

DOL Fiduciary Rule: Officially Delayed for Now, with More to Come

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As expected, the DOL has [officially delayed](#) the applicability date of the fiduciary rule to June 9, 2017 (the rule was originally scheduled to become applicable on April 10, 2017). In a surprising move, rather than extend the entire rule for a longer period or set the stage for further delays, the DOL concluded that while some delay is necessary to complete the broader examination of the rule as directed by the [Presidential Memorandum](#), certain core components of the rule should not be delayed further even in light of the continued examination.

It is, of course, possible that the DOL wanted to send a serious and conservative message at this stage, but will remain open to further delay of the rule in its entirety as it continues its examination of the rule. But, as of now, the DOL has established the following timeline in the [final rule](#) granting the delay:

June 9, 2017

- Revised definition of “fiduciary”, which significantly expands the scope of communications with retirement investors that would give rise to fiduciary status (see Section II of our [visual memorandum](#)), becomes applicable.
- Best Interest Contract (BIC) Exemption and Principal Transactions Exemption (see Section III of our [visual memorandum](#)) become available and both exemptions will only require fiduciaries to comply with the Impartial Conduct Standards.
- Impartial Conduct Standards in PTE 84-24 (see Section IV of our [visual memorandum](#)) become applicable, meaning that those who wish to rely on PTE 84-24 will need to comply with the Impartial Conduct Standards (but not the other amendments to this exemption).
- Amendments to PTEs 75-1, 77-4, 80-83, 83-1 and 86-128, which primarily add the Impartial Conduct Standards to these exemptions (see Section IV of our [visual memorandum](#)), become applicable.

January 1, 2018

- Remaining conditions of BIC Exemption and Principal Transactions Exemption (e.g., written contracts, warranties, disclosures) become applicable.
- Remaining amendments to PTE 84-24 become applicable.

In conceiving this timeline, the DOL essentially expressed its view that the broader examination of the rule would not, and should not, affect the implementation of the revised fiduciary definition and Impartial Conduct Standards, which the DOL viewed as basic fiduciary norms that are critical in protecting the interests of the retirement investors. In other words, the DOL has strongly signaled that, at least at this stage, readers should assume that the revised fiduciary definition and Impartial Conduct Standards are here to stay for the time being and will likely stay even after the DOL completes the broader examination of the rule. Consequently, advisers and financial institutions should be aware that, starting June 9, 2017, service providers to retirement investors (especially IRAs) will become fiduciaries at the much lower fiduciary threshold prescribed in the new fiduciary rule and will have added exposure to potential prohibited transactions under ERISA and the Internal Revenue Code, but they will have prohibited transaction relief under the BIC Exemption, Principal Transactions Exemption and other existing exemptions so long as they meet the Impartial Conduct Standards.

While this may not be welcome news to advisers and financial institutions, for now they can take comfort in the fact that the more burdensome requirements of the BIC Exemption and Principal Transactions Exemption will not kick in until 2018 and it is possible that one or more of these requirements will be scaled down or eliminated after the DOL completes the broader examination of the rule. In addition, as a result of further delay in the implementation of the contractual requirements under the BIC Exemption, they will not (at least for now) be exposed to private rights of action by IRA clients for alleged fiduciary violations.

Looking ahead, the comment period for comments on the broader examination of the rule will end on April 17, 2017, and the DOL indicated in the preamble to the final rule that it will aim to complete the broader examination and announce whether it will propose changes to the rule or the related exemptions by January 1, 2018. As it becomes increasingly likely that Alexander Acosta will be confirmed as the next Secretary of Labor, it remains to be seen how he, if confirmed, will lead the DOL in the upcoming months as the DOL undertakes the broader examination of the rule as directed by the Presidential Memorandum. Mr. Acosta has stated that he believes the rule goes beyond regulating the conduct of investment advisers and that, if confirmed, he will follow the direction of the President.

Associate Timothy John Durbin contributed to this post.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Edmond T. FitzGerald

+1 212 450 4644
edmond.fitzgerald@davispolk.com

Chaoyuan (Charles) Shi

+1 212 450 3346
charles.shi@davispolk.com

Veronica M. Wissel

+1 212 450 4794
veronica.wissel@davispolk.com

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