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# DOL Publishes Additional FAQ Guidance on Fiduciary Rule

[30573] February 9, 2017 TO: ICI Members SUBJECTS: Pension RE: DOL Publishes Additional FAQ Guidance on Fiduciary Rule

On January 13, the Department of Labor (DOL) released its second and third set of FAQs relating to the fiduciary rule, the second specifically addressing issues under the fiduciary advice definition itself and the third providing information to retirement investors about consumer protections and their rights with respect to financial advisers.[1] (The first set of FAQs, issued in October 2016, addressed issues relating to the Best Interest Contract (BIC) Exemption and other relevant exemptions.) In total, there are 35 questions and answers in the second set of FAQs. The FAQs clarify when a communication will constitute a "recommendation" triggering fiduciary status, provide examples of a variety of categories of information that will be treated as non-fiduciary investment education, clarify what types of communications will constitute "general communications" that do not trigger fiduciary status, clarify application of the exception for transactions with independent fiduciaries with financial expertise (the "Independent Fiduciary Exception" or "IFE"), as well as clarify the exceptions for the use of marketing platforms and providing assistance in the selection and monitoring of plan investment alternatives.

DOL also released concurrently a third set of FAQs aimed at retirement investors, providing information about the rule intended to help them better understand their rights and benefits as a retirement investor. In addition to the FAQs, the document includes a list of questions for retirement investors to ask their financial advisor. This document is no longer posted on the DOL website.

Although it is widely anticipated that the DOL will delay the applicability date of the fiduciary rule (and will likely make changes), it has not yet made an official announcement. Thus, we understand most financial institutions are continuing their implementation efforts and the FAQs may be helpful in that regard.

## I. Covered Investment Recommendations

FAQs 1 through 7 clarify what constitutes a fiduciary recommendation, particularly with respect to advice related to certain distributions. Of particular significance, FAQ 7 states that nothing in the rule or BIC exemption is intended to alter the analysis of Advisory Opinion 97-15A, which clarifies the use of fee offset arrangements and their implications under ERISA's prohibited transaction provisions. The FAQ did not, however, analyze the implications of such arrangements for purposes of the "level fee" provisions described in

Section 11(h) of the BIC exemption, as requested by the ICI in its questions presented to DOL.

The other FAQs dealing with covered investment recommendations are generally consistent with the language of the fiduciary rule and the preamble. For example:

- FAQ 1 clarifies when a communication will be viewed as a "recommendation." DOL reiterated that a recommendation is a "call to action" or a communication that a reasonable person would view as a recommendation. DOL noted that describing product features and attributes to a potential customer without a "specific recommendation" would not be investment advice.
- FAQs 2 and 3 address communications by product manufacturers about their investment products to their own employees who may act as a fiduciary to plans in recommending those products. DOL notes that the fiduciary rule excepts certain communications between an employer and its employees and from one employee to another. Importantly, the FAQs do not address communications to employees of affiliated companies.
- In FAQ 4, DOL concludes that an explanation of the fact that a participant will receive a minimum required distribution is not investment advice, but recommending a specific investment option for assets that will be distributed in the future is investment advice.
- FAQ 5 addresses forced distributions from a plan and provides that communications "required by the Code and ERISA" about such required distributions would not involve a recommendation. Although the answer is helpful, communications beyond those required under applicable law are not directly addressed by the FAQ, leaving some remaining uncertainty.
- Finally, FAQ 6 clarifies that an adviser or financial institution is not responsible for client actions that are inconsistent with the advice provided.

## II. Investment Education

Eight FAQs (FAQs 8 through 15) focus on the safe harbor exception for the provision of educational information, including the application of the exception to statements made to participants regarding the benefits of plan participation. For the most part, these FAQs reaffirm what was already assumed or understood about the education exception. In FAQs 9 and 10, however, DOL appears to have carefully worded two FAQs in a way that not only appears to limit the scope of the exception, but seems to expand the definition of covered advice to include recommendations to increase contributions.

FAQ 9 treats as "investment education" a call center representative's informing a participant that he is not contributing enough to fully take advantage of his plan's employer match and calculating the amount of the contribution percentage that would be sufficient to obtain the full match. The next question (FAQ 10), however, adds a wrinkle to this analysis that seems to expand the definition of covered advice. In FAQ 10, DOL explained that an employer could actually recommend that a participant increase his contribution to a specified percentage to take full advantage of the plan's match without becoming an advice fiduciary, but only where the employer does not receive a fee in connection with the employee's decision. DOL's approach to these two questions suggests that a "recommendation" to an individual participant to increase contributions so as to maximize the employer match could be fiduciary advice if the recommending party receives a fee or

compensation.

We discussed FAQs 9 and 10 with EBSA staff, and expressed our view that the analysis in the FAQs implies that discussions about increasing contributions are covered advice, an implication not supported by the clear language of the rule. We also observed that service providers often serve as the main communicator of employer plan policies and noted that the FAQs would have a chilling effect on the ability of recordkeepers and other service providers to urge participants to take action to maximize the employer match. Staff requested that we submit a suggested modification of the FAQ to EBSA for their consideration.

The remaining FAQs dealing with the education exception are generally consistent with prior DOL positions. For example:

- In FAQ 8, DOL confirms that a factual explanation of the guaranteed life income feature of a group annuity product would be nonfiduciary investment education. Regarding interactive investment materials, FAQ 11 appeared to confirm that the investment education exception covers an interactive planning tool that uses participant-provided data solely to estimate the participant's post-retirement income needs without also assessing the impact of various asset allocations on meeting those needs.
- FAQ 12 confirms that charging a fee to the plan for the provision of participant investment education would not, by itself, convert an education provider into an advice fiduciary.
- According to FAQ 13, referring a participant to an unaffiliated fiduciary investment advice provider, and receiving a referral fee in exchange, would, in and of itself, be fiduciary investment advice.
- FAQ 14 provides that, notwithstanding an existing fiduciary role, an adviser's provision of rollover education to an existing client would not be considered fiduciary advice absent a specific rollover recommendation.
- Finally, FAQ 15 clarifies the provisions of the education safe harbor–the provision sanctioning the population of asset allocation models. Specifically, DOL confirmed that, because the funds offered through a plan's brokerage window are not "designated investment alternatives," they need not be referenced in the presentation of the asset allocation model as funds with "similar risk and return attributes." Only designated investment alternatives must be identified.

## III. General Communications

FAQs 16 through 19 provide additional clarity on when a statement is a general communication and/or falls within the "hire me" exception.

FAQs 16 and 17 appear to limit when communications at "widely attended speeches or conferences" will not be considered investment advice. FAQ 16 offers an explanation as to what would constitute a widely attended event. In particular, DOL stated that a wholesaler would not be deemed to have provided investment advice if the wholesaler touted the benefits of a life insurance product and recordkeeping services to "many" (but presumably not all) 401(k) plans at a conference with 300 attendees open to retirement professionals (*i.e.*, consultants, other service providers, plan sponsors, and plan fiduciaries) but not individual retirement investors. DOL further muddles the issue by expressing the view in

FAQ 17 that free meal seminars offered for the purpose of marketing services or investments are not "widely attended speeches or conferences." DOL stated that a reasonable person attending a free meal seminar could view statements made to all attendees as an investment recommendation to each attendee, thereby negating the availability of the exception for general communications. DOL notes, however, that whether any particular communication delivered at a free meal seminar would rise to the level of an investment recommendation ultimately turns on the attendant facts and circumstances.

Consistent with the preamble discussion accompanying the fiduciary rule's "platform provider" exception, FAQ 18 reiterates DOL's position that the recommendation of a recordkeeping services provider does not, in and of itself, give rise to a fiduciary recommendation where no accompanying recommendation is made as to the appropriateness for the plan of the investment alternatives available through the recordkeeper's investment platform.

Finally, FAQ 19 describes a financial institution that makes four different rollover service offerings available: (a) self-directed brokerage, (b) an investment advice program, (c) a discretionary managed account program, and (d) a robo-advice program. DOL indicates that the mere description of the available offerings, even when coupled with a statement by a company representative that the financial institution itself is an industry leader featuring high-quality, low-cost services, is non-fiduciary in nature. The institution's self-promoting statements would be excepted under the "hire me" principle.  DOL cautions, however, that recommending a particular account type or service from among the four that it makes available, would be viewed as a fiduciary recommendation because it would involve a recommendation on the selection of an investment arrangement type (*e.g.*, brokerage versus advisory).

## IV. Independent Fiduciary Exception

A number of the FAQs (FAQs 20 through 29) focus on how to determine whether the Independent Fiduciary Exception (IFE) applies and the types of representations on which a service provider can rely.[2]

A few of the FAQs touched on issues raised by ICI in a list of questions and proposed answers on the application of the IFE submitted to DOL last year. For example, FAQ 20 confirms that the IFE permits plan and non-plan assets and the assets of multiple plans and non-plan investors to be combined in determining whether the $50 million threshold is met. FAQ 21 addresses the reasonable belief requirements for parties seeking to use the IFE, stating that reasonable belief can be based on representations from the independent fiduciary, which must be in place at the time of the transaction and cover the period over which the communications are to take place. The same FAQ also provides an example of a situation that would meet the requirements, in which an independent fiduciary represents in writing that it manages at least $50 million as of the date of the contract, and that it will notify the service provider in writing if the amount drops below $50 million. DOL has not otherwise provided written guidance suggesting that the IFE could no longer be used if assets managed by the independent fiduciary drop below the threshold. ICI had asked for guidance indicating that if the IFE requirements are satisfied prior to entering into the transaction, then the exception would continue to be applicable with respect to the relationship created when the $50 million threshold was met.

In FAQ 24, DOL addresses the application of the exception in circumstances where additional plan fiduciaries are present when a recommendation is made. DOL clarified that a financial institution may rely on the IFE when making sales presentations to a plan

committee that is accompanied by a registered investment adviser, provided that the financial institution knows or reasonably believes that the registered investment adviser is acting as a plan fiduciary responsible for making fiduciary recommendations to the plan committee with respect to the transaction at issue and that the other conditions of the IFE are satisfied. DOL went on, however, to note that ongoing communications between the financial institution and plan committee would not fall within the IFE unless the registered investment adviser participated in the ongoing communication with the service provider and it was clear that the registered investment adviser had continued responsibility for evaluating the transaction subject to the subsequent communication. This narrow interpretation suggests that it will not be enough for service providers to know that a plan committee will rely upon the advice of a registered investment adviser, but rather, will need to work through the registered investment adviser when communicating with the plan committee.

FAQ 25 provides that the mere fact a registered investment adviser is a fiduciary under the Internal Revenue Code with respect to an IRA is not alone sufficient to satisfy the requirement that a counterparty knows or reasonably believes that the adviser is responsible for exercising independent judgment in evaluating the transaction for the IRA. This answer underscores the importance in certain circumstances of obtaining representations that comprehensively address the requirements under the IFE. And, FAQ 26 confirms that an IRA owner with more than $50 million in personal and IRA assets cannot act as an independent fiduciary with respect to his or her own IRA for purposes of the IFE. In reaching this conclusion, DOL noted that the definition of "plan fiduciary" under the fiduciary rule expressly provides that an IRA owner is not a plan fiduciary with respect to his or her own IRA.

Several open questions regarding the application of the $50 million in assets requirement remain. For example, it is unclear whether, for purposes of determining whether a plan committee has at least $50 million in assets under management, one can count assets over which discretionary authority has been delegated to an outside investment manager. In addition, DOL has not addressed whether a plan officer's personal investment portfolio may be counted for purposes of meeting the $50 million in assets requirement, although FAQ 25 could be interpreted to suggest that only assets managed in a professional capacity can be taken into account.

FAQ 28 is helpful in allaying the concern expressed by some that DOL could take the position that independence could be compromised where, for example, an adviser receives a significant portion of its revenue from a single wholesaler. The FAQ clarifies that a broker that receives indirect compensation in connection with a plan's investment in selected mutual funds on a recordkeeper's platform will be considered independent of the recordkeeper if it complies with the conditions of the Best Interest Contract Exemption.

Finally, FAQ 29 provides further relief for wholesalers by clarifying that the requirement under the IFE that the party making the recommendation not receive direct compensation for the provision of investment advice is not violated when a financial institution receives a fee for providing model portfolio (including asset allocation) services to advisers so long as the fee is not paid directly or indirectly by the plan, plan participant, or IRA.

## V. Marketing Platforms and Selection and Monitoring Assistance

The circumstances under which the "platform exception" will be available and how a service provider may provide investment selection and monitoring information to plan fiduciaries are clarified in FAQs 30 through 35.

FAQs 30 and 31 focus on what qualifies as a platform and suggests that a financial institution has considerable flexibility in creating a platform made available or marketed to an ERISA-covered plan without making a recommendation. In FAQ 30, DOL clarifies that a group annuity contract can be a platform as described under the platform exclusion. Further, DOL confirms that, under the platform exception, the inclusion of proprietary products, including a single proprietary product representing a single asset class (*e.g.*, capital preservation), does not result in a loss of the exclusion. Note that, in reaching this conclusion, DOL assumed the group annuity contract or other platform otherwise offers a range of investment alternatives.

FAQs 32 through 34 provide narrow interpretations on how platforms can be marketed. In FAQ 32, DOL recognized that a service provider, such as a recordkeeper, may rely on the platform provider exception when marketing or making available a third party's platform of investment alternatives. FAQ 33 clarifies that a recordkeeper would not be providing a recommendation if, upon request of the plan sponsor and having received the plan's investment policy statement ("IPS") describing various investment criteria (e.g., asset classes and risk/return characteristics), the recordkeeper provides a list of all the investment alternatives available on its platform that meet the requirements of the IPS. DOL cautioned, however, that if the recordkeeper, in responding to the request, exercised discretion in providing a narrow, selective list of investment alternatives and a reasonable person would view its response as a recommendation regarding investments from the selective list, it could be considered to have provided a recommendation. Viewed in conjunction with language in the preamble to the fiduciary rule, DOL's response in FAQ 33 could be interpreted as supporting the conclusion that a recordkeeper can provide a list of investments that fit any set of objective characteristics specified in a request from a plan fiduciary without becoming an investment advice fiduciary.

FAQ 34 relates to automated cash sweep services offered by financial institutions that automatically place uninvested client account funds into short-term investment vehicles. DOL advised that a communication merely offering the cash sweep service and describing its features would not constitute a recommendation, but a communication recommending a particular cash sweep service may constitute a recommendation.

Finally, FAQ 35 provides that the platform provider exclusion is available for a platform that includes recordkeeping and other optional services, including connectivity with one or more investment advisory firms that a plan sponsor or plan participants may use to assist in selecting investment alternatives.

DOL clarified that merely offering or making the investment advisory firm's services available as an elective option would not necessarily constitute a recommendation, but the context in which the investment advisory firm's services are presented may give rise to a recommendation.

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**endnotes**

[1] The second set of FAQs is available here: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf. The third set of FAQs was initially posted at: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/consumer-protections-for-retirement-investors-your-rights-and-financial-advisers.pdf, but this page was removed after the change in Administration. For a description of the first set of fiduciary rule 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.

[2] In order for the Independent Fiduciary Exception to apply, the person making the recommendation must, among other requirements, know or reasonably believe that the independent fiduciary is either a regulated financial services provider (*i.e.*, a bank, insurance company, registered investment adviser or registered broker-dealer) or a plan fiduciary, such as an investment officer or committee, that has at least $50 million in total assets under its management or control.

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