
A heads-up from Wagner Law on the fiduciary rule

By Editorial Staff Thu, Sep 14, 2017

In a new posting, ERISA expert Marcia Wagner helps financial advisers and financial institutions answer the question, 'What do I do during the Transition Period?'

The Boston-based Wagner Law Group issued the following alert this week:

The DOL recently proposed to extend the transition period by 18 months (i.e., from January 1, 2018 to July 1, 2019) for the full implementation of the Best Interest Contract Exemption (“BICE”), the Principal Transactions Exemption, and PTE 84-24 (relating to sales of annuities and other transactions involving insurance companies and agents) (collectively, the “Exemptions”). The proposal, published in the Federal Register on August 31, 2017, is subject to a 15-day comment period.

We think it is highly likely that the DOL will finalize the proposal (although changes to the proposal are possible). The DOL stated that the Impartial Conduct Standards that are currently in effect will continue to be the sole conditions for the Exemptions during the extended Transition Period (i.e., the period in which the exemption is available but compliance with the full conditions of the exemption is not necessary).

Briefly, the Impartial Conduct Standards require that the financial institution and its advisors:

- (1) Act prudently and in the best interest of the retirement investor without regard to the financial institution’s or advisor’s interests,
- (2) Charge no more than reasonable compensation, and
- (3) Do not make misleading statements.

If you are in compliance with those standards now, the proposed extension does not otherwise increase or extend your liability.

However, we note that it is unclear if the DOL will extend its current temporary enforcement policy on the Exemptions. The DOL previously stated that it would not take action against financial service providers for failing to comply with the Exemptions as long as they were “working diligently and in good faith to comply with the fiduciary duty rule and exemptions” during the Transition Period, which was then scheduled to end on January 1, 2018.

In its recent proposal, the DOL asked for comments on whether to continue with this approach, suggesting that the DOL has not yet decided how to handle enforcement of the Impartial Conduct Standards.

What Do I Do Now? In this environment, a critical and bottom-line question for financial advisers and financial institutions is “What do I do during the Transition Period?”

For all its many faults, the Exemptions, especially the full BICE, provided compliance professionals with a long checklist of specific compliance items. The Impartial Conduct Standards are somewhat more vague and do not necessarily lend themselves to easy compliance checklists.

Below is a non-exhaustive list of steps that financial institutions and financial advisors can take to protect themselves and demonstrate compliance with the Impartial Conduct Standards during the extended Transition Period, or at least until it becomes more clear what the compliance landscape will look like after the Transition Period is over. Although no single step listed below is required by law or regulation, we think it is important for financial advisers and institutions to take some steps to implement and enforce the Impartial Conduct Standards.

- Identify and code all retirement investors as ERISA Plans, non-Title I Plans, IRAs, etc. This will help the firm to track disclosures, procedures, etc., that apply to each type of retirement investor.
- Make sure written policies and procedures for ERISA and other qualified retirement accounts such as IRAs and similar accounts (e.g., Archer Medical Savings Accounts, HSAs, Coverdell Educational Savings Accounts, Keogh plans, and sole proprietor 401(k) plans) incorporate the Impartial Conduct Standards and require compliance with those standards in making recommendations to retirement accounts. Periodic compliance training for advisors may be appropriate. Compliance manuals and written supervisory procedures (as required by FINRA Rule 3120) should be reviewed and updated.
- The Fiduciary Rule became fully applicable on June 9, 2017. If not already done, consider revising agreements to make clear the services for which the firm is and is not acting in a fiduciary capacity. Any registered representatives of broker-dealer firms should be licensed as investment advisor representatives, if not done already.
- Implement processes and controls for the delivery of non-fiduciary services to ensure that fiduciary advice is not inadvertently provided.
- If not already completed, review compensation structures and revenue streams to identify any potential conflicts.
- Implement steps to review recommendations to retirement accounts and conduct surveillance to ensure compliance with the best interest standard.
- Review advisor compensation for recommendations to retirement accounts to ensure that it is reasonable in the context of your financial institution as a whole.
- Consider reviewing corporate compensation and individual advisor compensation against market benchmarks to understand where corporate and individual compensation is set compared to the market. Documenting the benchmarking process is important.
- Review use of proprietary products and investments that generate third-party payments in retirement accounts to make sure use of such products is consistent with the best interest standard.
- Review all sales and marketing materials and disclosures with a view to identifying and eliminating any statements that could be viewed as misleading or inadvertently deemed to constitute a fiduciary recommendation.
- Review disclosures for retirement accounts to ensure that disclosures are accurate and fairly inform retirement investors of direct and indirect compensation received by the firm and its advisors and potential conflicts of interest.
- IRA rollovers are clearly a point of concern for the DOL and, to the extent the firm advises individuals on IRA rollovers, that activity should be treated as a fiduciary activity unless it can be clearly and conclusively established that the firm's role is purely informational.

- Although internal documentation is not a technical requirement at the moment for IRA rollovers (and rollovers of similar accounts such as Archer Medical Savings Accounts, HSAs, etc.) under the BICE's level fee exemption, firms should nevertheless consider maintaining records in support of the rollover decision.
- Make sure appropriate persons (such as the CCO, General Counsel, or their delegates) are made responsible – and do so by formal, written appointment – for overseeing compliance with the Impartial Conduct Standards.
- Consider reviewing how onboarding of discretionary accounts are handled. Under the fiduciary rule as currently in effect, what was formerly considered to be sales activity could be viewed as an investment recommendation to retain the firm for discretionary services. Use of “BICE for a Day” type language (minus the private right of class action lawsuit) in new or existing agreements could help cure this. Although this is not necessarily a point of emphasis for the DOL, it should not be ignored.
- Review existing fiduciary insurance and E&O policies to ensure persons responsible for compliance with the Impartial Conduct Standards are covered for the discharge of their duties. In addition or alternatively, these individuals may be indemnified by the financial institution.

Best Effort Compliance. The DOL, IRS and SEC will continue to share audit information and make cross-referrals under existent inter-Departmental protocols. Regardless of the stated enforcement position of any of these regulatory bodies, a demonstrated effort to meet the Impartial Conduct Standards during this Transition Period (whether it ends in 2017 or extends to a later date as currently proposed) will be a powerful factor in a finding of compliance for the financial institution. The presence of well-documented client files, formally adopted processes and procedures, evidence of attempts to adhere to such processes and procedures, and internal compliance training will be among the most impactful factors to demonstrate efforts to comply with the Impartial Conduct Standards.