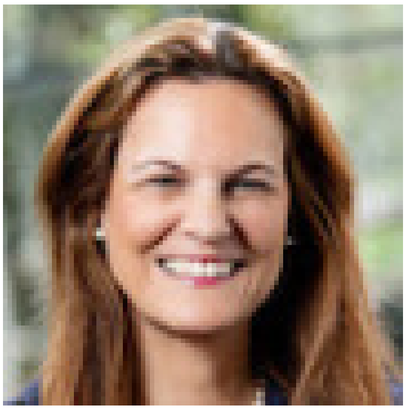
Department of Labor Declares 18-Month 'Transition Period' for BICE

By Wagner Law Group *Thu, Nov 30, 2017*

Though the DOL has said it will focus its enforcement policy on compliance assistance, 'private litigants' won't be so gentle, the benefits law firm warned, adding that even the DOL may decide at any time that some compensation systems are unacceptable. (Photo: Marcia Wagner.)



The DOL finalized its proposed 18-month extension—from January 1, 2018 to July 1, 2019—of the Transition Period for the Best Interest Contract Exemption ("BICE"), Principal Transactions Exemption and PTE 84-24 (collectively, the "Fiduciary Compensation Exemptions" or "Exemptions"). The formal notice of DOL action was published in the Federal Register on November 29, 2017.

The DOL action leaves in place the Fiduciary Rule (which became effective as of June 9, 2017), including the revised definitions of fiduciary and "investment advice" that applies to ERISA plans and IRAs (and similar accounts). The DOL's action continues the current status for the Exemptions. Financial services firms and others can rely on the BICE and the Principal Transactions Exemption as long as they satisfy the Impartial Conduct Standards.

PTE 84-24 will continue to be available for both fixed and variable annuities as long as the Impartial Conduct Standards are satisfied (along with the conditions in effect before the Fiduciary Rule was proposed). In short, financial advisors, broker-dealers and other financial institutions that are already in compliance with the Impartial Conduct Standards with respect to their ERISA and IRA clients do not need to take additional steps in order to comply with the Exemptions (until the DOL announces new changes). The DOL indicated that it will both complete its review and propose alternative or amended exemptions before July 1, 2019.

DOL agrees with comments supporting fixed 18-Month extension

In announcing the extension, the DOL stated that a delay was necessary to allow the DOL to complete its examination of the Fiduciary Rule and the Exemptions, to propose changes to the Exemptions and/or propose alternate exemptions, and to coordinate with the SEC and other regulators such as FINRA and the National Association of Insurance Commissions ("NAIC").

Notably, the DOL stated that it anticipates that it will propose in the near future a new streamlined class exemption. The DOL received numerous comments both for and against an extended Transition Period. Although many commenters expressed concern that extending the Transition Period would result in economic harm to investors and would not prompt financial services firms to comply with the Impartial Conduct Standards, the DOL stated that it "believes that many financial institutions are using the compliance infrastructure to ensure that they are currently meeting the requirements of the impartial conduct standards" and that there are adequate enforcement mechanisms in place to protect investors during an extended transition.

The DOL also agreed that a delay was necessary to give the financial services industry certainty regarding its compliance obligations and to avoid confusion or unnecessary restrictions on retirement investors that might occur if the original January 1, 2018 date was unchanged.

Current enforcement position extended

The DOL also extended the enforcement position articulated in FAB 2017-02 to July 1, 2019. FAB 2017-02 provided that the DOL would not pursue claims against investment advice fiduciaries who were working diligently and in good faith to comply with their fiduciary duties and meet the conditions of the Exemptions. The DOL stated that it was in the interest of plans, plan fiduciaries, plan participants and beneficiaries, IRAs and IRA owners to continue this approach.

The DOL emphasized, however, that diligent and good faith efforts were in fact required and that "the basic norms and standards of fair dealing" still applied during the Transition Period. The DOL further stated that as it reviews compliance efforts during the Transition Period, it will focus on the "affirmative steps" that firms have taken to comply with the Impartial Conduct Standards and reduce the scope and severity of conflicts that could lead to violations.

The DOL noted that although there is some flexibility in how to safeguard compliance with the Impartial Conduct Standards, financial services firms may look to the specific provisions of the Exemptions for compliance guidance. The DOL specifically noted that limitations on an advisor's investment recommendations to proprietary products or investments that generate third-party payments could be structured to comply with the Impartial Conduct Standards under the BICE.

Based on this statement, it appears that reliance on other compliance principles articulated or implicit in the Exemptions can be used to demonstrate compliance with the Impartial Conduct Standards during the Transition Period ending on July 1, 2019.

Compliance during the extended transition period

Although the extended Transition Period will help financial services firms by allowing the DOL to conclude its review of the Fiduciary Rule and the Exemptions without imposing new or interim compliance obligations, the DOL release does not provide clear compliance obligations in the short term.

To the extent that financial institutions and financial advisors have already implemented policies and procedures designed to demonstrate compliance with the Impartial Conduct Standards, those policies and procedures should remain in effect. To the extent that such policies and procedures have not been adopted, financial institutions should seriously consider doing so.

Even though the DOL has stated that its enforcement posture will continue to be focused on compliance assistance, private litigants will not be and, depending on the facts, the DOL may conclude that certain compensation systems or other fact patterns are simply inconsistent with the Impartial Conduct Standards.

With respect to any additional compliance steps, the DOL has clearly signaled that firms may look to certain principles and provisions of the BICE or the other Exemptions for guidance. In a prior Alert, which can be read here, we provided a non-exhaustive list of steps that can be taken, though no single step is required by law or regulation. Note that the DOL has stated that it is broadly available to discuss compliance approaches that have been adopted or may be adopted.

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