

Chapman Client Alert

May 24, 2017

Current Issues Relevant to Our Clients

DOL Confirms the Fiduciary Rule's June 9 Applicability Date—What to Expect from the Transition Period

Labor Secretary Alexander Acosta confirmed in an Op-Ed in the *Wall Street Journal* (available [here](#)) that the Department of Labor (the "DOL") fiduciary rule will become applicable on June 9th. Along with Mr. Acosta's Op-Ed, the DOL issued new Conflict of Interest FAQs (Transition Period) related to the June 9, 2017 to January 1, 2018 transition period (available [here](#)) and Field Assistance Bulletin No. 2017-2 (available [here](#)), which provides that, during the transition period, the DOL "will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and the related exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions."

What Goes Into Effect on June 9, 2017?

On April 7, 2017, the DOL issued a regulation providing that the DOL's Fiduciary Rule and certain parts of its related prohibited transaction exemptions (together, referred to as the "Fiduciary Rule") would be delayed from April 10, 2017 to June 9, 2017 and certain other parts of its exemptions would be further delayed until January 1, 2018 (described in our Client Alert available [here](#)). As a result, advisers who provide "investment advice" to ERISA retirement plan and IRA customers will be fiduciaries under the DOL's Fiduciary Rule starting June 9th. The DOL notes in its FAQs that parties will not become fiduciaries until 11:59pm local time on Friday, June 9th. After that time, if such advisers receive variable compensation, which the DOL broadly defines, they will be required to satisfy the "Impartial Conduct Standards" of the DOL's exemptions, including the Best Interest Contract (the "BIC") Exemption.

The Impartial Conduct Standards generally replicate ERISA's fiduciary standards. In general, the Impartial Conduct Standards will require fiduciary advisers to:

- Give advice that is in the "best interest" of the retirement investor. The "best interest" standard has two chief components: prudence and loyalty:
 - Under the prudence standard, advice will be prudent if it reflects the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in conduct of an enterprise of a like character and like aims, based on the investment objective, risk tolerance, financial circumstances, and needs of the retirement investor;

- Under the loyalty standard, the advice must be based on the interests of the customer, rather than the competing financial interest of the adviser or firm;
- Charge no more than a "reasonable compensation;" and
- Make no misleading statements about the investment transaction, compensation, and conflicts of interest.

What Goes Into Effect on January 1, 2018 (Unless the Rule is Revised or Rescinded)?

The more onerous requirements of the BIC and the other exemptions do not become effective until January 1, 2018. These conditions include the requirements to execute a contract with IRA investors that includes certain enforceable promises, make specified disclosures, and implement specified policies and procedures to protect retirement investors from advice that is not in their best interest. Such a contract would permit IRA investors to pursue claims in arbitration and preserve the investors' ability to bring class action claims in court.

What to Expect from the DOL During the Transition Period

The FAQs note that the DOL is still looking at the Fiduciary Rule and considering changes to the Fiduciary Rule. The DOL provided that it intends to ask the public in a Request for Information for (1) additional input on specific ideas for possible new exemptions (such as one for the use of "clean shares") or regulatory changes based on recent public comments and market developments and (2) whether an additional delay of the January 1, 2018 applicability date would

allow for more effective retirement investor assistance and help avoid needless or excessive expense. The DOL acknowledges that firms are building systems and compliance structures that may ultimately be unnecessary or mismatched with the DOL's final actions regarding the Fiduciary Rule in connection with the instructions it was given in the February 3, 2017 Presidential Memorandum (described in our Client Alert available [here](#)). The Presidential Memorandum directed the DOL to conduct an economic and legal analysis of the Fiduciary Rule's potential impact and, depending on the results of its examination, instructs the DOL to publish for notice and comment a proposed rule to rescind or revise the rule.

In the FAQs, and the Field Assistance Bulletin, the DOL indicates that although it has broad authority to investigate and audit employee benefit plans and plan fiduciaries, under its temporary enforcement policy, it will not pursue claims against

fiduciaries during the transition period if such fiduciaries are "working diligently and in good faith" to comply with the Fiduciary Rule. The DOL indicated that its general approach to the implementation will be marked by an emphasis on compliance assistance rather than citing violations and imposing penalties. The DOL has also confirmed with the IRS that the IRS will not apply the Internal Revenue Code's prohibited transaction excise tax provisions to any transaction to which the DOL's temporary enforcement policy would apply.

[For More Information](#)

For further information regarding these developments or the DOL's Fiduciary Rule in general, please contact a member of the Investment Management Group or the Chapman and Cutler LLP attorney with whom you work.

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