

Seminar Can Be Fiduciary Act: Interesting Angles on DOL's Fiduciary Rule #34

Article By:

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This is 34th article about interesting observations concerning the Department of Labor's fiduciary rule and exemptions. These articles also cover the DOL's FAQs interpreting the regulation and exemptions.

Last week, the DOL issued its second set of FAQs on the fiduciary rule and conflict of interest exemptions. For the most part, the DOL's answers were consistent with the industry's understanding of the rules. However, a few were particularly interesting. For example, Question 17 asked:

Q17. Would a free dinner seminar offered by an investment adviser as a means of marketing services or investments to a group of retirees or individuals approaching retirement be a widely attended speech or conference within the meaning of the general communications provision of the Rule?

Before giving you the answer, let me explain the significance of the question. If the adviser's comments at the meeting are considered to be "general communications," then they are not fiduciary advice. Also, if the meeting is a "widely attended" speech or conference, the comments would be considered general and, therefore, not fiduciary advice. On the other hand, if the seminar is not considered to be "widely attended" and if the adviser's comments "suggest" a particular course of investment action, then—probably unbeknownst to the adviser, the comments could be fiduciary investment advice. (Of course, to be fiduciary advice, the recommendation must ultimately also cause compensation to be paid to the adviser.)

The DOL answered:

The Department does not consider such free-meal seminars to be widely attended speeches or conferences within the meaning of the general communications provision. Moreover, in the Department's view, a reasonable person attending such a seminar could view statements by the investment adviser as investment recommendations even if the statements were made to

all the attendees. Whether the particular communications at the seminar could reasonably be viewed as a suggestion that the advice recipients engage in or refrain from taking a particular course of action (i.e., a recommendation) would be a matter of facts and circumstances.

In other words, in “free dinner seminars,” an adviser’s comments about investments, insurance products, advisory services, or investment strategies may be fiduciary advice. Forewarned is forearmed.

What if an adviser wants to minimize the risk of being a fiduciary at those meetings? In that case, the discussion would need to be about general market data and the adviser’s services. Keep in mind that, under the “hire me” discussion in the preamble to the fiduciary rule, an adviser can always recommend himself and his firm without becoming a fiduciary. However, the adviser cannot recommend specific products, strategies, etc., without becoming a fiduciary.

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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