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The Rubber Meets the Road for the Fiduciary Rule – Well, Almost

By [Sheila Ninneman, J.D.](#)

The Department of Labor's (DOL) delayed fiduciary rule, which includes extensive changes to the definition of a "fiduciary" applicable to both individual retirement accounts (IRAs) and ERISA-governed plans, will generally become effective June 9, 2017. In his May 22, 2017 op-ed in the Wall Street Journal, DOL Secretary Alexander Acosta announced that there was no legal basis to further delay the rule's implementation, while affirming that the DOL will continue to review the rule pursuant to President Trump's February 3, 2017 memorandum. See our prior articles: [DOL New Fiduciary Regulations: Action Items for the Next Year](#) and [The Delayed Fiduciary Rule May Have Already Changed the Landscape](#).

In concert with Secretary Acosta's announcement, the DOL issued Field Assistance Bulletin No. 2017-02 (FAB) entitled "Temporary Enforcement Policy on Fiduciary Duty Rule" and "Conflict of Interest FAQs (Transition Period)" (FAQs) to reflect and flesh out the phased implementation period from June 9, 2017 to January 1, 2018. Unless the DOL announces otherwise in the coming months, full compliance with the fiduciary duty rule, including all conditions necessary to rely on listed exemptions, will be required on and after January 1, 2018.

Importantly, for those impacted by the fiduciary duty rule who are still struggling to conform their practices and documentation to the rule's contours, the FAB states that the DOL's emphasis during the phased implementation period will be

on assisting plans, plan fiduciaries, and financial institutions with compliance efforts. The DOL "will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions." In a footnote, the DOL confirmed that the Internal Revenue Service (IRS) will continue its policy not to apply Section 4975 of the Internal Revenue Code, relating to prohibited transaction excise taxes, or related reporting requirements to any agreement or transaction to which the FAB applies.

Equally important, the FAQs, and particularly Q&As 4 and 5, make it clear that no one should get comfortable with the rule as written. The DOL is continuing to analyze the impact of the fiduciary duty rule, and to invite public comment. It noted, for example, that in response to the new conflict of interest provisions in the fiduciary rule, brokers are contemplating the use of "clean shares" in the mutual fund market and the DOL could envision a streamlined exemption for their use. The DOL also hinted that there may be further delay for full compliance in order to facilitate "more effective retirement investor assistance and help avoid needless or excessive expense as firms build systems and compliance structures that may ultimately be unnecessary or mismatched" with the DOL's final decisions on the rule.

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In addition to addressing the DOL's enforcement policy (Q&A 15), the DOL's openness to further changes in the rule (Q&As 4 and 5), and specifying that the rule is not effective until 11:59 p.m. (local time) on June 9th (Q&A 11), the FAQs provide clarifications regarding the rules substantive provisions, including:

- BICE (Q&As 1, 6, 7 and 8)
- PTE 84-24 (Q&As 2, 9 and 10)
- Other PTEs (Q&A 3)
- Fiduciary investment advice (Q&As 12, 13 and 14).

The BICE, PTE 84-24 and other PTEs clarifications include the facts that during the transition period, financial institutions and advisors, in order to rely on the respective exemptions must comply with the "impartial conduct standards" including giving advice in the "best interest" of the retirement investor that meets BICE's professional standard of care, charging no more than reasonable compensation and making no misleading statements about the advice. Clarifications regarding the definition of "investment advice" under the fiduciary duty rule include specific examples of plan communications that fall into the category of investment education and do not constitute fiduciary investment advice.

Until we learn further from the DOL in the coming months, plan sponsors and individual retirement investors can expect their advisors' compliance with the fiduciary rule's requirements in connection with the expanded fiduciary definition and the impartial conduct standard after June 9, 2017. This is true even though fiduciaries may not be subject to the IRS' and DOL's enforcement actions. The advisor community is simply too far down the road of compliance to turn back, and their clients expect it. What we are all most likely to see is further action on exemptions, and continued delay of enforcement.

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