

DOL Sends Parting Fiduciary Rule FAQs to Service Providers and Consumers

DOL released separate sets of FAQs aimed at service providers and consumers, respectively, during its last days under the Obama administration. Assuming the fiduciary rule is not rolled back by the new administration and Congress, the parting FAQs refine some details on how the agency intends the new protections to play out.

Background

DOL promised additional sets of FAQs on their fiduciary rule to supplement the first set issued last October, as noted in our [November 8, 2016 For Your Information](#). With only days left in the Obama Administration, DOL released two sets of FAQs to make good on that promise – one set for fiduciaries and another for consumers. Although efforts to repeal or delay the fiduciary rule are still afoot ahead of its April 10, 2017 initial implementation date (see our [January 9, 2017 Legislate](#)), the guidance addresses a number of service provider and consumer concerns that will be relevant in the event relief does not materialize.

FAQs for Service Providers

DOL's [second set of FAQs](#) for service providers responds to questions on the line between fiduciary and non-fiduciary communications, and on the Best Interest Contract Exemption (BICE).

What's an Investment Recommendation?

DOL starts with FAQs on general principles for determining whether a communication is "investment advice."

General investment recommendations (Q1). A communication needs to include a recommendation to be considered fiduciary advice under the rule. Merely describing attributes and features of an investment product, without a specific recommendation, is not investment advice. Specific recommendations on managing investments, investment strategies, portfolio composition, selection of investment arrangements and referrals of other persons to provide advice is covered investment advice, but only if the adviser receives a fee or other compensation in exchange for the advice.



Participant communications (Q5). Explaining the plan’s rules for handling automatic rollovers (e.g., transferring accounts not in excess of \$5,000 to a specific IRA vendor selected by the plan’s fiduciary) is not investment advice.

Responsibility for contrary actions (Q6). Neither the rule nor the BICE makes an adviser or financial institution responsible for a client’s investment decisions made contrary to the adviser’s recommendation.

Offsets (Q7). No prohibited transaction exists where a service provider’s fees are used to offset a mutually agreed upon asset-based fee to provide ongoing investment advice. Receipt of the fees would cause the adviser to be a fiduciary, but would not result in a non-exempt prohibited transaction.

Investment Education

DOL’s final rule excludes non-fiduciary investment education from the restrictions on fiduciary recommendations. Non-fiduciary investment education includes information about the plan and the investments it offers, general financial, investment and retirement information, information on asset allocation models, and interactive investment materials for assessing retirement needs and investment allocations.

Describing plan and investment features (Q8). Describing the various features, fees, restrictions and the like of a particular investment option is not advice as long as there is no discussion of the appropriateness of the product to the individual’s situation.

Maximizing the match (Q9 and Q10). A call center employee may note a participant’s failure to take full advantage of the employer’s matching contribution without crossing the line to giving fiduciary advice. This includes providing instructions on the plan’s procedure for implementing an increase in contribution rate. The employer can do the same given that an employer generally would not receive compensation in connection with such advice.

Interactive investment tools (Q11). An interactive investment tool can be treated as investment education even if it asks participants to input data like age and current savings so long as it follows the final rule’s specific provisions for non-fiduciary interactive tools.

Getting paid for educational information (Q12 and Q13). Educational information is still just that even if a fee is paid for providing the information. But the receipt of a fee in connection with a recommendation to use a particular third party is a prohibited transaction unless an applicable exemption applies.

Asset allocation models (Q15). Investment education on asset allocation models can limit specific identification of investment options to the plans designated investment alternatives. Options available in the plan’s brokerage window are not designated investment alternatives and need not be referenced in the education material.

General Communications

General circulation newsletters, television, radio, and public media talk show commentary, remarks in widely attended speeches and conferences, research or news reports prepared for general distribution, general marketing materials, and general market data are not typically considered fiduciary investment advice. But when do communications cross the line?

Conferences and seminars (Q16 and Q17). Marketing materials presented to professionals at a retirement industry conference are typically not individual investment recommendations because of the general descriptions of the products and because audience members would not reasonably view the communication as individualized advice. Materials presented to retirees or individuals approaching retirement at a free dinner seminar, on the other hand, are more likely to be fiduciary advice – depending on the facts and circumstances.

TPA referrals (Q18). Assuming the TPA steers clear of recommending particular investments offered by recommended recordkeepers, suggesting recordkeepers and describing their services is not fiduciary advice even though the recordkeepers provide revenue sharing payments to the TPA for various shareholder services the TPA provides the plan and its participants.

Self-promotion (Q19). A financial institution’s recommendation of a particular account type or service to an individual who approaches the institution for information about service offerings is a fiduciary investment advice recommendation. However, merely describing the available services and claiming to be an industry leader for providing high-quality services for competitive fees is not fiduciary advice.

Transactions with Independent Fiduciaries with Financial Expertise

DOL’s final rule exempts transactions with certain financially sophisticated counterparties such as banks, insurance carriers, broker-dealers and independent fiduciaries who manage or control at least \$50 million.

Aggregate control (Q20). Meeting the \$50 million threshold is on an aggregate basis, taking into account multiple retirement plans as well as securities in the company’s treasury department.

Mixed audience (Q24). The exception for financially sophisticated counterparties can apply even though other parties are listening in on the conversation as long as the adviser directs the advice to the independent fiduciary who satisfies the conditions for the exemption.

Independence (Q28). A financially sophisticated fiduciary can meet the requirement of being independent even if the fiduciary receives compensation from the plan for a transaction as long as the compensation, ordinarily a prohibited transaction, meets the BICE exception requirements.

Marketing Platforms and Monitoring Investments

Vendors can market their platform of investments to a fiduciary without making a fiduciary recommendation as long as individualized needs are not taken into consideration and other conditions are met.

Group annuity contracts (Q30 and Q31). A group annuity contract can be a platform for purposes of this rule. This is true even if the only capital preservation asset class on the platform is the insurer’s proprietary fixed income separate account.

Screened recommendations (Q33). A platform provider may provide a list of available investment alternatives with descriptions of asset classes, investment strategy, expense ratio range, and risk and return characteristics, and may identify which available alternative satisfies the requirements of a qualified default investment without crossing the fiduciary line. But if the provider limits responses to a selected list of investment alternatives, the communication could constitute an investment recommendation under the rule.

FAQs for Consumers

DOL's [FAQs for consumers](#) offer a plain language recitation of the fiduciary paradigm aimed at individual 401(k) and IRA/HSA account holders. In addition to framing expectations about providers' new fiduciary obligations, the DOL explains that individuals can sue in court under ERISA or breach of contract claim for non-ERISA accounts. DOL also explains that the rule does not hold the investment adviser responsible for all investment losses – if prudent at the time of a recommendation, the adviser is not liable merely because the investment did not turn out well.

The consumer FAQs also emphasize that a financial adviser is not required to charge asset-based fees instead of commissions, that providing advice about rolling money amongst plans is fiduciary advice, and that a financial adviser must consider alternatives to a rollover. They include a list of specific questions DOL recommends individuals should ask fiduciary advisers.

Comment. In anticipation of individual requests from plan participants based on DOL's suggestions, plan sponsors and their vendors may wish to prepare answers to relevant questions on the list in advance to assure uniform and timely responses.

In Closing

With the April 10, 2017 effective date around the corner, many service providers have already refined operations and business plans to comply with the fiduciary rule. Individuals may have heightened sensitivity to fees due to ongoing press coverage of the rule and may ask more questions about how their money is handled – whether the rule is rolled back or not. Advisors and plan sponsors should consider best practices for helping individuals meet retirement goals, with or without the framework of DOL's final rule.

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New BICE Proposed for Independent Agents

The DOL issued a third piece of fiduciary guidance – a **proposed BICE for insurance intermediaries** that would cover fixed annuity products, including fixed indexed annuities. The proposal would expand the required policies, procedures and disclosures beyond those of original BICE to compensate for the lack of regulatory oversight of these intermediaries.