

MEMO# 30820

August 8, 2017

DOL Issues Additional FAQ Guidance on Fiduciary Rule

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August 8, 2017 TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Issues Additional FAQ Guidance on Fiduciary Rule

On August 3, the Department of Labor (DOL) published additional [frequently asked questions](#) (FAQs) relating to the fiduciary rule and exemptions.^[1] The three new questions and answers address (1) fiduciary status disclosures under DOL's 408b-2 regulation on service provider disclosures, (2) recommendations to contribute to a plan or IRA, and (3) recommendations to plans on ways to increase participation and contribution rates. The guidance regarding recommendations to contribute to a plan or IRA relates back to prior FAQ guidance, specifically FAQs 9 and 10 in the second round of FAQ guidance (issued in January 2017) and FAQ 12 in the "Transition Period" FAQs (issued in May 2017).^[2]

408b-2 Disclosures

FAQ 1 describes generally the service provider disclosure requirements under the 408b-2 regulation and answers the question of whether service providers who are providing fiduciary investment advice as a result of the fiduciary rule becoming applicable on June 9, 2017, need to update their disclosures under the 408b-2 regulation, in particular to disclose their status as fiduciaries. The answer provides guidance relating to satisfying the 408b-2 disclosure requirement in different situations involving the fiduciary rule and exemptions. In particular, the answer explains that:

- If a covered service provider will continue after the fiduciary rule to provide services only in a non-fiduciary capacity, or already has effectively disclosed investment advice fiduciary status, no additional disclosure would be required under the 408b-2 regulation.
- For service providers who do not reasonably expect to provide fiduciary investment advice, DOL would not treat unauthorized and irregular actions (such as an individual call center representative making statements that may cross the line into fiduciary advice) that may exceed service contract limitations as necessitating a disclosure of investment advice fiduciary status under the 408b-2 regulation.
- For service providers who do expect to provide fiduciary investment advice under the

rule, covered service providers (under the 408b-2 regulation) can satisfy their 408b-2 fiduciary status disclosure obligation during the Transition Period between June 9, 2017 and January 1, 2018, by furnishing an accurate and complete description of the services that will be performed under the contract or arrangement with the plan, including the services that would make the covered service provider an investment advice fiduciary under the currently applicable fiduciary rule. During the Transition Period, however, this disclosure need not use the term “fiduciary” as long as it otherwise accurately describes the services. When the Transition Period ends and the BIC and Principal Transactions Exemptions’ requirement to disclose fiduciary status becomes applicable, the term “fiduciary” must be used.

- In regard to the 408b-2 requirement to update disclosures for a change in fiduciary status as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of a change in fiduciary status, an existing service provider to a pension plan would not have been “informed” of a fiduciary status change that is the result of the fiduciary rule until the rule’s applicability date (June 9, 2017). Also, due to the broad range of service providers who may have experienced changes in fiduciary status as a result of the rule, taken together with the uncertainty regarding the substance and timing of DOL’s past decision on whether to delay the applicability date of the rule and related exemptions, covered service providers will be in compliance with the timing of the “change in fiduciary status” disclosure requirement in the 408b-2 regulation if they disclose such change, or make a Transition Period disclosure described above, as soon as practicable after June 9, 2017, even if more than 60 days after June 9, 2017.

Contribution Recommendations

FAQ 2 asks whether it would be fiduciary investment advice under the rule to encourage additional savings or contributions to a plan or IRA by encouraging plan participants to make contributions to the plan at levels that maximize the value of employer matching contributions, or to otherwise increase contributions or savings to meet objective financial retirement milestones, goals, or parameters based upon the participant’s age, time to retirement or other similar measures, without recommending any particular investment or investment strategy. The answer (“No”) explains that the fiduciary rule generally does not treat communications “about the benefits of plan or IRA participation, [and] the benefits of increasing plan or IRA contributions” as fiduciary investment advice, provided that the information and materials do not include recommendations with respect to specific investment products or recommendations with respect to investment management of a particular security or other investment property.^[3] The answer goes on to provide four specific examples of communications involving a plan enrollment brochure, targeted emails sent on the participant’s enrollment anniversary date or birthday, and a telephone conversation between a call center employee and a plan participant.

Recommendations on Increasing Plan Contribution and Participation Rates

FAQ 3 provides that it would not be investment advice under the rule if a person makes recommendations or suggestions to a plan administrator or other plan fiduciary relating to methods to increase employees’ participation in, or level of contributions to, an ERISA plan, provided that the communications do not include recommendations with respect to specific investment products or recommendations with respect to investment management of a particular security or other investment property.

endnotes

[1] The FAQs are available at:
<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/c oi-transition-period-2.pdf>.

[2] For a description of earlier FAQ guidance, see ICI Memorandum No. 30716, dated May 24, 2017. *Available at* https://www.ici.org/my_ici/memorandum/memo30716. ICI Memorandum No. 30573, dated February 9, 2017. *Available at* https://www.ici.org/my_ici/memorandum/memo30573. For a description of the first set of FAQs (relating to the Best Interest Contract Exemption and other exemptions), see ICI Memorandum No. 30361, dated October 28, 2016. *Available at* https://www.ici.org/my_ici/memorandum/memo30361.

[3] We note that the quoted language is from the education exception in section 2510.3-21(b)(2)(iv)(A) of the final fiduciary rule.