

Compensation and Benefits Insights

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DOL Proposes Extension of Fiduciary Rule Transition Period and Issues Enforcement Policy on Arbitration Agreements

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Extension of Transition Period

On August 31, 2017, the U.S. Department of Labor (“DOL”) published [proposed rules](#) that, if finalized, would extend the DOL’s previously-announced “transition period” for the BIC Exemption and Principal Transaction Exemption (PTE 2016-01 and 2016-02, respectively) for 18 months until *July 1, 2019*, and would delay the applicability date of certain amendments to PTE 84-24, which applies to advisory transactions involving insurance and annuity contracts and mutual fund shares, for the same period.

Background

New Fiduciary Rule

As we previously reported [here](#), in April 2016 the DOL replaced its 1975 regulation establishing a 5-part test for determining whether a person should be treated as a fiduciary investment adviser with a new regulatory definition (the “Fiduciary Rule”). The new definition treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan or IRA as fiduciaries in a wider array of advice relationships than was true under the 1975 regulation. In connection with the publication of the new Fiduciary Rule, the DOL also published two new administrative class exemptions from the prohibited transaction provisions of ERISA¹ and the Code²--the BIC Exemption and the Principal Transactions Exemption—as well as amendments to PTE 84-24.

¹ The Employee Retirement Income Security Act of 1974, as amended.

² The Internal Revenue Code of 1986, as amended.

Our Practice

We advise public, private, taxable and tax-exempt clients on a wide variety of issues related to the design, preparation, communication, administration, operation, merger, split-up, amendment and termination of all forms of employee benefit plans and executive compensation programs and related funding vehicles. The firm has defended clients in significant high-profile ERISA litigation matters, including 401(k) plan “stock drop” cases and other breach-of-fiduciary-duty class actions.

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Fiduciary Rule Delay and Transition Period Announcement

In April 2017 the DOL promulgated a final rule extending the applicability date of the Fiduciary Rule, the BIC Exemption and the Principal Transaction Exemption by 60 days, from April 10, 2017 to June 9, 2017, as we previously described [here](#).

In addition, this final rule requires investment advice fiduciaries relying on these exemptions to adhere only to the “Impartial Conduct Standards” as conditions of the exemptions during a “transition period” from June 9, 2017 through January 1, 2018. The Impartial Conduct Standards generally require financial institutions and advisers to give prudent advice that is in the retirement investors' best interest, charge no more than reasonable compensation, and avoid misleading statements. As a result of the implementation of the transition period, compliance with the other conditions applicable to these exemptions (such as the requirements (i) to make specific disclosures and representations of fiduciary compliance in written communications with investors and (ii) for transactions involving IRA owners, that the financial institution enter into an enforceable written contract with the retirement investor) was postponed until January 1, 2018.

New Proposed Rules

The new proposed rules provide that the same rules and standards in effect now would remain in effect throughout the duration of the extended transition period. Thus, financial institutions and advisers (pursuant to the Impartial Conduct Standards) would have to give prudent advice that is in retirement investors' best interest, charge no more than reasonable compensation, and avoid misleading statements through the extended transition period ending July 1, 2019. These new proposed rules would become effective on the date of publication in the Federal Register of final rules or January 1, 2018, whichever is earlier.

Enforcement Policy on Arbitration Agreement

In Field Assistance Bulletin 2017-03, dated August 30, 2017, the DOL announced an enforcement policy related to the inclusion of arbitration agreements in contracts entered into pursuant to the BIC Exemption or the Principal Transactions Exemption.

Background

Both the BIC Exemption and the Principal Transactions Exemption make the exemptions unavailable if, among other conditions, the financial institution's contract with a retirement investor includes a waiver or qualification of the retirement investor's right to bring or participate in a class action or other representative action in court. As noted above, this contract requirement will come into effect upon the expiration of the transition period described above. Thus, advisers relying on either exemption after the transition period could not restrict the retirement investor's right to bring or participate in a class action or other representative action in court by limiting dispute resolution to arbitration.

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Enforcement Policy

The DOL announced in FAB 2017-03 that it will not pursue a claim against any fiduciary based on failure to satisfy the BIC Exemption or the Principal Transactions Exemption, or treat any fiduciary as being in violation of either of these exemptions, if the sole failure of the fiduciary to comply with the contract requirement under either exemption is the inclusion of an arbitration agreement preventing investors from participating in class-action litigation. The DOL noted that the U.S. Government is no longer challenging such arbitration agreements. FAB 2017-03 states that this policy will continue to apply as long as the exemptions would be unavailable upon the inclusion of such an arbitration agreement.

Insights

The transition period delay announced in the proposed rules and the new enforcement policy announced in FAB 2017-03 signal that the DOL is continuing to refine its position on the Fiduciary Rule and related exemptions under the Trump administration. We will continue to monitor developments for you. In the meantime, King & Spalding would be happy to assist you with any questions you have about the Fiduciary Rule and related exemptions.

October and November 2017 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for the next two months. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is generally delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

Deadline	Item	Action	Affected Plans
October 15	Medicare Part D Creditable Coverage Notice to Individuals	Deadline for employers that provide prescription drug coverage to Medicare Part D eligible individuals to provide a written disclosure notice to Medicare eligible individuals and their dependents covered under the plan indicating whether their prescription drug coverage is creditable coverage.	Health and Welfare Plans that provide prescription drug coverage to Medicare Part D eligible individuals

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Deadline	Item	Action	Affected Plans
October 15 (2 ½ months after extension granted)	DOL Form 5500	Deadline for plan administrator to file Form 5500 for prior year if deadline was extended by filing a Form 5558.	Retirement Plans Health and Welfare Plans
	IRS Form 8955-SSA	Deadline for plan administrator to File Form 8955-SSA if deadline was extended by filing a Form 5558.	Retirement Plans
October 15 (9 ½ months after the previous plan year)	PBGC Premium Filing	Deadline for plan administrator of large plans (500 or more participants) to pay flat-rate or variable PBGC premium for current plan year.	Defined Benefit Plans with 500 or more participants
November 1 (by the first day of open enrollment)	Summary of Benefits and Coverage for Health Plans that Require Reapplication	Deadline for group health plan administrator (for self-insured plans) or group health plan administrator or insurer (for fully insured plans) to provide a Summary of Benefits Coverage (SBC) if written application materials are required for renewal.	Group Health Plans and Health Insurance Issuers
November 14 (within 45 days after the close of the third quarter)	Benefit Statements for Participant-Directed Plans	Deadline for plan administrator to send benefit statement for the third quarter of the plan year to participants in participant-directed defined contribution plans.	Defined Contribution Plans with participant-directed investments
	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the third quarter of the plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	

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Deadline	Item	Action	Affected Plans
November 15 (the 15th day of the 11th month after the end of the plan year)	IRS Forms 990 and 990-EZ	Deadline for tax-exempt trusts associated with qualified retirement plans and voluntary employee beneficiary associations (VEBAs) to file Forms 990 or 990-EZ with the IRS for prior year if the trustee obtained a second 3-month extension by filing a Form 8868.	Qualified Retirement Plans* Voluntary Employee Beneficiary Associations
November 15	Transitional Reinsurance Report and Second Installment Fee (if applicable)	Deadline for sponsors of self-insured health plans (including retiree plans) to report the number of “covered lives” under the plan. If the entity chose to pay the 2016 fee in installments, it must pay the remaining \$5.40 for each covered life by this date.	Self-insured Group Health Plans (including retiree plans)

* Qualified Retirement Plans include all defined benefit and defined contribution plans that are intended to satisfy Internal Revenue Code §401(a).