# Client Update
## DOL Grants 60-Day Delay on Applicability of Fiduciary Rule, But Hope of Rescission Fades

NEW YORK
Lawrence K. Cagney
lkcagney@debevoise.com

Jonathan F. Lewis
jflewis@debevoise.com

Charles E. Wachsstock
cewachsstock@debevoise.com

Franklin L. Mitchell
flmitchell@debevoise.com

The U.S. Department of Labor delayed the applicability date of its revised rule regarding what conduct will cause a financial institution and its advisers to be deemed a fiduciary under ERISA and the applicable provisions of the Internal Revenue Code (the "Revised Fiduciary Rule"), and the applicability dates of the associated prohibited transaction exemptions (the "Associated PTEs"). The delay will be sixty days, from April 10, 2017 to June 9, 2017. However, in rendering its decision to effect this delay, the Department of Labor has also concluded that, despite the direction from the President to reexamine the rule and determine whether it should be revised or rescinded, the Revised Fiduciary Rule ***will take effect on June 9***, as will the so-called "Impartial Conduct Standards" applicable under the Associated PTEs.

Thus, starting June 9, any recommendation with respect to an investment decision being made by certain ERISA subject employee benefit plans (or a participant in an employee benefit plan) or in respect of an individual retirement account ("IRA") that is given in consideration of a fee or other compensation must comply with the "Best Interest Standard." This means that any such recommendation given must be made ***without regard to the financial or other interests of the adviser or financial institution rendering such advice***.

If a breach of the Best Interest Standard occurs between June 9, 2017 and January 1, 2018 (the "Transition Period") in respect of an ERISA subject plan, or with respect to advice to a participant in such a plan (such as with regard to a recommendation to rollover 401(k) plan assets), the plan or the participant likely could seek relief under ERISA's enforcement provisions. How such a breach would be enforced in the context of an IRA is less clear. Failure to comply with such standard would make the transitional relief under the Associated PTE unavailable, which would mean that an excise tax could be imposed under Section 4975 of the Internal Revenue Code. In implementing the 60-day delay, the Department stated that:

> "Because the provisions requiring written representations and commitments about fiduciary compliance, execution of a contract, warranties about policies and procedures, and the prohibition on imposing arbitration requirements on class claims, would not go into effect during this period, this approach eliminates or minimizes the risk of litigation, including class-action litigation, in the IRA marketplace, one of the chief concerns expressed by the financial services industry in connection with the Fiduciary Rule and PTEs."

However, the contract requirement under the so-called Best Interest Contract Exemption (the "BIC Exemption") states that "The contract must cover advice rendered prior to the execution of the contract in order for the exemption to apply to such advice and related compensation." This language was designed to allow an institution or adviser to make a recommendation prior to entering into the required contract, so long as the execution of the contract preceded the transaction. While it may not be intended to apply retroactively to recommendations given during the Transition Period, read literally, it could apply to provide a retirement investor standing to enforce a violation of the Impartial Conduct Standards during the Transition Period. Moreover, even if a contractual enforcement right does not retroactively apply once the full requirements of the BIC Exemption take effect on January 1, 2018, institutions will need to review their existing contractual arrangements to determine whether any private enforcement right might otherwise exist for failing to comply with the Best Interest Standard during the Transition Period.

The "grandfathering" relief in the BIC Exemption for investments effected before the Revised Fiduciary Rule takes effect is tied specifically to the applicability date. Thus, grandfather relief will only be available to investments held when the Revised Fiduciary Rule and the Impartial Conduct Standards become applicable on June 9, despite the fact that other aspects of the BIC Exemption and the Associated PTEs will not need to be met until January 1, 2018.

In addition to the 60-day delay, the Department has provided some incremental transitional relief in respect of the Associated PTEs, eliminating the need to comply prior to January 1, 2018 with any provision (in each case, other than the Impartial Conduct Standards) of the newly issued Associated PTEs (such as the otherwise applicable transition disclosure under the BIC Exemption) and the incremental requirements added to existing PTEs. Thus, for example, PTE 84-24 will remain available through the end of 2017 with respect to transactions involving the purchase of variable annuities and indexed annuities, subject to compliance with the Impartial Conduct Standards.

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Please do not hesitate to contact us with any questions.