FIDUCIARY RULE DELAYED - IMPORTANT COMPLIANCE TAKEAWAYS

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ERISA Fiduciary Alert

By: Kristina M. Zanotti, Ruth E. Delaney, Amanda Katlowitz Strickler, Robert L. Sichel, David R McCandless

Today, the Department of Labor ("DOL") published its final rule[1] delaying the applicability dates of its rule changing the definition of the term "fiduciary" (the "Fiduciary Rule") and related prohibited transactions exemptions ("PTEs") by 60 days, as proposed. The new timeline for compliance with the Fiduciary Rule is as follows:

- June 9, 2017 - The Fiduciary Rule becomes applicable, and new PTEs as well as amendments to existing PTEs are also applicable.
- June 9, 2017 - Firms relying upon the BIC Exemption or the Principal Transactions Exemption (each discussed below), must comply with Impartial Conduct Standards but no additional conditions.
- June 9, 2017 through December 31, 2017 - the Transition Period (discussed below). During the Transition Period, DOL will review the Fiduciary Rule and report on the factors outlined in the Presidential Memorandum (discussed below).
- January 1, 2018 - Firms relying upon the BIC Exemption or the Principal Transactions Exemption must come into full compliance with those exemptions.

As noted above, the final rule adopted a 60-day delay of the applicability date of the Fiduciary Rule from April 10, 2017 to June 9, 2017. The applicability dates of the new PTEs — the Best Interest Contract Exemption (the "BIC Exemption") and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (the "Principal Transactions Exemption"), as well as the applicability dates for most of the amendments to existing PTEs, were also extended to June 9, 2017.

The BIC Exemption and Principal Transactions Exemption already provided for a "Transition Period" between the original applicability date of the Fiduciary Rule and January 1, 2018, the date when fiduciaries relying on such exemptions are expected to be in full compliance. The final rule does not change the full compliance date for those exemptions.

The final rule *does* simplify compliance with the BIC Exemption and Principal Transactions Exemption during the Transition Period. During the Transition Period, fiduciaries will *only* be required to comply with the "Impartial Conduct Standards" and not the other conditions of such exemptions, such as the affirmative disclosure requirements. The Impartial Conduct Standards require that fiduciary advisers make recommendations that are in the customer's best interest (subject to a prudence and loyalty standard), receive no more than reasonable compensation, and not make materially misleading statements.

The final rule also delays the applicability date for the streamlined "Level Fee Fiduciary" exemption within the BIC Exemption until June 9; however, during the Transition Period, Level Fee Fiduciaries that are eligible for the Transition Period relief under the full BIC Exemption may comply with those conditions (*i.e.*, only the Impartial Conduct Standards) instead. For robo-advisers that are Level Fee Fiduciaries, who were not eligible for Transition Period relief under the full BIC Exemption, the final rule revises the Level Fee Fiduciary exemption so that only the Impartial Conduct Standards are required in their case as well.

The amendments to the other PTEs that were issued at the same time as the Fiduciary Rule — PTE 86-128, PTE 75-1, PTE 77-4, PTE 80-83, and PTE 83-1 — are delayed until June 9, 2017. However, for PTE 84-24, while compliance with the Impartial Conduct Standards will be required as of June 9, 2017, the other amendments to the exemption (such as the removal of the ability to use PTE 84-24 with respect to recommendations regarding variable or indexed annuities) will not apply until January 1, 2018.

On February 3, the Trump Administration released a memorandum directing a reexamination of the Fiduciary Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice (the "Presidential Memorandum"). In the final rule, DOL positions itself as both complying with the Presidential Memorandum's directive, as well as avoiding the necessity of further delays. In issuing the final rule, DOL concluded that some delay in full implementation of the Fiduciary Rule and PTEs is necessary to perform the examination required by the Presidential Memorandum, as well as to avoid a chaotic transition as firms had slowed their compliance efforts in anticipation of a delay. However, DOL also concluded that delaying the change in fiduciary definition and imposition of the Impartial Conduct Standards for an extended period would ignore its previous findings of ongoing injury to retirement investors. DOL's solution, a 60 day delay followed by a simplified Transition Period with fewer technical conditions required to comply with the BIC Exemption and Principal Transactions Exemption until January 1, 2018, attempts to impose fiduciary standards within a relatively short time frame while retaining the ability for DOL to make more general changes to the Fiduciary Rule or PTEs if deemed appropriate before full compliance with the PTEs becomes required on January 1, 2018.

If fiduciary status is imposed on financial institutions on June 9, even if compliance with the BIC Exemption and Principal Transactions Exemption is simplified, here are a few key items to keep in mind:

- The final rule generally does not expand the categories of advice covered by the PTEs. For example, advisers making recommendations regarding a principal transaction (other than a riskless principal transaction) still may not rely on the BIC Exemption, and may only rely on the Principal Transactions Exemption if the product falls within a covered category.
- A person claiming an exemption from ERISA's prohibited transaction restrictions has the burden of proving it complied with the exemption. Thus, even though monitoring, documentation, and recordkeeping are not explicit requirements of the BIC Exemption or Principal Transaction Exemption during the Transition Period, taking these steps may be advisable in order to demonstrate compliance with the exemption.
- Compliance with the requirement under the Impartial Conduct Standards that an adviser make only a "best interest" recommendation still may necessitate changes in procedures and resolution of material conflicts of interest.

- If existing materials disclaim fiduciary status, such materials would need to be revised in order to avoid materially misleading statements.

LOOKING AHEAD

The future of the Fiduciary Rule continues to be uncertain. DOL has requested comments from interested stakeholders on the issues raised by the Presidential Memorandum by April 17.

Although, as discussed above, DOL positions itself in the final rule as both complying with the Presidential Memorandum while also suggesting no further delays, the Fiduciary Rule has been extremely controversial and the source of partisan acrimony. Consequently, next steps will remain unclear until senior DOL officials are confirmed. Further delays are possible, followed by modifications or rescission of the rule.

NOTES:

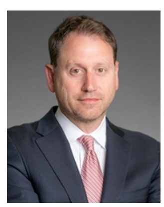
[1] 82 Fed. Reg. 16902 (Apr. 7, 2017).

KEY CONTACTS

KRISTINA M. ZANOTTI
PARTNER
WASHINGTON DC
+1.202.778.9171
KRISTINA.ZANOTTI@KLGATES.COM

RUTH E. DELANEY
PARTNER
LOS ANGELES
+1.310.552.5068
RUTH.DELANEY@KLGATES.COM

AMANDA K. STRICKLER
ASSOCIATE
NEW YORK
+1.212.536.3970
AMANDA.STRICKLER@KLGATES.COM



ROBERT L. SICHEL
PARTNER
NEW YORK
+1.212.536.3913
ROB.SICHEL@KLGATES.COM

