# DOL ISSUES ADDITIONAL FAQS RELATED TO NEW FIDUCIARY RULE

**The Department of Labor (DOL) has released two additional sets of FAQs providing guidance related to its final rule expanding the definition of fiduciary "investment advice" (the Final Rule) for purposes of the Employee Retirement Income Security Act of 1974, as amended (ERISA).**

On January 13, 2017, DOL posted 35 FAQs related to the definition of fiduciary advice in the Final Rule. In contrast to the first set of FAQs released in October 2016, which mostly considered the complex of prohibited transaction exemptions issued or modified in conjunction with the Final Rule, and consistent with public statements previously made by DOL, the January FAQs primarily focus on the circumstances in which fiduciary status would or would not attach under the Final Rule.

DOL simultaneously issued a third set of non-technical FAQs directed to the general public. These FAQs rearticulate DOL's justification for the Final Rule – essentially, a final argument by the current Administration in the public domain defending the Rule – along with scenarios illustrating at a high level the operation of the new definition and the Best Interest Contract Exemption (BICE) in retail settings. These FAQs variously state, among other things, that:

- The Final Rule makes changes in the financial services industries.
- "Financial advisers," "investment advisers," stockbrokers, insurance agents, registered investment advisers and bank employees may all be fiduciaries under the Final Rule.
- Fiduciary advisers are obliged to give "best interest" advice to retirement investors, which neither means that the fiduciary must recommend the best possible investment nor makes the fiduciary automatically liable for investment losses.
- It is not true that the Final Rule prohibits commission-based arrangements or restricts investments available to retirement investors, although some financial advisers may choose to do business that way. (Predictably, there is no discussion of the uncertainties and exposures under the Final Rule that could lead financial services providers to make those choices.)

The non-technical FAQs also include a series of questions that retirement investors might raise with financial professionals about their observance of the Final Rule, and a suggestion that investors only deal with financial professionals that agree to abide by the Final Rule for all investments, not just retirement investments.

- » *The non-technical FAQs are a political document as much as a substantive document, and as such may or may not remain on DOL's website after the pending change in Administrations.*
- » *DOL is affirmatively encouraging the "knock on" effect extending the effective reach of its Final Rule beyond retirement assets.*

The 35 technical FAQs, after an overview of the fiduciary "investment advice" definition [FAQ 1], primarily address the operation of the new definition in a variety of specific factual settings, as summarized below.

| Definition of fiduciary "investment advice" | | FAQ |
|---|---|---|
| **General** | | 1,6,7 |
| **Elements of Core Definition** | Recommendation | 4,5,34 |
| | To plan fiduciary/participant/IRA owner/etc. | 2 |
| | Subject of recommendation/status of adviser | 18 |
| | For a fee | 10 |
| **Exceptions** | "Hire me" rule | 19 |
| | Platform provider | 30-33,35 |
| | General communications | 16,17 |
| | Investment education | 7-9,11-15 |
| | Independent fiduciary | 20-29 |
| | Swap transactions | |
| | Employee | 3 |

## COMMUNICATIONS ABOUT PLAN FEATURES AND PROVISIONS

- A conversation with a call center about the benefits of increasing participant contributions so as to maximize the employer match, including operational information about how to do so, is "investment education" rather than fiduciary advice. [FAQ 9] An employer can go on to recommend that participants increase contributions, inasmuch as the employer generally would not receive a fee for that recommendation and thus cannot be providing fiduciary investment advice. [FAQ 10]
  - » *Given the benefits to participants and the retirement system, it is unfortunate that DOL did not also clarify that financial services providers can promote increased contributions to particular participants without exposure to fiduciary claims.*
- Asset allocation models that take into account only the designated investment alternatives on the plan investment menu can qualify as investment education even if they do not consider other investments available through the plan's brokerage window. [FAQ 15]
- A factual description of the guaranteed lifetime income feature in a target date fund also is non-fiduciary investment education, even if provided by the call center of the annuity provider, so long as the appropriateness of the investment for the participant is not discussed. [FAQ 8]
- An interactive tool provided by a service provider for participants to estimate future retirement income needs should follow the conditions of section (b)(2)(iv)(D) of the Final Rule to be treated as investment education. [FAQ 11]
  - » *This FAQ confirms that even interactive tools that allow participants to input personal data such as age, expected retirement date and annual contributions can still be investment education.*
- General information about rollover options is investment education, even if provided on a compensated basis [FAQ 12] or to a plan participant who is an existing client [FAQ 14]. An additional communication that refers the participant to a specific third party to provide investment advice, which in turn would pay a referral fee, would be a fiduciary recommendation, however. [FAQ 13]
- Communication about and implementation of the cash out and automatic rollover provisions of a plan, including rollout to a specified IRA provider, is not fiduciary advice. [FAQ 5]
  - » *Plan sponsors will welcome this FAQ.*

## PRESENTATIONS TO POTENTIAL CLIENTS AND THE RFP PROCESS

- "Free meal" seminars for retail investors are not, in DOL's view, the type of widely attended speech or conference that falls within the "general communication" exception in the Final Rule. Accordingly, the content of the seminar determines whether or not fiduciary advice is being provided. [FAQ 17]
- The explanation by an IRA provider to a prospective investor of the investment advice and investment management services on offer, including the selection of brokerage vs. advisory accounts, fits within the "hire me" rule, and without more is not fiduciary advice. [FAQ 19]
  - » *This FAQ confirms that the "hire me" rule applies to account types as well as general fiduciary services and encompasses marketing statements beyond bare factual descriptions.*
- The recommendation by a plan's third-party administrator (TPA) of non-fiduciary recordkeepers the plan might consider is not fiduciary investment advice, provided that the TPA makes no representations regarding the investment options available through the recordkeepers (beyond a general description of any differences in their investment platforms, e.g., open architecture vs. a propriety fund platform). [FAQ 18]
  - » *It is hard to see why, e.g., providing factual information about the specific investment options offered by the recordkeepers would cross the line into fiduciary advice.*
- The "platform provider" exception is available to:
  - A recordkeeper that bundles, with its administrative and other services, a platform of investment alternatives and/or access to one or more investment advisory firms. Whether the connectivity to the advisory firm constitutes a fiduciary recommendation that the plan sponsor or participant make use of those services would depend on content, context and presentation. [FAQ 35]
  - A recordkeeper that responds to a plan sponsor's request to identify all available investment options that meet the various requirements of the plan's investment policy statement, so long as the recordkeeper does not in its discretion narrow its response to only selected investments. [FAQ 33]
  - A recordkeeper making available a third-party investment platform as part of its offering. [FAQ 32]
  - A life insurance company offering a range of investment alternatives to a plan sponsor under a group annuity contract [FAQ 30], even if those alternatives are proprietary products or only one investment option (e.g., the insurer's fixed income separate account) is available in certain asset classes [FAQ 31].
- Communications with certain regulated financial institutions serving as an independent fiduciary for a plan or IRA, including communications with representatives of such an institution acting under its direction [FAQ 23], are not fiduciary advice even if plan officials are present, provided that the other conditions of that exception are met. [FAQ 24]
  - The party making use of the exception may rely on representations from the plan, IRA or independent fiduciary about those conditions that are in place when the transaction takes place and that cover the period over which the communications take place. It is not sufficient to establish just that the financial institution is a fiduciary. [FAQ 21, 25]
  - A broker-dealer receiving 12b-1 or similar third party payments can nonetheless serve as an "independent" fiduciary under this exception so long as the broker-dealer satisfies the conditions of the BICE and there is no side agreement or understanding with the party relying on the exception that compromises the broker-dealer. [FAQ 28]
  - A fee paid for services received (e.g., model portfolio services) by the independent fiduciary to another financial institution relying on the exception does not vitiate the exception so long as the independent fiduciary pays that fee out of its own funds rather than plan or IRA assets. [FAQ 29]

The exception extends to "gating" interactions with respect to the account or service to be selected for the plan or IRA, as well as to specific portfolio investments. [FAQ 22]

» *These FAQs generally improve the practical utility of the independent fiduciary exception.*

## THE $50 MILLION RULE

- Even the most sophisticated investor cannot serve as an "independent fiduciary" under that exception for her own IRA [FAQ 26] or, apparently, her own plan account [FAQ 27]. A plan participant can fulfill that role for advice received in the participant's capacity as a fiduciary for the plan (as distinguished from her own account). [FAQ 27]
  - » *This point continues to be a puzzling outcome – that investors deemed sophisticated under the securities laws and capable of protecting their own interests are nonetheless treated by DOL as requiring the protection of the Final Rule as to their own retirement assets.*
- The $50 million floor can be satisfied on the basis of the assets of multiple plan and non-plan investors, as well as plan sponsor or other corporate assets (e.g., cash and securities held by the treasury department of a corporation), which the independent fiduciary manages or controls. [FAQ 20]
- The party making use of the exception may reasonably rely on written disclosures that the independent fiduciary manages at least $50 million as of the date of an ongoing agreement, with the independent fiduciary required to provide notice if assets fall below that amount. [FAQ 21]
  - » *As always, a fixed dollar standard like $50 million that is not tied to the prior year-end or some other specified date will produce complications in practice.*

## COMMUNICATIONS INTERNAL TO FIDUCIARY ADVISERS

- Internal materials prepared by a firm for and communicated to its employees regarding their job responsibilities, including training materials for internal use, are not fiduciary recommendations, but could become so if forwarded to investors. [FAQ 2]
- Employees of fiduciary advisers who in the course of their normal job responsibilities prepare models, materials, reports, recommendations and products for their employer to use with investors are not themselves providing fiduciary investment advice. [FAQ 3]
- A wholesaler's presentation on a group annuity contract at a broker-dealer's conference for financial professionals in the retirement industry could not be reasonably understood to be an investment recommendation under the Final Rule, so long as the presentation is unrelated to any particular plan, and is not fiduciary advice. [FAQ 16]

## OTHER MATTERS

- The mere offering of an automated daily cash sweep service to retirement investors, where the service is not used if the investor does not elect it, is not fiduciary advice even if the financial institution limits the short-term investment vehicles from which the investor must choose and receives fully disclosed shareholder servicing fees. The financial institution can make use of the investment education exception to describe the sweep service and vehicles, so long as it stops short of making a specific recommendation. [FAQ 34]
- Providing a recommendation to invest a required minimum distribution in a permanent life insurance product, to be held outside of any retirement arrangement, is fiduciary advice. [FAQ 4]
  - » *It may be difficult for DOL to sustain this position. Its purported jurisdiction over recommendations regarding the investment of distributions outside retirement arrangements arises from the distribution advice itself, which in these circumstances is not fiduciary advice.*
- A fiduciary adviser is not liable for investment decisions taken by the retirement investor or plan fiduciary against the adviser's recommendation, although depending on the circumstances the fiduciary adviser may have a monitoring responsibility for that investment. [FAQ 6]
- A firm or adviser that becomes a fiduciary under the Final Rule may avoid a prohibited transaction by returning to the retirement arrangement the economic benefit of any third-party payments it receives by reason of the advice, as discussed in the Frost Bank advisory opinion. [FAQ 7]

## COUNTDOWN TO APPLICABILITY DATE

| | | |
|---|---|---|
| -367 days | April 8, 2016 | Final Rule published |
| -307 days | June 7 | Effective Date – Final Rule officially became law |
| -277 days | July 7 | Technical corrections to BICE, PTE 2016-02 released |
| -228 days | August 25 | District court hearing in DC litigation |
| -201 days | September 21 | District court hearing in Kansas litigation |
| -165 days | October 27 | First FAQs issued |
| -157 days | November 4 | Decision in DC litigation for DOL on preliminary injunction and summary judgment |
| -147 days | November 14 | Appeal docketed in DC litigation |
| -144 days | November 17 | District court hearing in Texas litigation on summary judgment; decision pending |
| -133 days | November 28 | Decision in Kansas litigation for DOL on preliminary injunction; summary judgment motion pending |
| -89 days | January 11, 2017 | SEC no-action letter issued on new mutual fund share classes |
| -87 days | January 13 | Second FAQs issued |
| -81 days | January 19 | Proposal of class exemption for insurance intermediaries |
| -80 days | January 20 | Inauguration Day |
| -38 days | March 3 | Scheduled summary judgment hearing in Minnesota litigation |
| **Deadline** | **April 10** | **Applicability Date – Final Rule fully applicable; all PTE relief available, with limited transition provisions for financial institutions relying on the BICE** |
| +266 days | January 1, 2018 | PTE relief subject to all conditions; transition provisions expire |

## SUTHERLAND'S INTERDISCIPLINARY DOL FIDUCIARY RULE COMPLIANCE TEAM

Sutherland's unique team of ERISA, insurance, securities, banking, investment management and litigation attorneys are working collaboratively to share industry knowledge and insight regarding DOL fiduciary rule compliance best practices.

## FOR MORE INFORMATION

For resources and commentary regarding the Final Rule, visit Sutherland's www.dolfiduciaryrule.com.

- Text of and supporting materials for the Proposed and Final Rule
- Pleadings in the pending litigations challenging the Final Rule
- Articles, presentations and client alerts
- Videocasts about the Final Rule

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