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DOL Extends Fiduciary Rule Transition Period, Issues FAQs on Fee Disclosures

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Transition Period Extension

In an August 9th court filing, the DOL announced it will extend the transition period for three prohibited transaction exemptions relating to the fiduciary investment advice rule (the "Fiduciary Rule"), including the Best Interest Contract (BIC) Exemption, to July 1, 2019. Previously, the transition period was set to end on January 1, 2018. The DOL's extension of the transition period delays for at least 18 months the more onerous conditions of the BIC Exemption. The DOL has been considering making changes to the Fiduciary Rule or related exemptions during the transition period, and the SEC has indicated that it intends to engage constructively with the DOL on these issues.

During the transition period that began on the Fiduciary Rule's June 9, 2017 applicability date, service providers relying on the BIC Exemption must comply with more limited rules, including (i) providing investment advice that is in the best interest of the plan, (ii) receiving no more than reasonable compensation for their services, and (iii) not making any materially misleading statements regarding a recommended transaction, their conflicts of interest, or other matters relevant to the investment decision. For more information on the transition period, see our Legal Alert.

Disclosure FAQs

Additionally, the DOL issued a set of Frequently Asked Questions (FAQs) on the Fiduciary Rule last week that are intended to resolve a difference between the Fiduciary Rule's transition period requirements and the fee disclosure requirements of ERISA section 408(b)(2) (the "Fee Disclosure Rules"). These FAQs may require some service providers to ERISA plans, such as 401(k) or pension plans, to take action as soon as possible to notify the plans of their status as fiduciaries. The FAQs do not require any additional disclosures to IRAs because the Fee Disclosure Rules do not apply to IRAs.

Although the BIC Exemption does not require disclosure of one's fiduciary status during the transition period, the existing Fee Disclosure Rules require "covered service providers" to ERISA plans, including investment advisers, broker-dealers or recordkeepers, to inform the plan if they will provide, or reasonably expect to provide, services in a fiduciary capacity. Because the Fiduciary Rule expands the scope of what constitutes fiduciary services, some service providers may have first become fiduciaries upon the applicability date of the Fiduciary Rule on June 9, 2017, which would trigger a notification of a change in fiduciary status under the Fee Disclosure Rules.

This creates a tension between the Fiduciary Rule's transition relief, which allows service providers to

hedge their bets on fiduciary status during the transition period as changes to the Fiduciary Rule are still being considered, and the Fee Disclosure Rules, which require disclosures of one's fiduciary status. The FAQs attempt to resolve this tension in two ways:

- Fee Disclosures Disclaimed Fiduciary Status. If the plan service provider has disclaimed fiduciary status in a contract or by other disclosures, it must make a corrective disclosure as soon as practicable, even if this is beyond the 60-day deadline that ordinarily applies under the Fee Disclosure Rules for notifying plans of a change in fiduciary status . The corrective disclosure does not have to state the plan service provider is a fiduciary. Rather the DOL will consider the corrective disclosure sufficient during the transition period if it provides an accurate and complete description of the services provided without disclaiming fiduciary status. After the transition period, if the plan service provider qualifies as a fiduciary under the Fiduciary Rule, it will have to make a second corrective disclosure acknowledging its status as a fiduciary.
- Fee Disclosures Did Not Disclaim Fiduciary Status. If the plan service provider has not disclaimed fiduciary status, it will not need to update its disclosures during the transition period as long as its disclosures are an accurate and complete description of the services provided. At the end of the transition period, if the service provider is a fiduciary under the Fiduciary Rule, it would have to make a corrective disclosure at that time acknowledging its status as a fiduciary.

In addition to discussing the Fee Disclosure Rules, the FAQs also confirm that recommendations to contribute to (or increase contributions to) a plan will not make one a fiduciary as long as no advice is provided on specific investments.

The FAQs are available at: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-2.pdf.