

January 17, 2017

DOL Issues Additional Interpretative Guidance on New Fiduciary Rule

On January 13, 2017, the U.S. Department of Labor (the “DOL”) issued the second in a planned three-part set of FAQs on its new fiduciary rule. (For details on the fiduciary rule, see our prior [Alert](#), and for details on the first set of DOL FAQs, see our prior [Alert](#).) The new [FAQs](#) focus on the regulation defining “investment advice” and include some important clarifications, including on the independent fiduciary carve-out, cash sweep programs and interactions with plans that will not be treated as investment advice. The DOL also issued a separate FAQ and Questionnaire for consumers. The [Consumer FAQ and Questionnaire](#) does not include substantive guidance on the implementation of the rule. However, broker-dealers and other fiduciaries covered under the rule may wish to review the FAQ and Questionnaire in preparation for questions that consumers may ask.

The most notable FAQs, and possible implications and action items for financial institutions, advisors, and asset managers, are described below.

FAQ Answer	Potential Implications / Action Items
<p>Transactions with independent fiduciaries where other plan fiduciaries are present: If a party knows or reasonably believes that an "independent fiduciary" (within the meaning of the fiduciary rule) is acting as the plan fiduciary and has responsibility for exercising its independent judgment with respect to a transaction, then the presence of other fiduciaries to the plan who do not meet the definition of "independent fiduciary" will not prevent the transaction from being exempt from the definition of investment advice under the rule.</p>	<p>Firms that participate in meetings or otherwise communicate with independent fiduciaries while other plan representatives are present should adopt policies and procedures to establish and document that all advice is being given solely to the independent fiduciary. Firms should also take care to ensure that all follow-up communications are with the independent fiduciary, not with the plan's other representatives.</p>
<p>Cash sweeps: Offering a daily cash sweep service to IRA and small plan clients will not constitute investment advice where the client must elect to make use of the service.</p>	<p>Firms seeking to avoid being treated as fiduciaries should evaluate the implementation of the cash sweep program to determine whether it is commercially reasonable to offer a cash sweep program in accordance with the FAQs. The FAQs do not address mandatory cash sweep programs or programs that include only a single short-term investment option.</p>
<p>Client actions against advice: If a client makes an investment decision against the advisor's advice then the advisor will not be liable as a fiduciary with respect to that investment. However, depending on the relationship between the advisor and the client, the advisor may be responsible for monitoring the investment.</p>	<p>Firms should establish a process for documenting when a client decides to act against advice. Firms may consider expressly limiting their obligations to monitor investments made against advice under their Best Interest Contract ("BIC") Exemption contracts.</p>

<p>Fees for educational materials: An advisor may charge a fee for providing educational materials under the rule without making an investment recommendation.</p>	<p>Firms considering charging a fee for educational materials should review those materials and the scripts for related interactions with the client to ensure that none of the interactions (alone or in the aggregate) could result in the provision of investment recommendations.</p>
<p>Free-meal seminars: The DOL does not regard free-meal seminars for a group of retirees or individuals approaching retirement as a widely attended speech or conference eligible for the general communications carve-out.</p>	<p>Firms that make use of free-meal seminars or similar marketing strategies should review the scripts and materials prepared for these meetings to determine whether they will result in investment recommendations, and if so, what exemptions may be available.</p>
<p>Internal communications with employees: A firm's internal communications with employees (including training materials) generally will not be recommendations under the rule, but those materials could be treated as an investment recommendation if they are forwarded or made available to retirement investors, depending on the applicable facts and circumstances.</p>	<p>Firms should clearly mark materials that are not intended for client use, and should train employees not to share internal materials with clients.</p>
<p>Who may serve as an independent fiduciary: The DOL clarified that corporate officers who are also plan participants may serve as independent fiduciaries under the rule. The DOL also clarified that an IRA owner may not be an independent fiduciary with respect to his or her own IRA. Finally, the DOL clarified that a broker-dealer may represent that it is an independent fiduciary even if it receives indirect compensation in connection with plan investments, as long as the broker-dealer satisfies the requirements of the BIC exemption with respect to such compensation so that there is no prohibited transaction impairing the broker-dealer's independence.</p>	<p>Firms should obtain representations from independent fiduciaries in connection with any interaction intended to fall under the "independent fiduciary" carve-out.</p>

For more information about these FAQs or the DOL's fiduciary rule, please contact any member of Ropes & Gray's [ERISA practice group](#).