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DOL Fiduciary Rule Post-Mortem: How Long Will the Taste Linger? FiduciaryNews ft. Edward McNamara

Edward "Ted" J. McNamara, attorney in the Kaufman Dolowich & Voluck Ft. Lauderdale office, was quoted in the first of a three part series written by Christopher Carosa published by FiduciaryNews.

DOL's Fiduciary Rule has been vacated. In its stead we now have the SEC's "Best Interest" proposal. This three-part series will reflect on the past, present, and future of the fiduciary standard.

In March 15, 2018 the U.S. Court of Appeals for the Fifth Circuit vacated the DOL's 2016 Conflict-of-Interest (a.k.a., "Fiduciary") Rule. The 2-1 decision sided with the U.S. Chamber of Commerce in its case against the DOL. Three months later, on June 21, 2018, the court issued its formal mandate which officially nullified the DOL's Rule. Prior to that, on May 7, 2018, in anticipation of this mandate, the DOL issued a Field Assistance Bulletin ("Field Assistance Bulletin No. 2018-02").

This Bulletin addressed the subject of a Temporary Enforcement Policy. It stated "for the period from June 9, 2017, until after regulations or exemptions or other administrative guidance has been issued, the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules."

"It is very likely that many advisors who previously relied on the safe harbors in the rule will continue to rely on the DOL's Field Assistance Bulletin 2018-02 that allows conflicted advice to retirement plans and account holders as long as a good faith effort is made to comply with the Impartial Conduct Standards," says Duane Thompson, Senior Policy Analyst at Fi360 in Pittsburgh, Pennsylvania. "As firms became more comfortable with operating in a fiduciary environment, it's certainly possible they will continue to comply with these fundamental duties of loyalty and care even if the FAB is superseded by other guidance."

The legacy of the Fiduciary Rule will remain as long as the industry – both the service providers and their clients – foresee these other regulators continuing the process initiated by the DOL. "Many plan sponsors and brokerages already implemented internal changes anticipating the Rule's enactment," says Ted McNamara, an attorney at Kaufman Dolowich & Voluck in Fort Lauderdale, Florida. "Some may leave these changes in place in anticipation of similar rules. Indeed, the DOL continues to seek a heightened standard for ERISA plan sponsors and others rendering investment advice. Simply reverting to prior standards appears unlikely. We anticipate future rule proposals like the SEC's 'Best Interest' Proposal, that apply heightened standards for disclosure without placing onerous burdens on plan sponsors."

For evidence of influence, we need look no further than SEC's Proposal (which will explore more thoroughly in or next installment). Thompson says, "It can be argued that some elements of the SEC's best interest standard for brokers contains language from ERISA such as the prudent investor standard and a requirement that firms establish safeguards to ensure that a broker's advice is in the best interest of the customer. So, no matter how it's described – as a suitability-plus or quasi-fiduciary standard – Regulation Best Interest does carry along the seeds of the DOL rule that raise the bar for advice."

Still, it can't be denied the demise of the DOL's Fiduciary Rule will leave us wanting in some areas. "Under the proposal Rule," says McNamara, "plan sponsors and brokers would have had to strictly operate in the participants' best interest without regard for their own. Conflicts-of-interest and all fees and commissions must have been fully disclosed (in monetary form) to participants. The proposed fiduciary standard was much higher than its predecessor. The former requires that the client's interests are placed above the financial professional at all costs. The latter simply requires investment recommendations that meet client needs on an objective basis."

There's also a feeling that, now that the DOL Fiduciary Rule is gone, we've lost some clarity. "First off," says Kohm, "the impartial conduct standard has been lost by the vacated Fiduciary rule. The SEC's Regulation Best Interest just doesn't go as far to help clear the confusion surrounding the capacity that 'advisers' are acting in, especially dually-registered firms – are they fiduciaries or are they simply registered reps selling a product? What both the DOL Fiduciary Rule and the Best Interest proposal demonstrate is that valuable *disclosure can turn into jumbled run on sentences in too many cases."*

The broadest concern, however, is that while the SEC can cover both taxable and retirement investors, unlike the DOL, its scope is not as wide when it comes to financial products. "At first glance," says Walters, "what has potentially been lost as a result of the vacated DOL Fiduciary Rule is the scope of reach that the DOL may have been able to exercise while other regulatory bodies may not be able to duplicate. For example, in the early days of the DOL Fiduciary Rule debate, Elizabeth Warren zeroed in on the 'Super Bowl style rings and extravagant trips' being awarded to insurance-only licensed agents selling fixed annuities. It is highly questionable whether the SEC will somehow gain authority over the State licensed insurance agents as they may over registered representatives and registered investment advisers."

Despite the downside, it appears we may continue to live with the ramifications of the now-vacated Rule. "The DOL's proposed Fiduciary rule sought to promote transparency and disclosure," says McNamara. "The proposed Rule garnered media attention and brought the issue of protecting plan participants (and individual investors) into the national spotlight. The proposed Rule is gone, but not forgotten."