

Morgan Lewis

LAWFLASH

TWO NEW SETS OF DOL FIDUCIARY RULE FAQs

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DOL releases additional guidance on fiduciary rule in the waning days of the Obama administration.

The US Department of Labor (DOL) has released two new sets of frequently-asked-questions (FAQs) regarding the conflict of interest final rule on fiduciary investment advice. An earlier set of FAQs was released in October 2016 and focused on the exemptions the DOL released along with its rule redefining fiduciary investment advice (see our coverage [here](#) and [here](#)).

ANALYSIS OF THE FAQs

One of the new sets of FAQs focuses on the new definition of fiduciary investment advice itself. Major topics covered include

- what constitutes a “recommendation” that can result in fiduciary investment advice;
- clarification of investment education vs. general communications; and
- application of the “sophisticated” independent fiduciary and investment platform exceptions.

These 35 FAQs respond to a number of questions raised to the DOL. For example, several questions deal with the extent to which explanations of plan contribution and distribution rules avoid being viewed as investment recommendations under the rule.

The other set is directed at retirement investors and consumers, covering consumer protection features of the new rule.

This set of FAQs describes the reasons that the DOL considered the conflict of interest rule to be necessary, and seeks to address a number of questions and concerns that have been raised. For example, the FAQ guidance explains that while the rule will require changes in the financial services industry that the DOL believes will better protect retirement savings, it will not require advisers to move clients from commission-based accounts to fee-based accounts, and it does not mean that a financial adviser must always identify the “absolute best product” or be liable any time an investment loses money (so long as the financial adviser meets the “best interest” standard).

IMPACT OF THE INCOMING US PRESIDENTIAL ADMINISTRATION

There has been speculation as to what might happen to the DOL fiduciary investment advice rule after the transition to the new US presidential administration. Many past administrations taking office have delayed the effective date of any rules adopted toward the end of the prior administration that were not yet in effect.

While the DOL rule is already effective, it is widely expected that the new administration will postpone the applicability date of April 10, 2017, giving time for the DOL under the new administration to reconsider the rule and for the US Congress to act on the subject matter. There already has been a bill proposed in Congress to delay the rule for two years, and other proposals are expected to emerge shortly.

We should have a better sense after the new administration takes office—possibly as early as the week of January 23. In the meantime, until there is clear action on a delay, many firms are continuing to move forward with their plans for compliance to avoid getting caught unprepared if the rule and its April 10 applicability date remain unchanged.

Morgan Lewis is evaluating these FAQs and their impact on our clients and the industry.

MORGAN LEWIS ANALYSES

Morgan Lewis is continuing to closely follow developments on this rule and will provide updates as new information becomes available. Click on any of the links below to read prior Morgan Lewis thought leadership covering the rule to date:

- [The 2016 Election and the Future of the Department of Labor Fiduciary Rule](#) (Morgan Lewis LawFlash, November 14, 2016)
- [Fiduciary Rule FAQs Challenge Back-End Recruitment Bonuses](#) (Morgan Lewis LawFlash, November 1, 2016)
- [DOL Releases First Wave of FAQs on Fiduciary Rule](#) (Morgan Lewis LawFlash, October 28, 2016)
- [The Final DOL Fiduciary Rule—Considerations for Plan Sponsors](#) (Morgan Lewis LawFlash, June 14, 2016)
- [More DOL Final Fiduciary Rule Fallout: Some Potential IRS Pitfalls for IRA Custodians and Trustees \(Part 2 of 2\)](#) (*ML BeneBits* blog post, May 18, 2016)
- [More DOL Final Fiduciary Rule Fallout: Some Potential IRS Pitfalls for IRA Custodians and Trustees \(Part 1 of 2\)](#) (*ML BeneBits* blog post, May 13, 2016)
- [Final DOL Fiduciary Rule—First Impressions](#) (Morgan Lewis LawFlash, April 8, 2016)
- [DOL Sends Fiduciary Rule to OMB for Review](#) (Morgan Lewis LawFlash, January 29, 2016)
- [Any Congressional Action on Proposed DOL Fiduciary Rule Postponed to 2016](#) (*ML BeneBits* blog post, December 23, 2015)
- [Threshold Issues Raised by DOL's Proposed Fiduciary Rule](#) (*ML BeneBits* blog post, June 17, 2015)
- [DOL's Proposal to Expand Fiduciary Definition Would Bring Many Service Providers Into Scope](#) (Morgan Lewis White Paper, May 20, 2015)
- [DOL Fiduciary Rule to Revamp Regulation of Advice to Plans and IRAs](#) (Morgan Lewis LawFlash, April 15, 2015)
- [DOL Sends Proposed Conflict of Interest Rule to OMB for Review](#) (Morgan Lewis LawFlash, March 5, 2015)

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