Thinking ahead

DOL's fiduciary proposal 3.0 - what financial institutions should be considering now

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Speakers

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Summary of Proposal 3.0

- Rollover advice may be fiduciary advice under five-part test
- Proposed PTE for conflicted, nondiscretionary investment advice that allows (i) receipt of reasonable compensation, and (ii) certain principal transactions

| Impartial conduct standards | • Best interest  
|                           | • Reasonable compensation  
|                           | • No materially misleading statements  
| Advance disclosure | • Fiduciary status  
|                     | • Services  
|                     | • Conflicts  
| Policies and procedures | • Conflict mitigation  
|                          | • Principal transactions  
| Documentation | • Rollover advice  
| Retrospective compliance review annually | • CEO certification  

Underlying premises for discussion

- DOL will finalize proposed PTE in late third or fourth quarter of 2020
- Rollover interpretation and final PTE will largely track proposal
- Risk of reversal
  - Unlikely by litigation, at least in advance of enforcement
  - Depending on timing and election results, more exposed to reversal by midnight regulation/Congressional Review Act/legislation in next Congress
## Decision tree today

<table>
<thead>
<tr>
<th>Do nothing</th>
<th>Prepare for rollover/hire me position</th>
<th>Consider planning opportunities</th>
</tr>
</thead>
</table>
| • Proposal adds an alternative compliance solution that does not displace existing solutions  
• Changes in final guidance are likely, reversal is possible  
• In particular, rollover position was roundly criticized in comments  
• Already resource constrained | • Rollover and, if extended, hire me position would be the most disruptive element of the package if DOL persists  
• May need to respond promptly on finalization | • Like the BICE, in some circumstances, the proposed PTE may offer a more reliable or otherwise preferable compliance solution than existing alternatives  
• Best interest trend  
• May be advantageous to act promptly on finalization |
Agenda

Consider from the perspective of industry paradigms

- Insurance companies
- Broker-dealers
- Banks
- Registered investment advisers
Insurance companies

— Alignment is least productive here; perhaps most at sea and most questions?
  • Definition of Financial Institution: Insurance intermediaries?
  • Fiduciary Acknowledgement/Product Manufacturer as fiduciary?
  • Not otherwise subject to Reg BI?
  • Coordination with state insurance laws?
  • Conflicts with NAIC suitability rules?
  • Misalignment with distribution models?
  • Trailing commissions = ongoing relationship?

— New PTE vs. 84-24?
## Insurance companies (cont’d)

<table>
<thead>
<tr>
<th>Condition</th>
<th>Proposed PTE</th>
<th>PTE 84-24</th>
</tr>
</thead>
<tbody>
<tr>
<td>Covered Transactions</td>
<td>Compensation paid to Financial Institutions and Investment Professionals</td>
<td>Purchase of insurance/annuity contract</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Payment of Sales commission</td>
</tr>
<tr>
<td>Relief</td>
<td>406(b) Fiduciary Conflicts of Interest</td>
<td>406(a) Party-in-Interest plus</td>
</tr>
<tr>
<td></td>
<td></td>
<td>406(b) Fiduciary Conflicts of Interest</td>
</tr>
<tr>
<td>Best Interest Standard</td>
<td>Yes</td>
<td>No (but ERISA plan fiduciaries have 404)</td>
</tr>
<tr>
<td>Disclosure</td>
<td>• Fiduciary status</td>
<td>Fees</td>
</tr>
<tr>
<td></td>
<td>• Services</td>
<td>Limitations on products</td>
</tr>
<tr>
<td></td>
<td>• Conflicts</td>
<td></td>
</tr>
<tr>
<td>Conflict Mitigation Policies</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Retrospective Review and Certification</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
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Broker-Dealers

― Strong alignment with Reg BI, but DOL’s proposal has a number of traps for the unwary

• Inconsistencies with Reg BI
  • Scope
    • Advice about non-securities products
    • Advice to non-retail investors
    • A stand-alone rollover recommendation
  • The fiduciary acknowledgment
  • Conflict management – mitigation across the board?
  • CEO certification and testing
  • Explicit requirement to document basis for advice relating to rollovers, plan-to-plan or IRA-to-IRA transfers, account type-to-account type transfers
  • In rollover context, explicit requirement to collect actual plan information, or use reasonable estimates if actual information is not readily available
  • Limits on instruments that can be recommended as part of a principal transaction
Broker-Dealers (cont’d)

— What kinds of changes to policies and procedures can firms consider now?
  • Extending Reg BI policies and procedures beyond current scope
  • Conflict management?
  • Documenting rollover, transfer and account type advice
  • Collecting actual plan information, or using reasonable estimates
  • Limits on principal transactions – investments and quality

— Should firms be reconsidering their Reg BI judgment calls in light of ERISA exposure?

— If the DOL’s new exemption ends up being unworkable, what existing exemptions do firms have in their back pocket?
Banks

– The curious case of banks
  • Existing regime
  • Discussion of banks in proposal
  • Nature of comments submitted by banks
Banks (cont’d)

— Rollover advice
  • Advisory Opinion 2005-23A
  • DOL’s policy shift

— DOL acknowledgement that rollover advice may constitute investment advice
  • “Regular basis” prong of five-part test
    • One-time, independent transaction
    • Ongoing relationship with the retirement investor
  • Concern about retroactive attachment of fiduciary status?
  • What are possible responses?
Registered Investment Advisers

— Planning opportunities?
  • New PTE preferable to existing exemptions?
  • No existing exemption specific to service setting?

— PTE compliance requirement not addressed by securities law alignment?
  • Status of interactions subject to anti-fraud requirements only and not IAA fiduciary standard?
  • Incremental requirements?
Registered Investment Advisers (cont’d)

— Incremental requirements
  • Reasonable compensation
  • Retrospective compliance review
  • Ineligibility provisions
Questions?

For more information
For resources and commentary regarding this regulatory process, visit Eversheds Sutherland’s dolfiduciaryrule.com.
- Text of and supporting materials for Proposal 1.0, Proposal 2.0/Final Rule, and Proposal 3.0
- Pleadings in the litigations challenging the Final Rule
- Articles, presentations and client alerts
- Videocasts about the Final Rule and other matters