

DOL Delays Parts of Fiduciary Rule About to Take Effect, Extends Enforcement Relief

Finalizing its earlier proposal, DOL extended until July 1, 2019, the effective date for the written disclosures and fiduciary representations required under prohibited transaction exemptions to the expanded fiduciary rule. During this time, the department will consider possible changes and alternatives to the exemptions, as well as potential input from the SEC. The DOL similarly extended its “enforcement lite” policy for fiduciaries working diligently and in good faith to comply with the updated rule, which went into effect on June 9, 2017.

Background

In 2016, the DOL finalized the “fiduciary rule” and thereby expanded the scope of the definition of fiduciary and impermissible conflicts of interests for employer-sponsored plans as well as non-ERISA investment vehicles like IRAs and health savings accounts. The rule was generally scheduled to take effect in April 2017, with certain transition rules effective in 2018. However, on February 3, 2017, President Trump directed the DOL to re-evaluate the effect of the rule and its likely impact on retirement savings efforts.

In response, DOL pushed back the April applicability date by 60 days and said it would focus on providing compliance assistance, rather than enforcement, through the end of 2017. Thus, the expanded fiduciary definition went into effect on June 9, 2017, but DOL delayed the written disclosures and fiduciary representation requirements under the revised prohibited transaction exemptions until January 1, 2018. (See our [May 24, 2017 FYI Alert](#)). DOL later proposed extending this transitional period for written disclosures and representations until July 1, 2019, and solicited comments. DOL also released Field Assistance Bulletin No. 2017-03 to assure constituents that it will not enforce an aspect of the Best Interest Contract and Principal Transactions Exemptions that would allow investors to bring class action lawsuits rather than be required to arbitrate claims. (See our [August 31, 2017 For Your Information](#)).



DOL Extends Both Transition Period and Temporary Enforcement Relief

In a [press release](#), DOL announced that it will [extend](#) the transition period until July 1, 2019, as proposed. This extra time will allow for full consideration of the public comments in light of the February 3, 2017, directive – including “whether possible changes and alternatives to these exemptions would be appropriate” as well as “potential input from, and action by, the Securities and Exchange Commission and state insurance commissioners.” According to the DOL, the additional delay will allow financial institutions and advisors to avoid preparations for the rule’s provisions that would have become applicable in 2018 “despite the possibility of changes and alternatives on the horizon.”

Comment. Opponents of the extension argued that the absence of the contract warranty, disclosure, and other accountability provisions leaves investors without any meaningful enforcement mechanisms for the prohibited transaction exemptions.

While the expanded definition of fiduciary that went into effect on June 9, 2017 remains in place, DOL has extended its temporary enforcement relief period to July 1, 2019. During this time, financial institutions and advisors must continue to give prudent advice that is in retirement investors’ best interest, charge no more than reasonable compensation, and avoid misleading statements – but the DOL will not pursue claims against fiduciaries working “diligently and in good faith” to comply with these obligations. In evaluating compliance, DOL will instead focus on the steps a fiduciary has taken to reduce the scope and severity of conflicts of interest that could lead to violations of the impartial conduct standards.

Comment. Notwithstanding this enforcement relief, as of June 9, 2017, participants can bring class action lawsuits against fiduciaries for breaches that occur on or after that date. See our [April 22, 2016 For Your Information](#) for more information on the types of scenarios that could lead participants to bring these claims.

DOL did not explicitly say so in this guidance, but it appears that Field Assistance Bulletin 2017-03 remains in force. This means that during the transition period, while plan participants can sue to enforce their rights under ERISA, fiduciaries can require arbitration for settling claims.

In Closing

While keeping an eye on updates to the rule and its application, plan sponsors should continue to focus on compliance with the DOL’s expanded definition of fiduciary – by, for example, reviewing their investment education material and conducting fiduciary training sessions.

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