

May 23, 2017

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Acosta's DOL Approach to the Fiduciary Rule

Last night, there were three major pieces of guidance on the Fiduciary Rule. The most significant is an announcement by Secretary Acosta that the Fiduciary Rule will become applicable on June 9, 2017. In an op-ed that appeared in the May 23, 2017, *Wall Street Journal*, Secretary Acosta announced that the Department of Labor ("DOL") will not delay the June 9, 2017 Applicability Date. Secretary Acosta wrote that, "The fiduciary rule as written may not align with President Trump's deregulatory goals." However, DOL concluded there was "no principled legal basis to change the June 9 date."

The second two important pieces were posted on DOL's website late in the evening on May 22, 2017. There, DOL posted a Temporary Enforcement Policy on Fiduciary Rule 2017-02 (the "FAB") and a set of FAQs titled "[Conflict of Interest FAQs \(Transition Period\)](#)". Both the FAB and the FAQs contain guidance that assists retirement service providers in complying with the Fiduciary Rule and reduces liability risk during the Transition Period. Below, we describe the key points.

Timing Guidance

As mentioned above, the Applicability Date will remain June 9, 2017 despite efforts to further delay the implementation. The op-ed discusses the inability to delay the Applicability Date while respecting the Administrative Procedure Act. In the FAQs, DOL makes clear that the Fiduciary Rule and related exemptions will become applicable immediately before midnight, 11:59 PM local time on June 9, 2017.

Non-Enforcement Guidance

In keeping with prior statements, the DOL has released a non-enforcement policy meant to encourage good faith compliance efforts and reduce the risk of litigation while the Fiduciary Rule continues to be in flux. The key takeaway from the FAB is that, "during the phased implementation period ending on January 1, 2018, [DOL] will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions." In a footnote, DOL clarified that this non-enforcement policy applies both to ERISA plans where it has enforcement authority and to IRAs where IRS has enforcement authority. Because there is no contract during the Transition Period, there is a reduced risk that a private litigant could enforce the Fiduciary Rule, even in that circumstance DOL provided some comfort by going further than merely saying that it would not enforce but also stating that it would not "treat those fiduciaries as being in violation".

Guidance Regarding Anticipated Changes

Acosta's op-ed makes it clear that the current Fiduciary Rule is not in keeping with the goals of the Trump Administration. All three pieces of Fiduciary Rule guidance anticipate that further changes to the rule will be under consideration and that DOL would consider extending the Transition Period beyond January 1, 2018.

Recommendation Guidance

DOL provides color on communications it would consider not to be a recommendation under the Fiduciary Rule. DOL examined three specific communications, and helpfully, DOL states that educational materials are not covered "irrespective of who provides or makes available the information and materials (e.g., plan sponsor, fiduciary, or service provider), the frequency with which the information and materials are provided, the form in which the information and materials are provided (e.g., on an individual or group basis, in writing or orally, or via call center, video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of information and materials, provided that the information and materials do not include (standing alone or in combination with other materials) recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations with respect to investment or management of a particular security or securities or other investment property."

BIC Transition Period Compliance Guidance

A series of questions provide guidance on the requirements of the BIC Exemption during the Transition Period. In the FAQs, DOL states that during the Transition Period, the only requirement for exemptive relief under the BIC Exemption is compliance with the Impartial Conduct Standards. DOL summarized these standards using language it had not in prior guidance:

- Give advice that is in the "best interest" of the retirement investor. This best interest standard has two chief components: prudence and loyalty:
 - Under the prudence standard, the advice must meet a professional standard of care as specified in the text of the exemption;
 - Under the loyalty standard, the advice must be based on the interests of the customer, rather than the competing financial interest of the adviser or firm;
- Charge no more than reasonable compensation; and
- Make no misleading statements about investment transactions, compensation, and conflicts of interest.

DOL clarifies that these standards can be met "even if a fiduciary adviser recommends proprietary products or investments that generate commissions or other payments that vary with the investment recommended," so long as the adviser ensures "that the recommendations are prudent; the investment advice is based upon the customer's financial interests, rather than the adviser's competing financial interests in the transaction; the communications are free from material misrepresentations; and the associated fees and charges are reasonable."

DOL provides two other pieces of helpful guidance about the BIC Exemption. It states that (1) the specific provisions of Section IV of the BIC Exemption do not need to be adhered to for the distribution of proprietary products during the Transition Period and (2) robo-advisers and other level-fee advisers can rely on the BIC Exemption during the Transition Period.

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Prohibited Transaction Exemption (“PTE”) 84-24 Guidance

Another series of questions focuses on PTE 84-24 during the Transition Period. In short, the only change to the conditions of PTE 84-24 during the Transition Period is the addition of the Impartial Conduct Standards. In terms of relief, PTE 84-24 remains available for the sale of all annuity products and can provide relief for the receipt of certain types of compensation by insurance companies, advisers, agents, consultants, investment company principal underwriters, brokers, and independent marketing organizations.

Independent Fiduciary Exception Guidance

Finally, DOL helpfully confirmed the industry’s position by stating that a reasonable basis for belief that a counterparty is an independent fiduciary with financial expertise can be negative consent to a written representation.

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Many of the FAQs were submitted by Groom at the request of clients. We will continue to work with you and other clients to obtain additional favorable guidance and to encourage DOL to make changes to create a workable “best interest standard”.

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