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## From the DOL to the SEC - Interesting Angles on the DOL's Fiduciary Rule #67

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### Fiduciary Rule: From the DOL to the SEC

This is my 67<sup>th</sup> article about interesting observations concerning the Department of Labor's (DOL) fiduciary rule and exemptions. These articles also cover the DOL's FAQs interpreting the regulation and exemptions, and related developments in the securities laws.

It now seems certain that the DOL will extend the applicability date of the final exemptions to July 1, 2019, or thereabouts. In any event, it will be a long extension. As a practical matter, that means that the transition rules under the Best Interest Contract Exemption (BICE) and Prohibited Transaction Exemption 84-24 will be extended until June 30, 2019 . . . in other words, the transition rules will continue until the applicability of revised final exemptions.

The extended time will be used for the DOL and the Securities and Exchange Commission (SEC) to cooperate in the development of new fiduciary rules by the SEC (and perhaps changes to the DOL's fiduciary regulation) and for revised exemptions to be issued by the DOL for BICE and 84-24.

However, that coordination will probably not produce rules as favorable as some expect nor as unfavorable as others anticipate. Let me explain that comment.

The DOL's new fiduciary regulation—which became fully applicable on June 9 of this year—defines the recommendations that cause an advisor and his or her supervisory entity to be fiduciaries. For example, if an advisor recommends an investment, an investment manager, an investment strategy or policy, a withdrawal from an IRA or a distribution and rollover from a plan, that is already fiduciary advice.

Since that's a regulation, the DOL can amend it. However, I doubt that any of those recommendations will be removed from the category of fiduciary advice. On the other hand, an amended regulation could expand the circumstances in which selling is allowed without becoming fiduciary advice (perhaps with enhanced disclosures of non-fiduciary status) and could require a more personalized recommendation, *e.g.*, a recommendation that is individualized to a plan, participant or IRA owner. However, I doubt that the changes will substantially alter the current landscape.

The second fiduciary issue is the standard of care—the dual duties of prudence and loyalty. For advice to plans and participants, those duties are statutory. They cannot be changed by regulation. And, they cannot be changed by the SEC. Only Congress can amend the law (and this Congress seems to have a difficult time doing anything).

However, the statutory prudent man rule and duty of loyalty only apply to advice to ERISA plans and their participants. For IRAs, those duties (which are referred to as the "best interest standard of care") are imposed by the exemptions, for example, BICE. (As an aside, that means that advisors and their firms only need to comply with the best interest standard of care for IRAs if they are committing prohibited transactions by, *e.g.*, receiving variable compensation or third party compensation. So, for example, a level fee advisor to an IRA would not be committing a prohibited transaction and, therefore, would not need to comply with the conditions of an exemption, *e.g.*, the best interest standard of care.) However, the DOL can amend exemptions. So, BICE and 84-24 could be changed to a standard other than the best interest standard of care. Having said that, though, there may not be significant changes. If you look at the best interest standard, it requires that the advisor and his or

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her firm act prudently and loyally. It's possible that the SEC could adopt the ERISA rule as the standard for retail advice for broker-dealers and RIAs. In any event, it's difficult to imagine a new SEC standard that is much different than prudence and loyalty.

With regard to disclosures for exemptions, it's possible—perhaps even likely—that the DOL will follow the SEC's lead. Before the DOL does that, though, it must make an independent finding that the SEC's disclosures are adequately protective of the interests of plans, participants and IRA owners. In that regard, the DOL needs to consider the effectiveness of the disclosures, as well as the facts to be disclosed. Nonetheless, I believe that the SEC will be leader on disclosures and the DOL will make every effort to use the SEC disclosures as conditions of the prohibited transaction exemptions. That will be more than is required under the transition exemptions, but it will probably be significantly less than is required under the current versions of the final exemptions.

We are working with clients to develop their strategies and comments for the SEC. I expect to have additional insights as those develop.

*The views expressed in this article are the views of Fred Reish, and do not necessarily reflect the views of Drinker Biddle & Reath.*

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