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If the DOL Delays, Why You Should Not

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Where Are We Now?

In August, the DOL asked the Office of Management and Budget (OMB) to delay full implementation of the fiduciary rule until July 1, 2019. The current full implementation date is set for January 1, 2018. The Department of Justice (DOJ) has proposed removing the class-action litigation provision. The DOL has proposed some changes to the best-interest contract exemption (BICE) and the prohibited transaction exemption. The other major provisions of the rule are slated to remain intact at this juncture.

Delayed or Dismantled?

While a potential delay has been perceived by some as a Trump Administration effort to eventually gut the rule, there has been little indication this is the case. With both support and concern for a delay rising as the year progresses, reactions on both sides have intensified. The proposed changes may or may not occur. Likewise, a delay may or may not occur.

One thing, however, remains. Both the DOL and the Securities and Exchange Commission appear to be committed to a heightened understanding of and adherence to fiduciary and impartial conduct standards in the long run. Change is inevitable, and the core elements of these proposals represent a framework for protecting both investing consumers and financial professionals, as well as their firms.

Therefore, one could conclude that – regardless of a delay in the adoption of the DOL fiduciary rule – a wealth management practice that is seeking to operate at a high-level fiduciary standard is striving to

1) seek the best interest of its clients and
2) operate prudently, given the direction of securities industry regulation globally.

"You may delay, but time will not."

BENJAMIN FRANKLIN

If firms at the leading edge of the industry continue to press into compliance with fiduciary and impartial conduct standards, it would stand to reason that not doing so may put your practice in an untenable position going into 2019. Your clients could be inadequately served and may be forced to look elsewhere. Your business could be worth less as a result. And, you could be facing an insurmountable obstacle of last-minute compliance with new regulations in the face of these unfavorable trends.

Potential Trouble Spots

It's hard to envision a world where A and C share mutual funds as we know them today no longer exist. However, the days where clients who are willing to pay up front commissions for a fund they can buy at NAV (without trailing 12b-1 fees) are waning. The educated consumer seeks lower costs at the fund management level and more service or insight for their dollar on the advisory side. Additionally, impending fiduciary standards and current case law are driving qualified plan assets to lower-cost share class options1. This appears to spell trouble for the traditional share classes most commonly used by advisors who have relied on commission-driven share classes or who simply do not see value in fee-based advice.

Variable annuities face a similarly uncertain fate. Class B and L share variable annuities have fallen out of favor with some advisors and C share products have largely filled that gap. Further, some carriers now offer true fee-based annuity products that can be held within a wrap account structure. Fee-based indexed annuities have also increased in popularity in recent years. With the DOL moving to levelized compensation requirements for qualified accounts, there will likely be more uniformity in variable and indexed annuity offerings going forward, and less for the advisor to earn as a front-end commission.

It should stand to reason that inconsistent investment policies or client recordkeeping procedures may be hotspots for potential regulatory action. However, many firms and practices lack the technology or clearly-articulated standards to maintain consistency across client relationships, both in terms of investment portfolio execution and financial planning recommendations. Most regulatory indicators today point toward a continued move to consistency in advice offered and services provided to clients in similar life situations. And, where aberrations exist, consistency in documenting those decisions and having firm-level policies which require such documentation will be key.

A less-obvious candidate for potential difficulty is the asset-management-only business model, meaning the advisor working with the retail client who does not provide financial planning or education as part of the fee-based or wrap-account platform. Know-your-customer rules were put in place as a first step in addressing this concern. However, impartial conduct and fiduciary standards could take the requirements for offering investment advice to a higher level still, requiring at least a modicum of financial education to be included in the offering. The days of the transactional "investment-manager-only" retail advisory practice may be coming to an end.

Commission-based 401(k) plans have already fallen out of favor for most large plan sponsors. However, with many insurance and mutual-fund based plans still in the mix among small retirement plans, the continued move to low-cost, fee-based qualified plan platforms across the industry will very likely have an eventual impact in this space, as well. Those changes could be coming as soon as day one of the Fiduciary Rule's eventual implementation.

How Can You Fix This?

1) Comply now!

- Make sure you are able to offer fee-based advice from a regulatory standpoint through an RIA or robo-advisor (or both). Adding designations like the AIF® and CFP® can help reassure your clients you are being held to a high standard of conduct from a fiduciary perspective.
- Moving one's practice toward a fee-based, financial-planning-centric model is not only generally considered to be in the best interest of your clients, it makes business sense. The potential for disappearing 12b-1 fees aside, the ability to more accurately measure and anticipate your clients' changing needs may mean the difference between improved retention and constantly having to look for new clients. And, referrals are much more likely to come from clients who are engaged and appreciate the value you bring to them.
- If you advise employer-sponsored retirement plans, make sure you clearly understand the different types of fiduciary roles and how they apply to each plan under your care. Ensure you are operating within the guidelines of your firm or broker-dealer's regulatory and stated policy guidelines. If your firm or broker-dealer is not aligned to provide the fiduciary services you require, find one that is.

> "Intelligence is the ability to adapt to change."
>
> STEPHEN HAWKING

2) Employ useful technology solutions

While technology has resulted in consumers having access to more information and, therefore, being able to theoretically make more-informed buying decisions, technology is also part of the solution for the advisor.

Financial technology (fintech) is evolving at such a rapid rate. Costs have come down, functionality and integration have improved, and large institutions like Fidelity and Betterment continue to invest meaningful capital into fintech development both internally and externally. However, the gap between broad functionality and truly compliant integration at the practice level is still notable, as compliance policies and procedures vary widely from one firm to another.

Three key components of good fintech are:

- **Integration** – This doesn't just mean integration between CRM, trading, reporting, financial planning, etc., which are important, it also means the ability to integrate with your practice's culture and client base.
- **Flexibility** – Factors like the ability to use multiple custodians on one platform, aggregation of asset managers in a single registration, and addition of other services as they become available are key to staying relevant and avoiding headaches.
- **Efficiency** – If your fintech is confusing and inoperable to your staff or to clients, costs more than it adds to your bottom line, and doesn't result in more time spent with clients and prospects, it's probably not the right platform for you.

3) Think and start acting like a fiduciary today.

While this may seem like a common-sense statement to some financial planners and advisors, many still operate in the less-stringent standard of FINRA's suitability requirement.

FINRA's web site states: "FINRA Rule 2111 requires that a firm or associated person have a reasonable basis to believe a recommended transaction or investment strategy involving a security or securities is suitable for the customer. This is based on the information obtained through reasonable diligence of the firm or associated person to ascertain the customer's investment profile.[2]"

The DOL web site defines fiduciary responsibility under ERISA as follows: "The primary responsibility of fiduciaries is to run the [retirement] plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses. Fiduciaries must act prudently and must diversify the plan's investments in order to minimize the risk of large losses. In addition, they must follow the terms of plan documents to the extent that the plan terms are consistent with ERISA. They also must avoid conflicts of interest. In other words, they may not engage in transactions on behalf of the plan that benefit parties related to the plan, such as other fiduciaries, services providers or the plan sponsor.[3]"

You will have to decide for yourself which path to take for you and your clients. However, history and momentum seem to be on the side of the fiduciary rule…eventually.

The big question:

Will you get out in front of this opportunity, or wait to chase its heels and try to catch up when it may be too late?

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References:

1. "Plaintiffs Win Decade-Long Tibble v. Edison Case Over 401(k) Fund Fees." ThinkAdvisor (www.thinkadvisor.com). August 17, 2017.
2. "FINRA: For Industry Professionals / Key Topics / Suitability" FINRA (www.finra.com).
3. "DOL: Topics / Retirement Plans, Benefits & Savings / Fiduciary Responsibilities" US Dept. of Labor (www.dol.gov).

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About Ashton Thomas Private Wealth

Ashton Thomas Private Wealth is a diversified, boutique financial advisory firm headquartered in Scottsdale, Arizona. We're committed to excellence, integrity, and respect in every aspect of our business. We also strive to stay at the forefront of technological innovation and thought leadership within our industry. We encourage our advisors and staff to use independent thought and collaborate collegially.

What we believe sets us apart:

- A family-oriented, warm, professional culture where you and your clients can thrive
- A seamless, cutting-edge technology solution to manage your practice and serve your clients
- Smart, interactive tools for communicating with clients and tracking their progress
- Single-platform access to SMA and institutional fund managers with a choice of custodian
- A DOL-compliant, fully-integrated 401(k) platform with comprehensive fiduciary capabilities
- Over 40 years of combined in-house portfolio strategy experience and guidance

Hello, Future. Hello, Ashton Thomas.

Come home to Ashton Thomas. We'll be glad to have you!
