

RFI from DOL Signals More Uncertainty in the Future of Fiduciary Rule

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Last Thursday evening, the DOL issued a [Request for Information](#) (RFI) on the fiduciary rule and related exemptions. While financial institutions and other service providers to retirement investors have been living under the fiduciary rule since June 9, many of them still take comfort in the fact that the more burdensome requirements of the Best Interest Contract (BIC) Exemption and the Principal Transactions Exemption will not become applicable until January 1, 2018 and that, for now, they can rely on these exemptions so long as they comply with the principles-based Impartial Conduct Standards (see our [prior post](#) for a description of which requirements became applicable as of June 9 and which requirements are currently scheduled to become applicable on January 1, 2018). Many have predicted, or at least hoped, that the January 1, 2018 full applicability date will be delayed further. By issuing the RFI, the DOL took the first step toward making this further delay a real possibility.

The DOL indicated that it is still in the process reviewing comments submitted on the broader examination of the rule as directed by an earlier [Presidential Memorandum](#) issued by the Trump administration, but in light of recent market developments in response to the rule (e.g., the development of mutual fund “clean shares” and T-shares), it is interested in receiving additional input from the public on whether and how to streamline the rule and related exemptions, and whether to delay the rule’s full applicability date to allow more efficient implementation, in response to these recent developments. Accordingly, the RFI seeks comments on the potential delay of the January 1, 2018 applicability date of the full requirements of the BIC Exemption and the Principal Transactions Exemption, as well as 17 other questions that address a range of general and specific topics, including:

- Do the rule and related exemptions appropriately balance the interests of retirement investors in receiving broad-based advice while protecting them from conflicts of interest?
- Are there alternative approaches better than the current rule and exemptions?
- Does the contract requirement in the BIC Exemption and the Principal Transactions Exemption ultimately harm investors by increasing costs and limiting their access to advice?
- Can mutual fund clean shares help eliminate conflicts of interest by taking away compensation incentives for recommending certain funds over others, and what are the legal and operational hurdles in making such shares available?
- Besides clean shares and T-shares, what other market innovations can help eliminate or mitigate conflicts of interest associated with recommendations of certain financial products and increase transparency for investors?
- How can the Principal Transactions Exemption, which is currently available only with respect to a limited set of asset classes, be revised or expanded to better serve investor interests and provide market flexibility?
- How can the disclosure requirement under the BIC exemption be simplified?
- Should there be exclusions under the rule for advice regarding making or increasing contributions to plans or IRAs, bank deposit products (e.g., CDs) and health savings accounts (HSAs)?
- Should the scope of the grandfathering provision and the sophisticated independent fiduciary carve-out under the rule be expanded?
- If the SEC or other regulators were to adopt updated standards of conduct for providing investment advice to retail investors, how can the rule be streamlined for advisers who will also be subject to those standards?

The RFI provides a 15-day comment period for input on the potential delay of the January 1, 2018 applicability date and a 30-day comment period for input on the other 17 questions. An RFI is typically used by an administrative agency to help develop a proposed rule, which, if developed and issued by the agency, would then go through its own notice-and-comment period before a final rule is issued. The short duration of the comment periods in this RFI, especially on the delay of the applicability date, suggests that the DOL is trying to move quickly on the delay so that it will have more time to complete the broader examination of the rule and consider whether the rule should be revised or rescinded, as directed by the Presidential Memorandum. This process will likely take a significant amount of time and may last well into, or possibly even beyond, 2018.

The process is further complicated by the SEC's [announcement](#) last month that it is seeking input from the public on standards of conduct for investment advisers and broker-dealers that are subject to the SEC's regulation. The SEC has purportedly been reviewing this area for a long time, but recent statements from both SEC Chairman Jay Clayton and Secretary of Labor Alexander Acosta suggest that the SEC is poised to get involved this time and intends to work closely with the DOL on the development of the fiduciary rule.

In short, we still have a long way to go before the remaining aspects of the rule are finalized and this RFI is just the beginning of a potentially protracted process in the DOL's attempt to revamp the fiduciary rule to align with the goals of the current administration. Financial institutions and other stakeholders should first ensure that they are in compliance with those aspects of the rule that have already become applicable and then continue to monitor further developments on the rule. In addition, even though it seems likely that the January 1, 2018 applicability date could be delayed, stakeholders should use this RFI as an opportunity to voice their concerns and suggestions about the rule and related exemptions to the DOL. The DOL has made it quite clear in the RFI that it is interested in hearing ideas on how to make the rule and related exemptions more practicable for all stakeholders.

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.

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