

April 5, 2017

Department of Labor Delays Fiduciary Rule for 60 Days

On April 4, 2017, the U.S. Department of Labor (the “DOL”) issued a final rule delaying the applicability date of its fiduciary rule from April 10, 2017 to June 9, 2017 – the 60-day delay it proposed at the end of February. The rule also delays to June 9, 2017 certain transitional requirements under the Best Interest Contract Exemption (the “BIC”) and other new or revised prohibited transaction exemptions; however, it does not delay the compliance date for the “full” BIC, which remains January 1, 2018. In addition to delaying the compliance date under the BIC, the final rule repeals all of the requirements for relying on the BIC between June 9, 2017 and January 1, 2018, other than the requirements to (i) adhere to a best interest standard, (ii) receive no more than reasonable compensation, and (iii) avoid making materially misleading statements.

The final rule should provide some relief to institutions and advisers that have been working towards the original April 10 applicability date. However, given the short length of the delay, institutions and advisers will need to decide quickly whether to use the additional time to finalize compliance plans or whether to halt compliance efforts until the DOL releases its new analysis under the rule, as is required under President Trump’s February 3 executive memorandum. It is possible that the DOL may seek to delay the compliance date further while it completes its analysis, although the final rule does not indicate that this is planned. The DOL indicated in the preamble that it does not expect to complete its new analysis and review prior to June 9, 2017, but it does expect to complete it before the January 1, 2018 deadline for full compliance with the BIC.

The DOL’s proposed delay received a significant number of public comments – by the DOL’s count, approximately 193,000, of which 178,000 opposed the delay and 15,000 supported it. However, the DOL did not subject the rule to a full 60-day notice and comment period and released the final rule very shortly after the close of the comment period, and either of these factors could potentially form the basis for a challenge to the delay in court based on alleged process defects in the rule-making process.

Assuming that the final rule is not invalidated by a court and that no further delay is implemented by the DOL, the new compliance dates include the following:

Requirement	New Compliance Date	Notes
Expanded Definition of Fiduciary	June 9, 2017	Reviews of marketing materials, call center/sales scripts, public facing websites and other materials provided to clients or prospective clients should be completed by June 9, 2017
Exemption from Fiduciary Status for Advice to Sophisticated Independent Fiduciaries	June 9, 2017	Certain requirements of this exemption may be satisfied by obtaining representations from the independent fiduciary; institutions will need to decide when to obtain these representations and in what form (i.e., by affirmative consent or negative consent, or in subscription materials for commingled funds)

Impartial Conduct Standard under the BIC	June 9, 2017	While documentation of compliance with this standard is not required following the final rule, it may still be advisable for firms and advisors to document their policies and procedures for ensuring that the best interest standard is followed
Documentary and Disclosure Requirements under the BIC	January 1, 2018	All written and disclosure-based requirements have been delayed to January 1, 2018, including the requirements to acknowledge fiduciary status in writing and to disclose material conflicts
Impartial Conduct Standards in Other Exemptions (PTE 2016-02, PTE 84-24, PTE 86-128, PTE 75-1)	June 9, 2017	Certain other changes to these exemptions have been delayed to January 1, 2018

For details on the fiduciary rule, see our prior [Alert](#), and for details on the DOL FAQs, see our prior [Alert on the First FAQ](#) and [Alert on the Second FAQ](#).

If you would like further information, any member of Ropes & Gray’s [ERISA](#) practice group would be happy to discuss with you the current status of the DOL’s fiduciary rule.