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ALERT

ERISA

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Department of Labor Provides Guidance on Fiduciary Rule Transition Period

On May 22, 2017, the U.S. Department of Labor (the "DOL") released a new set of FAQs confirming that the compliance date for the fiduciary rule will remain June 9, 2017 (with compliance required as of 11:59 PM on that date) and providing guidance on the transition period from June 9, 2017 until January 1, 2018. (The January 1 date for full compliance may change.) The FAQs confirm certain guidance that was previously included in the DOL's Notice delaying the applicability date of the rule from April 10 to June 9, and provide answers to some common compliance questions. The FAQs also make it clear that the DOL's review of the rule is ongoing, and that the DOL intends to request additional comments from the public on certain aspects of the rule in the near future.

Key compliance points from the FAQs include the following:

Compliance Question	DOL Answer
Does advisor compensation have to be changed to rely on the Best Interest Contract Exemption during the transition period?	No. During the transition period, compliance with the impartial conduct standard does not necessarily require institutions to make changes to compensation structures.
Do the additional requirements to rely on the Best Interest Contract Exemption when recommending proprietary products or products that pay third-party fees apply during the transition period?	No. During the transition period, institutions are expected to develop plans that they reasonably conclude are necessary for ensuring and monitoring compliance with the impartial conduct standard; however, advisers should be candid about compensation and limits on investments when recommending proprietary products or products that pay them third-party fees.
Is the level-fee exemption under the Best Interest Contract Exemption available during the transition period?	Yes. The level-fee exemption is available to advisers (including robo-advisers) during the transition period if they adhere to the impartial conduct standard.
May firms rely on "negative consent" to representations for purposes of relying on the sophisticated independent fiduciary exemption when communicating with certain independent, qualified investor representatives?	Yes.
Is the provision of a non-client specific model portfolio that is not individualized to the needs of a specific plan or IRA a fiduciary recommendation under the rule?	No. The provision of a non-individualized model portfolio to an unaffiliated intermediary generally will not be fiduciary investment advice.

The DOL also issued Field Assistance Bulletin No. 2017-02, announcing a temporary non-enforcement policy for non-compliance with the rule. Under this policy, the DOL will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the rule, or treat those fiduciaries as violating the rule or the related prohibited transaction exemptions. The release also confirms that the Treasury Department and the IRS will follow a similar non-enforcement policy. Notably, these non-enforcement policies do not protect institutions from private lawsuits by ERISA plans or their participants for failure to comply with the rule.

For details on the fiduciary rule, see our prior Alert, and our Alert on the Final Delay, and for details on the DOL FAQs, see our prior Alert on the First FAQ and Alert on the Second FAQ.

If you would like further information, any member of Ropes & Gray's ERISA practice group would be happy to discuss with you the current status of the DOL's fiduciary rule.