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# DOL Fiduciary Regulation—Where are We Now?

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In July 2017, the Department of Labor (DOL) published a request for information (RFI), opening another set of comment periods, to assist it in the examination directed by President Trump of the DOL's investment advice fiduciary regulation (fiduciary regulation) and related prohibited transaction exemptions (together, the Final Rule) adopted April 8, 2016.<sup>1</sup> The RFI was issued just a few weeks after a modified version of the Final Rule became applicable on June 9, 2017. The prospect of yet further changes to or delays in the full implementation of the Final Rule begs the question: Where are we now? Or more importantly, where are we going?

## RULEMAKING AND OTHER DEVELOPMENTS DURING 2017

When President Trump took office in January, the Final Rule was scheduled to become applicable on April 10, 2017. On Feb. 3, 2017, just two weeks after his inauguration, President Trump issued a memorandum (President's memo)<sup>2</sup> directing the DOL to examine whether the Final Rule may adversely affect the ability of Americans to gain access to retirement information and financial advice, and to prepare an updated economic and legal analysis concerning the likely impact of the Final Rule as part of the examination. The President's Memo also directed the DOL to commence a rulemaking rescinding or revising the Final Rule if the DOL makes an affirmative determination on three considerations posed by the memo, or concludes for any other reason that the Final Rule is inconsistent with Administration priorities. (The three considerations relate to whether the anticipated applicability of the Final Rule: has harmed or will harm investors; has resulted in disruptions or dislocations in the retirement services industry; or is likely to cause an increase in litigation and an increase in prices for access to retirement services. The Administration's priorities are to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, and to withstand unexpected financial emergencies.)



In response to the issuance of the President's memo, the DOL issued a document<sup>3</sup> on March 2, 2017 (March Delay Proposal) requesting comments on a proposed 60-day delay of the applicability date of the Final Rule, for which the DOL established a 15-day comment period closing on March 17, 2017. The DOL reported receiving approximately 193,000 comments and petition letters by March 17, 2017, addressing the proposed 60-day delay. On April 6, 2017, the DOL's document approving a final rule (Final Delay Rule) delaying the applicability date for 60 days to June 9, 2017, as originally proposed, was published in the Federal Register. The Final Delay Rule also included modification of the transition period provisions in the Best Interest Contract (BIC) Exemption and Principal Transactions Exemption that were adopted as part of the Final Rule, and the addition of a transition period provision to Prohibited Transaction Exemption (PTE) 84-24, which had been amended as part of the Final Rule.<sup>4</sup>

The March Delay Proposal also requested comment on the questions raised in the President's Memo and generally on questions of law and policy concerning the Final Rule, for which the DOL established a 45-day comment period ending April 17, 2017. More than 300 letters were submitted after the close of the first comment period to address these questions. The comment letters predictably reflected a split between consumers and consumer groups who favor immediate and full enforcement of the Final Rule, and most retirement industry service providers

who advocate for delays, substantial revisions and/or repeal of the Final Rule or parts of it. The DOL has yet to publish any rulemaking in response to these comments.

After the Final Delay Rule took effect, the DOL issued an RFI, published in the Federal Register on July 6, 2017,<sup>5</sup> requesting public comments on a further delay of the applicability date for full compliance with the BIC Exemption—beyond Jan. 1, 2018—for which DOL established a 15-day comment period, ending July 21, 2017. The RFI also requested information on recent market developments, now that the Final Delay Rule has taken effect, as well as possible new prohibited transaction exemptions. In particular the RFI requested comment on the impact if DOL eliminated or substantially altered the BIC Exemption’s written contract requirement or eliminated the warranty requirements for IRAs. The RFI also requested comment on whether the DOL should consider a more streamlined exemption for recent market innovations, such as “clean shares” and fee-based annuities. The DOL established a 30-day period, ending Aug. 7, 2017, for comments on these requests. Then, in a document published in the Federal Register on Aug. 31, 2017,<sup>6</sup> the DOL requested comment on a further extension of the transition period provisions for 18 months, until July 1, 2019. The comment period for this proposal ends Sept. 15, 2017.

On June 1, 2017, before the Final Delay Rule took effect, Securities and Exchange Commission chair Jay Clayton issued a public statement requesting comment on the “standard of conduct” under the securities laws that should be applicable to investment advisers and broker-dealers serving retail investors, including retirement investors.<sup>6</sup> No end-date was set for these comments. On yet another track, a bill in the U.S. House of Representatives, the Financial Choice Act, would apply the SEC’s standard to advice provided to retirement accounts by broker-dealers and investment advisers in lieu of the Final Rule (or similar rule adopted by DOL).<sup>7</sup> Meanwhile, legal challenges to the Final Rule continue to make their way through the courts.<sup>8</sup> Notably, a brief filed on behalf of the DOL in July 2017 signaled that the government has determined that the BIC Exemption’s provision

restricting class-action litigation waivers in pre-dispute arbitration clauses should be vacated from the exemption.<sup>9</sup> On Aug. 30, 2017, the DOL issued a “field assistance bulletin” announcing a non-enforcement policy with regard to the arbitration limitations in the BIC Exemption and Principal Transaction Exemption.<sup>11</sup>

## WHERE ARE WE NOW?

The Final Delay Rule delayed the applicability date and modified (or added) transition period conditions in the PTEs, but did not alter in any way the fiduciary regulation that is the foundation for the Final Rule. Consequently, after June 9, 2017, any person who receives compensation for recommending an annuity or life insurance policy to or for a qualified retirement plan or IRA is potentially an investment advice fiduciary and must avoid prohibited transactions (such as receipt of insurance commissions from an insurance company) except in accordance with the conditions of an applicable PTE.

As noted above, the Final Delay Rule did modify or add transition conditions for the initial transition period (currently still set to end Jan. 1, 2018) under the PTEs. In the case of the BIC Exemption, during the transition period, the Final Delay Rule imposes only the condition that the financial institution and adviser relying on the exemption comply with the Impartial Conduct Standards. (The Impartial Conduct Standards require that investment advice be in the “best interest” of the retirement investor, that compensation received by the financial institution, adviser, affiliates and related entities, be “reasonable,” and that no misleading statements be made about investment transactions, compensation or conflicts of interest.) The Final Delay Rule thus eliminated the disclosure notice requirement and certain other conditions that had been included in the BIC Exemption’s transition period safe harbor as originally adopted.

In the case of amended PTE 84-24, the Final Delay Rule effectively created a transition period by restoring historical provisions making the PTE available for the sale of all annuities, including variable and indexed annuities, to qualified plans and IRA accounts, and deferred until Jan. 1, 2018 the provision restricting the PTE to fixed-rate annuities and life insurance. This restoration provides a path forward—at least for the transition period—for sales of indexed annuities by insurance agents who are not associated with broker-dealers or investment advisers (and therefore could not rely on the BIC Exemption). Indeed, the litigation challenging the Final Rule has focused in part on the restriction of amended PTE 84-24 to fixed-rate annuities, particularly because the DOL was unable to finalize a PTE for insurance intermediaries before the applicability date for the Final Rule.



## WHAT'S ON THE TABLE?

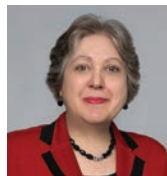
The DOL has yet to publish the results of its examination of the Final Rule and considerations referenced in the President's memo. In light of the President's directive, the DOL's requests in the Delay Proposal and RFI, and the public comments submitted so far, it appears that the following changes or revisions may be open for consideration:

- An additional delay in the full implementation of the Final Rule, beyond Jan. 1, 2018 (as noted above, DOL has proposed extending the delay until July 1, 2018).
- Potential curtailment of the scope of advice triggering the investment advice fiduciary regulation, particular with regard to recommendations to make or increase contributions to a plan or IRA.
- Elimination of the written contract requirement in the case of financial institutions and advisers relying on the BIC Exemption (when fully implemented).
- Modification of the written disclosures mandated by the BIC Exemption (when fully implemented).
- Retention of the broadened scope of amended PTE 84-24 to cover all annuities, and not just fixed-rate annuities.

## WHAT'S NEXT

The DOL needs to complete its examination of the Final Rule and issue a rulemaking reflecting its conclusions, specifically, whether to further delay full implementation of the Final Rule, and whether to make changes to the investment advice fiduciary

regulation or the conditions of any of the PTEs. Industry commenters have urged the DOL to move quickly on any delay decision, both to delay full implementation for a significant period of time beyond Jan. 1, 2018 and to announce the delay soon, so that the industry has sufficient time to implement appropriate changes in an orderly fashion. ■



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## ENDNOTES

- 1 81 Fed. Reg. 20946 et seq. (Apr. 10, 2016).
- 2 82 Fed. Reg. 9675 (Feb. 7, 2017).
- 3 82 Fed. Reg. 12319 (Mar. 2, 2017).
- 4 82 Fed. Reg. 16902 (Apr. 7, 2017).
- 5 82 Fed. Reg. 31278 (Jul. 6, 2017).
- 6 82 Fed. Reg. 41365 (Aug. 31, 2017).
- 7 The Statement is posted at <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.
- 8 Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).
- 9 Plaintiffs-Appellants' Emergency Motion for an Injunction Pending Appeal, Chamber of Commerce U.S.A. et al., v. Dep't of Labor et al., No. 17-10238, 2017 WL 1284187 (5th Cir. Mar. 21, 2017).
- 10 See Brief for Appellees at 59, Chamber of Commerce U.S.A. et al., v. Dep't of Labor et al., No. 3:16-cv-1530 (N.D. Tex. July 3, 2017), appeal docketed, No. 17-10238, 2017 WL 1284187 (5th Cir. Apr. 5, 2017).
- 11 Field Assistance Bulletin No. 2017-03 is posted at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-03>.