE, firms must notify the Department of Labor of its intent to rely on BICE at BICE@dol.gov. Records must be retained for up to six (6) years and made available at a customary location for examination by regulators or investors.

C) Pre-Existing Transaction Exemption

A fiduciary may receive compensation that is otherwise prohibited if the transaction is effected before the effective date of the rule. However, the fiduciary may not receive additional compensation in connection with the investment of additional amounts based on advice given after the effective date.

D) Contractual Requirements

The exemption requires the firm to enter into a written contract with the investor that contains the following:

Fiduciary Status. An affirmative statement that the firm and adviser are fiduciaries under ERISA or the Code, or both;

Impartial Conduct Standard. The adviser and the firm affirmatively agree to adhere to and comply with the "Impartial Conduct Standard" which consists of the following:

- Provide advice that is in the "Best Interest" of the investor (the Best Interest Standard is substantially similar to the ERISA duties or loyalty and prudence);
- The transaction will not result in compensation that is in excess of "reasonable" compensation; and
- Will not make any misleading statements about the transaction, fees and compensation, "material conflicts of interest,"[2] and any other matters relevant to the investors' investment decision.

Warranties. The firm affirmatively warrants, and complies with, the following:

- It has adopted and will comply with written policies and procedures reasonably and prudently designed to ensure that its advisers adhere to the impartial conduct standards;
- In formulating its policies and procedures, has specifically identified and documented its material conflicts of interest; adopted measures to prevent the material conflicts of interest from causing violations of the impartial conduct standards; and designated a person (by name or title) responsible for addressing the above and ensuring compliance; and
- The policies and procedures prohibit quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that are intended or will reasonably be expected to cause advisers to make recommendations that are not in the best interest of the investor.

Disclosures. The contract must, among other things, specifically disclose the following:

- Statement of the Best Interest standard of care;
- Describe any material conflicts of interest; all fees and charges; disclosure of third-party compensation;
- Inform the investor of their right to

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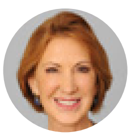
PLUS Conference 2016

November 9–11 | Hyatt Regency | Chicago, IL

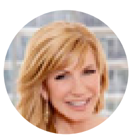
The PLUS Conference is a destination event for professional liability insurance professionals, and this year's event promises to be one of the best yet. It is the place to connect, learn and find solutions.

An Afternoon with Jim Gaffigan

Jim Gaffigan is a Grammy nominated comedian, New York Times best-selling author, top touring performer, and multi-platinum selling father of five. Season two of his semi-fictitious television show, The Jim Gaffigan Show, premiered on Father's Day, June 19, on TV Land. Jim's new tour, Fully Dressed, started July 7th.



A **Luncheon Keynote** with 2016 Presidential Candidate & Former Hewlett-Packard Chairman & CEO **Carly Fiorina**!



Leeza Gibbons, Pop-culture icon, Emmy award-winner and *Celebrity Apprentice* champion

A **Breakfast Keynote** with NASA Astronaut **Scott Kelly**!

Don't miss out–register now online at **www.plusweb.org** obtain copies of the firm's written description of its policies and procedures required by the exemption and specific disclosure of complete information about all costs, fees, compensation, including third-party payments associated with the recommended transactions. The latter disclosure must be described with sufficient detail to allow the investor to make an informed judgment about the severity of the material conflict of interest;

- A link to the firm's website, which must contain certain Web Disclosures (below);
- Whether the firm offers proprietary products or receives third-party payments with respect to any recommended investments;
- Contact information (phone and email) of a representative from the firm that the investor can contact with concerns;
- A statement advising that the investor can research the firm using Broker Check, Investment Adviser Registration Depository or other databases; and
- Whether or not the adviser and firm will monitor the investments and alert investor to any recommended change and, if monitoring, the frequency and the reasons the investor will be alerted.

Prohibited Provisions. The contract may not contain exculpatory provisions disclaiming or limiting liability for a violation of the contract's terms, and may not waive the right of the investor to bring a class action lawsuit.

E) Required Web Disclosures

The firm must maintain a website freely accessible to the public and updated quarterly, at a minimum, disclosing the following non-exhaustive information:

- The firm's business model and material conflicts of interest associated with that business model;
- Schedule of typical account or contract fees and service charges;
- A model contract or other model notice of contractual terms and required disclosures;
- Written description of firm's policies and procedures accurately describing or summarizing the key components relating to conflict mitigation and incentive practices sufficient to permit investors to make an informed judgment about the firm's protections against conflicts of interest;
- A list of all product manufacturers and other parties with arrangements for third-party payments to the adviser or firm in connection with specific products or classes of investments. A description of these arrangements, including a statement on whether and how the arrangement will impact adviser compensation and a statement of benefits the firm provides to the manufacturer or other parties in exchange of the third party payments; and
- Disclosure of the firm's compensation and incentive arrangements with advisers for recommending particular product manufacturers, investments or categories of investments, or for advisers to move to the firm or stay at the firm and a full and fair description of any payout or compensation grids (not adviser specific).

F) Streamlined Exemptions

Title I ERISA Plans and Level Fee Fiduciaries[3] have streamlined conditions that require them, among other things, to affirm their fiduciary status in writing and comply with the Impartial Conduct Standards. In contrast, Bank Networking arrangements must only comply with the Impartial Conduct Standards.

G) Proprietary Products and Third Party Payments

Firms that restrict adviser's recommendations, in whole or in part, to Proprietary Products or to investments that generate Third-Party Payments, may rely on BICE if the firm satisfies the Best Interest standard. Some of the criteria for meeting this standard set forth in the Rule are as follows:

- Notifying the investor whether the firm offers proprietary products or receives third-party payments;
- Prior to, or at the same time, as the execution of the transaction, disclose material conflicts of interest in writing and comply with all other web based disclosures;
- Document *in writing* its limitations on the universe of recommended investments and material conflicts of interest, reasonably concludes that there will not be compensation in excess of reasonable compensation and concludes that after considering its policies and procedures, these limitations and conflicts of interest will not cause the adviser to recommend imprudent investments;
- Adopts, monitors, implements and adheres to policies and procedures and incentive practices that meet the other requirements of the exemption and does not use or rely upon quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that are intended or will reasonably be expected to cause advisers to make recommendations that are not in the best interest of the investor;
- The amount of compensation is not in excess of reasonable compensation; and
- The adviser's recommendation meets the general standards of prudence and loyalty and is acting solely based on the investor's interests.

H) Exemption for Purchases and Sales Including Insurance and Annuity Contracts

BICE provides an exemption for the purchase of insurance or annuity contracts from an insurance company that has a pre-existing relationship with an investor. The transaction must be in the ordinary course of the company's business; the company's fees must be reasonable; and the terms of the purchase must be at least as favorable for the retirement investor as the terms generally available in an arm's length transaction with an unrelated party. This exemption, however, does not apply if the fiduciary has discretionary authority, among other exclusions.

Other Amendments

The Rule also contains certain amendments and revocations to other existing Prohibited

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PLUS University 2016

The 2016 edition of PLUS University takes place in **Chicago, August 15 & 16**. Attendees will learn from industry veterans and get in-depth instruction on multiple professional liability lines. Attendees will also receive a complimentary digital copy of PLUS Curriculum module 01/02, *Fundamentals of Liability Insurance/CGL Insurance Overview,* to review prior to the live session.

Put your career on a winning trajectory, register for PLUS University now!
Visit www.plusweb.org for more details.

Transaction Exemptions ("PTE"), as follows:

A) Amendments to Class Exemption for Principal Transactions in Certain Assets between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs

This exemption allows fiduciaries, acting on behalf of their own accounts, employee benefit plans or individual retirement accounts to buy and sell investments. The exemption allows principal transactions, including riskless principal transactions, under conditions to safeguard the interests of investors, between a plan, plan participants or beneficiary account, or an IRA, and a fiduciary that provides investment advice to the plan or IRA. For entities seeking to apply this exemption, they must:

- Acknowledge fiduciary status with respect to any investment advice regarding principal transactions or riskless principal transactions;
- Adhere to Impartial Conduct Standards requiring them to:
  - ¤ Give advice that is in the Retirement Investor's Best Interest;
  - ¤ Seek to obtain the best execution reasonably available under the circumstances with respect to the transaction; and
  - ¤ Make no misleading statements about investment transactions, compensation and conflicts of interest;
- Implement policies and procedures reasonably and prudently designed to prevent violations of the Impartial Conduct Standards;
- Refrain from giving or using incentives for Advisers to act contrary to the customer's Best Interest; and
- Make additional disclosures.

This exemption does not apply to Advisers who have or exercise discretionary authority or discretionary control with respect to management of the assets of a plan, participant or beneficiary account or IRA who exercise any discretionary authority or control regarding the management, the disposition of the assets, or responsibility in the administration of the plan, participant or beneficiary account, or IRA.

This amendment applies to all applicable transactions that take place on or after April 10, 2017.

B) Amendments to Prohibited Transaction Exemptions, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

The amended exemption allows Broker-Dealers to extend credit to a plan or IRA to avoid a failed securities transaction. Previously, ERISA and the Internal Revenue Code did not permit broker-dealers who are fiduciaries from receiving compensation for buying or selling a security if the broker-dealer extends credit to the client as part of the transaction. The exemption now requires the Broker-Dealer provide written disclosures related to the plan or IRA regarding the rate of interest or other fees charged for the loan or other extension of credit.

This amendment applies to all applicable transactions that take place on or after April 10, 2017.

C) Amendment to, and Partial Revocation of, PTE 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters

The amended exemption allows fiduciaries and other service providers to receive compensation when plans and IRAs purchase insurance contracts and "Fixed Rate Annuity Contracts," and when plans purchase securities of investment companies registered under the Investment Company Act of 1940 (e.g. mutual fund shares), as well as certain related transactions. Fiduciaries, however, can no longer receive compensation under the amended exemption when plans and IRAs purchase annuity contracts that do not satisfy the definition of a Fixed Rate Annuity Contract (including variable and indexed annuities), and when IRAs purchase investment company securities.

Non-exempt transactions, which the DOL characterized as complex and subject to significant conflicts of interest at the point of sale, should be sold under the more stringent conditions of the Best Interest Contract Exemption. Fiduciaries engaging in exempt transactions must adhere to certain "Impartial Conduct Standards," including acting in the best interest of the plans and IRAs when providing advice. The amendment also more specifically defines the types of payments that are permitted under the exemption and revises the disclosure and recordkeeping requirements of the exemption.

The exemption, as amended, also permits investment professionals to avoid fiduciary status when they engage in arm's length transactions with plans or IRAs that are independently represented by a fiduciary with financial expertise. Such independent fiduciaries generally include banks, insurance carriers, registered investment advisers, broker-dealers and other fiduciaries with $50 million or more in assets under management or control.

D) Amendment to, and Partial Revocation of, PTE 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Amendment to, and Partial Revocation of, PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks

The amended exemption allows investment advice fiduciaries and fiduciaries with discretionary authority or control over plan assets (i.e., investment management fiduciaries) and their affiliates, to receive a fee directly from a plan for effecting or executing mutual fund and other securities transactions as an agent on behalf of a plan. It also allows such fiduciaries to act in an "agency cross transaction"–as an agent both for the plan and for another party–and receive reasonable compensation from the other party.

The amended exemption also allows investment management fiduciaries to IRAs to receive commissions in connection with mutual fund transactions. The amended exemption revokes relief for investment advice fiduciaries with respect to IRAs. Investment advice fiduciaries can only receive commissions in connection with mutual fund transactions involving IRAs under the Best Interest Contract Exemption.

The amendment requires fiduciaries relying on PTE 86-128 to adhere to "Impartial Conduct Standards," including acting in the best interest of plans and IRAs, when they exercise their fiduciary authority.

The Impartial Conduct Standard

Under the Rule, new "Impartial Conduct Standards" are conditions of the enacted exemptions and are applicable to transactions involving both plans and IRAs. The Impartial Conduct Standards require fiduciaries to act in the "best interest" of plans and IRAs; charge no more than reasonable compensation; and make no misleading statements to the plan or IRA, when engaging in the transactions that are the subject of the exemptions.

A fiduciary acts in the best interest of a plan or IRA when it acts with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters will use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party. The Impartial Conduct Standards represent fundamental obligations of fair dealing and fiduciary conduct. The concepts of prudence, undivided loyalty and reasonable compensation are all deeply rooted in ERISA and the common law of agency and trusts. These longstanding concepts of law and equity are developed in significant part to deal with the issues that arise when agents and persons in a position of trust have conflicting loyalties, and according to the DOL, are well-suited to the problems posed by conflicted investment advice.

Conclusion

The Department of Labor's new fiduciary rule will touch nearly every brokerage firm, financial adviser and investment adviser's business. Compliance with the Rule will require all brokerage firms, financial advisers and investment advisers to modify their business practices and revise their written supervisory procedures, as failure to do so may expose them to civil lawsuits and regulatory investigations.

Endnotes

1 The Rule was officially issued on April 6, 2016. See 29 CFR 2510.3-21 et seq. (2016) (the "Rule").

2 A "material conflict of interest" exists when an adviser or firm has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to an investor.

3 A "Level Fee" is defined as a fee or compensation that is provided on the basis of a fixed percentage of the value of the assets or a set fee that does not vary with the particular investment recommended, rather than a commission or other transaction-based fee.

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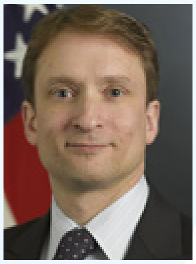

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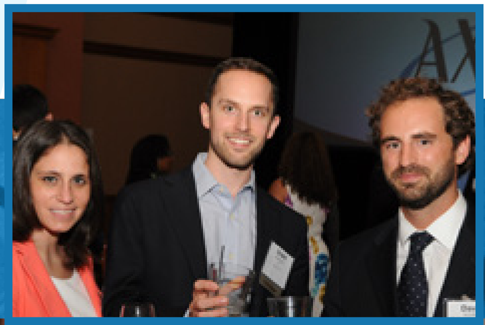

Panama Papers continued from page 3

Tracey McDermott, has reported "a significant amount of business in Panama would be expected to be 'perfectly legal'" and it is, of course, possible that the regulatory investigations will conclude there was no illicit activity and no prosecutions will follow. Irrespective of the legalities of off-shore transactions, however, the negative media attention may cause many to evaluate their association with these structures and they may wish to give careful consideration to the following points going forward:

- the reputational risks to banks, financial institutions, professionals and corporations of being associated with secrecy havens;
- the importance of reviewing relationships with law firms and financial advisors in off-shore jurisdictions that deal with opaque structures;
- the importance of enhanced due diligence regimes when dealing with off-shore transactions to show that banks, in particular, have properly considered money-laundering, breaches of trade sanctions and other possible corruption; and
- the risk that off-shore activities will be scrutinised by the regulators, if there are concerns of possible complicity in financial crimes.

Protection against data leaks

The Panama data leak raises a very important issue for businesses and particularly professional advisers that hold confidential data. Electronic data is vulnerable to attack by third party hackers who may delete, corrupt or distribute confidential information.

Given that lawyers, accountants and other professional advisers hold highly confidential documents electronically, many will now be concerned about data theft from their own systems and the risk of claims by clients in the event of a similar data hack. Many will question what they can do to minimise their exposure to a similar attack in the future.

Those storing confidential papers in particular should assess their data security measures within their organisation and consider how data is stored and accessed, and by whom. The following precautions may help minimise the risk of a data attack:

- Ensure there is appropriate vetting of employees with access to confidential data;
- Require employees to change passwords frequently;
- Use additional layers of IT security for those accessing data remotely such as home workers;
- Ensure IT is properly managed and overseen by senior IT members responsible for an efficient and modern system (adopting the best security practices available);
- Ensure appropriate IT education is given to staff;
- Restrict those employees/officials who can access the entire internal system;
- Spread data across multiple infrastructures to limit the impact of a leak; and
- Prepare a response plan that will respond in the event the system is attacked.

The Panama data leak is a wake up for many. It has highlighted the reputational risks of being associated with off-shore structures and highlighted the vulnerabilities of storing confidential data electronically. Professional advisers, in particular, should reflect on the reputational damage they may cause to themselves and to their clients where sensitive information is leaked publicly and ensure their digital security is sufficient to minimize the risk of a security breach in the future.

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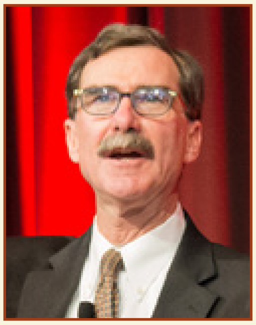

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Calendar of Events

July 2016 • Vol. XXIX • Number 7

*Many Chapter event dates will be finalized and reported in future issues.
Please visit the PLUS website at www.plusweb.org to view the most up-to-date information.

Chapter Events*

Canadian Chapter
- September 21, 2016 • Educational Seminar • Montreal, QC
- November 2016 • Networking Reception • Toronto, ON
- November 2016 • Networking Reception • Montreal, QC
- November 2016 • Educational Seminar • Montreal, QC

Eastern Chapter
- September 13, 2016 • Educational Seminar • New York, NY
- December 2016 • Winter Social • New York, NY

Hartford Chapter
- September 6, 2016 • PLUS Foundation Golf Outing • West Hartford, CT
- October 2016 • Future PLUS Reception • Hartford, CT
- November 2016 • Networking Reception • Hartford, CT
- December 2016 • Educational Seminar • Hartford, CT

Midwest Chapter
- September 14, 2016 • Educational Seminar • Chicago, IL
- October 20, 2016 • Networking Reception • Milwaukee, WI
- November 2016 • Future PLUS Reception • Chicago, IL
- December 6, 2016 • Holiday Party • Chicago, IL

New England Chapter
- September 29, 2016 • Educational Seminar • Boston, MA
- December 1, 2016 • Holiday Party • Boston, MA

North Central Chapter
- August 25, 2016 • Educational Seminar & Twins Game • Minneapolis, MN
- October 2016 • Educational Seminar • Minneapolis, MN

Northern California Chapter
- September 2016 • Educational Seminar • San Francisco, CA
- October 14, 2016 • PLUS Foundation Golf Outing • Berkley, CA *(New Location & Start Time!)*
- December 2016 • Networking Reception • San Francisco, CA

Northwest Chapter
- October 6, 2016 • Educational Seminar • Seattle, WA
- December 2016 • Educational Seminar w/ IIABKC • Seattle, WA

Southeast Chapter
- September 15, 2016 • Educational Seminar • Richmond, VA
- September 22, 2016 • Networking Reception • Birmingham, AL
- October 3, 2016 • PLUS Foundation Golf Outing • Milton, GA
- November 17, 2016 • Networking Reception • Atlanta, GA

Southern California Chapter
- October 2016 • Educational Seminar • Los Angeles, CA
- December 8, 2016 • Holiday Party • Los Angeles, CA

Southwest Chapter
- August 18, 2016 • Networking TopGolf Reception • Salt Lake City, UT
- October 4, 2016 • Educational Seminar • Phoenix, AZ
- Fall 2016 • Educational Seminar • Las Vegas, NV

Texas Chapter
- September 21, 2016 • Educational Seminar • Dallas, TX
- September 22, 2016 • Educational Seminar • Houston, TX
- December 2016 • Holiday Party • Dallas, TX

International Events

2016 PLUS University
- August 15&16, 2016 • Gleacher Center • Chicago, IL

2016 Cyber Symposium
- September 27, 2016 • New York, NY

2016 PLUS Conference
- November 9-11, 2016 • Hyatt Regency • Chicago, IL

Women's Leadership Event
- October 5, 2016 • San Francisco, CA
- October 5, 2016 • The Yale Club • New York, NY

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