

DOL Fiduciary Standard Implementation Checkpoint: What Do You Need to Do to Get Ready for June 9th?

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- Mr. Campbell concentrates his practice in Employee Benefits advice, specializing in ERISA Title I issues, including fiduciary conduct and prohibited transactions. He also serves as an expert witness in ERISA litigation. The former Assistant Secretary of Labor for Employee Benefits, head of the Employee Benefits Security Administration, Mr. Campbell was ERISA's primary Federal regulator and law enforcement official. He played a key role in ERISA retirement and health reform initiatives of the prior decade, and his regulatory and policy decisions had a fundamental impact on the structure and operation of ERISA plans, including:
 - Proposing the initial 408(b)(2) service provider and 404(a)(5) participant disclosure regulations
 - Issuing final regulations establishing Qualified Default Investment Alternatives (QDIAs), electronic fee disclosure, and participant access to investment advice
 - Administering an enforcement program reporting more than \$2.6 billion in monetary results and more than 200 criminal indictments

We Have Partial Implementation of the Fiduciary Rule—What's Next?

Long Term Policy—We don't really know. Secretary Acosta still gathering team.

Short Term Policy—Lots of activity and uncertainty:

- Feb. 3: Presidential Memo orders review of Rule to decide repeal, amend, or no change.
- March 2: Proposed Rule delaying applicability from April 10th to June 9th. Rule also asks for new info regarding economic effect.
- April 7: Final Delay Rule, new transition PTEs
- April 17: New economic effect info due—critical process issue for policy decisions.

Final Delay Rule a Surprise

- We THOUGHT Trump Admin would delay, and keep delaying while reviewing rule.
- INSTEAD, Trump Admin gives only 60 day delay, partially implements Obama rule, future changes TBD. No additional delays are likely.
- Fiduciary portions take effect on June 9th—must have a prudent, thorough and well-documented process for recommendations.
- BUT—from June 9 to December 31, BIC Exemption, 84-24 made much easier to use.
- Bottom line—need a prudent fiduciary process in place by June 9th, but may not have to change all compensation arrangements until 2018.

Beginning June 9, What Advice is Fiduciary?

Investment advice is fiduciary investment advice if it is provided to:

- IRAs (and other entities under IRC §4975); or
- ERISA plans, or plan participants/beneficiaries

AND it consists of:

- Recommendations as to acquiring, holding, disposing of or exchanging investments;
- Recommendation of distributions or rollovers to participants and IRA owners (including whether, in what amount, in what form, or where to);
- Recommendations of fiduciary advisors; or
- Recommendations of type of investment account (e.g. brokerage vs. fee-based)

Final Regulation Expands Definition (cont.)

AND advice is provided for “direct or indirect” fee where:

- the advisor acknowledges fiduciary status;
- There is a written or verbal agreement, arrangement or understanding that advice is based on the particular investment needs of the recipient; or
- Advisor directs the advice to a specific recipient regarding the advisability of a particular investment or management decision.

Marketing fiduciary services is not advice.

What is Not Advice?

- Education—including plan information, retirement income needs, distribution options, benefits of participation, asset allocation models (models cannot discuss specific investments, unless ERISA plan DIAs, and must list all similar DIAs)
- Advice to financial professional—"wholesaler" fix
- Sophisticated Fiduciary—fiduciary of plan or IRA managing \$50 million+ total assets with disclosure
- Platform provider—platform services, including selection/monitoring assistance, if without regard to individualized needs of plan. Can respond to RFP with sample menu based on size, existing menu.
- General communications—if a reasonable person not view as recommendation

Special Considerations for Fiduciary Advice

- Distribution Advice—casts very wide net. If recommend using funds from a plan or IRA, then fiduciary: source of funds and timing issues.
- Rollover Advice—new speed bump. Whether level fee advisor or not, probably a prohibited transaction (PT) (b/c new or different comp).
- Rule always applies to Plans, only to IRAs if PT.
 - ✓ Exp: Most rollover/transfer/distribution advice
 - ✓ Exp: Commission, variable compensation
- If PT for IRA, then Best Interest standard applies via an exemption, such as BIC or 84-24.
- If no PT re IRA, then outside DOL jurisdiction.

What are the Impartial Conduct Standards?

Impartial Conduct Standards have three required elements:

1. Compensation can be no more than reasonable (typically means fee not unreasonable compared to comparable providers of similar services)
2. No materially misleading statements are made at the time of the recommendation
3. Recommendation is in the Best Interest of the client. Best Interest standard is essentially the ERISA prudent man fiduciary standard.

Best Interest vs. Prudent Man Standard

- Best Interest Standard (new part underlined):

“...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 would 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.”
- Take into account “all relevant factors” includes suitability, “Know Your Customer” info
- Rollovers: plan fees, investments, expenses, distribution options, services (including advice) compared to IRA and alternatives.
- Insurance: assess carrier fitness.

The New Transitional Exemptions, 6/9-12/31

PTE 84-24: Existing exemption for commissions related to annuities and insurance contract transactions.


- Obama Rule—narrowed the definition of commission, required new disclosures, excluded VAs and FIAs, and imposed Impartial Conduct Standards.
- New Transition—until Dec 31, only Impartial Conduct Standards apply, and VAs and FIAs are covered.

BIC Exemption: New exemption for a wide range of transactions including rollovers; overlaps laps with 84-24

- Obama Rule—transition BIC requirements include a notice disclosing conflicts of interest and other issues along with the Impartial Conduct Standards.
- New Transition—until Dec 31, only Impartial Conduct Standards. Note 408(b)(2) for plans.

What Do We Do Before and After June 9th?

- Review lines of business and determine where advisors will become fiduciaries.
- Augment forms to develop a fiduciary process taking into account and documenting all relevant factors.
- Document review of fee reasonableness
- Train advisors and staff
- Consider grandfather issues (wide variation in how financial institutions are addressing).
- Consider compensation issues (wide variation)
- After June 9th—work with DOL to shape final version of rule and exemptions. What changes do you want?
- Before Dec 31—unless DOL acts, exemptions revert to “Obama” BIC, 84-24.



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