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DOL Fiduciary FAQs for Advisers

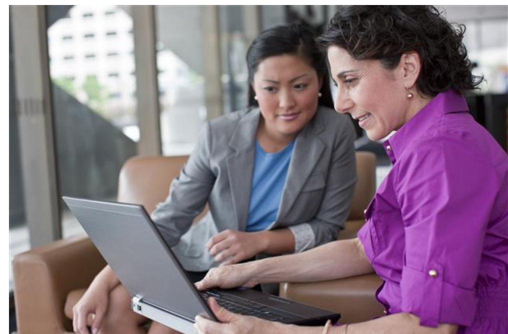
The first set of FAQs from the DOL on the expanded fiduciary requirements focuses on the duties and responsibilities of investment providers who provide services to plans and participants. Plan sponsors will want to have a tangential understanding of this guidance for awareness of the disclosures and obligations that will soon arrive for their review. More FAQs (addressing definitions and then additional questions, including more on the conflict of interest exemption) are expected by the end of the year.

Background

Earlier this year, DOL expanded the scope of the definition of fiduciary for employer-sponsored plans and swept in non-ERISA investment vehicles such as IRAs and HSAs. A key aspect of the expanded definition is the "Best Interest Contract" exemption (BIC) — which allows firms and advisers to continue using otherwise prohibited compensation arrangements if they agree to take certain steps to avoid conflicts of interest. (See our April 22, 2016 *For Your Information* for a summary of the final regulation and its exemptions.) Despite efforts underway in the courts and Congress to derail the regulation, the DOL promised to provide supplemental guidance to help constituents understand their responsibilities and how to revise compensation arrangements under the new rules in time for the April 10, 2017 effective date of the final regulation.

FAQs for Investment Fiduciaries

DOL has said that several sets of FAQs will be provided before the rule's effective date. An initial set of FAQs — generally directed at financial institutions and advisers — focuses on compensation questions and how to avoid prohibited transaction penalties. A service provider that provides investment advice for a fee is a fiduciary, and receiving that fee is a prohibited transaction unless an exemption applies or the fee is offset against fees that the plan (or IRA owner) otherwise is obligated to pay to the fiduciary — hence the interest in questions about compensation arrangements.



While the questions focus on the types of pay arrangements and duties imposed on financial institutions, those discussed below shed some light on issues of interest to plan sponsors.

Rollover Advice

The BIC exemption is not available for advisers to retirement plans that have or exercise discretionary authority or discretionary control over a recommended transaction. However, FAQ 6 clarifies that the BIC Exemption can provide relief where the adviser who provides investment advice to a participant to roll over assets to an IRA then provides fiduciary investment advice for the IRA account — as long as the adviser does not have or exercise their authority or control over the decision to roll over (and the other applicable conditions of the exemption are satisfied).

Under the BIC Exemption:

- The financial institution must provide a written acknowledgment of its and its advisers' fiduciary status to the retirement investor.
- The financial institution and its advisers must satisfy the impartial conduct standards (requiring fiduciaries to act in the best interest of their clients, charge no more than reasonable compensation, and make no misleading statements).
- Document the reasons why the advice was considered to be in the best interest of the retirement investor, which, in the case of investment advice to roll over assets from an ERISA plan to an IRA, must:
  - Include consideration of the retirement investor's alternatives to a rollover, including leaving the money in his or her current employer's plan, if permitted.
  - Take into account the fees and expenses associated with both the plan and the IRA; whether the employer pays for some or all of the plan's administrative expenses; and the different levels of services and investments available under each option.

This means that participants with advisers who make these recommendations can expect to receive various disclosures required under the BIC exemption. Plans may encounter requests for information about fees and expenses that would allow the adviser to make the required BIC evaluation.

Annuity Purchases

With little interest in annuities in the defined contribution market, use of the available exemptions for these products is more likely in the defined benefit market for plan terminations and other "de-risking" activities. Service providers offering annuity placements had long used PTE 84-24 to avoid any possible prohibited transaction exposure. FAQs 21 to 23 confirm that insurance companies can use either the revised PTE 84-24 or the BIC exemption to sell policies through their captive sales force or through independent agents, and describe the insurer's supervisory obligations. The FAQs do not mention the plan fiduciary's obligations to evaluate "safe" products, but having vendors on the hook to provide advice in the "best interest" of the retirement investor would appear to support those obligations.

Applicability Date

The FAQs make clear that the DOL has no current plan to delay the initial and final applicability dates adopted in the final rule. Firms and advisers must either structure compensation arrangements to avoid prohibited transactions (e.g., using offset arrangements described in Advisory Opinion 97-15A) or meet one of the prohibited transaction exemptions such as the BIC exemption or principal transaction exemption, which become available on April 10, 2017. Initially, fewer conditions apply for using the exemptions; full compliance is required by January 1, 2018.

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In Closing

The DOL indicated in the FAQs that its "general approach to implementation will be marked by an emphasis on assisting (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions and others who are working diligently and in good faith to understand and come into compliance with the new rule and exemptions." Although this round of guidance offers instructive comments to financial institutions and fiduciary advisers more so than plan sponsors and administrators in their fiduciary roles, presumably some comfort can be assumed on the employer front as well.

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