

DOL FIDUCIARY RULE

3 Things Producers Should Do Right Now

Article written by: Summit Compliance Group, LLC – www.summitcompliancegroup.com



“Change is the only constant” is a saying that has never been exemplified in a more obvious manner than with the DOL Fiduciary Rule (“the Rule”).

As a result, we’re not going to opine on what will happen next. Frankly, we continue to be amazed at the number of people who are willing to state what will happen next as though their prediction was fact. Many of these people have been incorrect throughout the past several months and yet they continue to categorically state that they know what will happen next. Meanwhile, rumors are everywhere and seem to multiply daily.

ONE THING WE KNOW IS THAT THE DOL HAS ISSUED A FINAL RULE THAT ESSENTIALLY DID TWO THINGS:

- 1** DELAYED IMPLEMENTATION OF THE DEFINITION OF FIDUCIARY, THE IMPARTIAL CONDUCT STANDARDS, AND THE AVAILABILITY OF THE EXEMPTIONS UNTIL JUNE 9, 2017
- 2** DELAYED MOST OF THE REMAINDER OF THE EXEMPTIONS UNTIL JANUARY 1, 2018.

SO, WHAT DOES THIS MEAN?

Beginning June 9 of this year, you will likely be a fiduciary if you make recommendations involving retirement plans or IRAs and you receive compensation. It also means that you will likely need to comply with the impartial conduct standards beginning June 9.

As a compliance firm, our mission is to help protect people from risk. To do this effectively, we must be objective and analytical in our approach and seek to offer practical guidance. **Despite the continuing uncertainty surrounding the Rule, we’ve identified three things that we believe make sense for producers to do right now.**

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1 LEARN ABOUT THE RULE (BITE THE LEMON)

A PROFESSIONAL DEVELOPMENT ORGANIZATION DESCRIBED “BITING THE LEMON” AS TAKING ON TASKS THAT ARE COMPLEX, UNPLEASANT, AND HIGHLY IMPORTANT.¹ THE LESSON WAS SIMPLE – JUST DO IT AND GET IT OUT OF THE WAY RATHER THAN PUTTING IT OFF UNTIL LATER.

We know the requirements under the Rule are long and complex, but to comply with the Rule, you need to understand the Rule. **What does it mean to be a fiduciary? What does it mean to act in a client’s best interest? What types of conflicts of interest exist? What information will need to be gathered from clients? Will additional forms be required in the new process? How is this different from suitability requirements? What could be deemed to be misleading? What is reasonable compensation? What role will insurance carriers and IMOs play? Do producers need to become registered with a broker-dealer or registered investment adviser? How will this affect documentation requirements? Do sales practices need to be altered? Will there need to be an increase in the use of technology?** These are just a few of the reasons you need to understand the Rule and its implications on your practice.

THEREFORE, WE RECOMMEND THAT YOU BITE THE LEMON.

Read guidance from reliable sources like law firms, compliance firms, and IMOs – not just trade publications. We enjoy reading trade publications and they provide valuable information about the Rule. However, the articles are usually too short and high-level to provide the type of detailed knowledge you’ll need. Read the guidance and FAQs issued by the DOL. Seek information from your IMO, insurance carriers, an ERISA attorney, and/or a compliance professional with relevant experience. The more you understand the specifics of the Rule, the better off you’ll be when it comes to the second item on our list.

2 PARTNER WITH THE RIGHT IMO

A GOOD IMO WILL DO MANY THINGS ON YOUR BEHALF TO HELP PROTECT YOU AND YOUR PRACTICE. LET’S EXPLORE A FEW THINGS THAT YOU NEED TO LOOK FOR WHEN CHOOSING AN IMO.

The IMO understands the Rule and takes it seriously.

You may want to avoid partnering with an IMO that tells you that it’s going to be “business as usual” after June 9 and that no changes are required. Sure, that sounds great - but this type of approach could put you and your practice at risk. Instead, look for an IMO that can answer your questions about the Rule and understands the impact on your practice and the industry.

The IMO should also have a culture that includes a commitment to ensuring compliance with the Rule and to providing you with the support needed to protect you and your practice. **No one wants to be the subject of a lawsuit or regulatory enforcement action, so find an IMO that will reduce your odds of being pulled into either one.**

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2 PARTNER WITH THE RIGHT IMO

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The IMO provides a customized technology solution to help manage the best interest process. We believe it's theoretically possible to have a manual best interest process that is compliant.

From a practical perspective, however, it simply isn't feasible. You should be looking for an IMO that has invested in a comprehensive technology solution. The technology solution should manage the best-interest process, retain necessary documentation, and will ideally streamline the entire process by populating fields on electronic applications and allowing for electronic signatures. Electronic documents should be automatically routed to the IMO and then to the insurance carriers.

MAKE NO MISTAKE, SOME ADDITIONAL EFFORT WILL BE REQUIRED TO MEET THE BEST-INTEREST STANDARD.

It will be critical for you to demonstrate how the best interest standard was met and to create the documentation to protect yourself. However, the right technology solution will make the process much more manageable and minimize the need for more paper. You may also find that it isn't overly burdensome on consumers and they may appreciate the modern, environmentally-friendly, systematized approach.

ONE MORE THING – BE SURE TO INQUIRE ABOUT CYBER SECURITY OF THE SYSTEM WHEN CHOOSING AN IMO.

Security of information continues to be a concern for everyone and you may find that consumers will ask you how their information is being protected. A good system will have robust safeguards in place to prevent unauthorized access of consumer information.

DON'T BE TURNED OFF BY SUPERVISION.

A good IMO will understand the need to conduct reasonable supervision of their producers. While this supervision helps protect the IMO, it also helps protect you. Supervision helps document that you are meeting the best-interest standard and not misleading consumers, provides a means for correcting misunderstandings, and makes you and the IMO less of a target for lawsuits and regulatory actions.

3 REVIEW YOUR ADVERTISING AND SALES PRACTICES

To comply with the “no misleading statements” portion of the impartial conduct standards, you should have your advertising and sales practices reviewed. It can be difficult to objectively critique your own work. Add the complexity of insurance regulations and requirements under the Rule, and it can become quite confusing. That's why it's important to have someone else assess your advertising and sales practices. It could be your IMO or some other third party. Whoever completes this review, however, needs to have a thorough understanding of the Rule and insurance regulations.

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WHY IS IT IMPORTANT TO HAVE YOUR ADVERTISING REVIEWED?

Remember that a misleading statement doesn't only refer to what is said during a conversation. A misleading statement can be something in writing. In fact, it could be more damaging to have a misleading statement in writing. Consider complaints received by insurance companies. In many complaints, it's a "he said, she said" situation. The client may claim that the producer said something wrong or neglected to say something that he/she should have said. The producer, in turn, disputes the allegation by the client. Something that can "break the tie" is documentation. Applications, product brochures, producer notes, and compliant advertising can all offer evidence that the consumer was provided with the correct information. However, if any of the documentation is incorrect or misleading, then it becomes evidence to support the consumer's complaint. The same will be true under the Rule. It can be difficult to prove whether a producer said something misleading or not. It is much easier to use advertising as evidence.

SALES PRACTICES HAVE SIMILAR RISKS.

While very few producers intentionally utilize misleading sales practices, a greater number unintentionally use sales practices that could be deemed misleading. To protect yourself and your practice, it's important to have your sales practices reviewed along with your advertising.

CONCLUSION

THE RULE WILL REQUIRE SIGNIFICANT CHANGES TO THE WAY YOU HAVE TRADITIONALLY CONDUCTED BUSINESS AND UNFORTUNATELY, THE RISK OF LITIGATION WILL BE VERY REAL.

However, the good news is that there are practical steps you can take to reduce your risk. Yes, the Rule poses another challenge, but we've faced other challenges in the past (annuity suitability, privacy, anti-money laundering, etc.) and managed to evolve and continue to thrive. Learn about the Rule, partner with the right IMO, and have your advertising and sales practices reviewed. Doing these three things will help prepare you for whatever other changes are in store for us in the future.



Maureen James, Co-owner/Principal
Roger Hayashi, Co-owner/Principal
Summit Compliance Group, LLC

Sources:

¹ www.pma-phil.com/blog/bite-the-lemon-and-boost-your-productivity-daily-0



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