

DOL would need to put out a proposal by the fall detailing changes it wants to make to provide enough time for the comment period, which Campbell said would be at least 60 days. From there they would have to “work through the comments and come up with a final rule and publish them by roughly July [2019],” he said.

Indeed, Labor is acting in “coordination” with the SEC, said Fred Reish, partner at Drinker Biddle & Reath in Los Angeles, during the webcast. “As a result, the timing of the releases of new proposals may be the same for each.”

Labor announced the official 18-month extension for the start of key provisions of the fiduciary rule (which make the rule enforceable) last November, stating that the transition period for the rule’s Best Interest Contract Exemption and the Principal Transactions Exemption, and of the applicability of certain amendments to Prohibited Transaction Exemption 84-24 (PTEs), would move to a July 1, 2019 compliance date from the previous Jan. 1, 2018 date.

Now that the SEC has a full commission, “better coordination internally and better coordination with DOL” will ensue, said James Lundy, a partner in Drinker Biddle’s SEC & Regulatory Enforcement Team, during the webcast. Any SEC fiduciary rule, Lundy said, will “be crafted in such a way to attempt to avoid any challenge by any outside party vis-a-vis a judicial proceeding that would overrule the rule.”

STATE FIDUCIARY ACTION

As to new fiduciary rules issued by the states, Campbell said that “there’s a question about how some of these state statutes might be pre-empted. In particular, there’s some decent pre-emption in the securities area, so there’s a ques-

tion about how much states could do in securities regulation that might be preempted by federal law.”

In 2018, Campbell said that he’ll be watching how developments and outcomes “in the fiduciary regulatory fights at the SEC, at DOL and the resolution of court cases challenging the DOL rule as being invalid” will “encourage states to take action or discourage them.”

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MASTERMIND WEIGHS IN

Phyllis Borzi, the former head of EBSA during the Obama administration and architect of the fiduciary rule, told IA that she worries Labor, in revising the rule, “will render the [fiduciary] standard unenforceable either directly or by deferring to a weak and unenforced (or unenforceable) SEC rule that is called a ‘best-interest’ standard but is really a ‘suitability light’ standard.”

Also, revisions to the rule likely would provide the insurance industry with “even more lenient treatment than it did pre-DOL rule, and the rampant industry conflicts that are built into most of their products and sales practices continue unabated while their sales people can continue to claim they act in their clients’ best interest,” Borzi explained.

During her six years as EBSA chief, Borzi said she and her staff “worked closely with the SEC staff from the beginning” to ensure the rule was not in conflict with existing SEC rules to avert “a compliance bind,” and to allow the SEC “to consider and/or develop its own rule consistent with the DOL rule for non-retirement securities investments if

it chose to do so.”

Borzi believes that in collaborating with Labor and in issuing its own rule, there are “a number of positive contributions that the SEC can make to improve investor protection that can augment its traditional disclosure regime.”

However, the brokerage industry appears confident that the SEC will “merely adopt some version of their cynical industry proposal, which they claim to be a ‘best-interest’ standard, but which really would enshrine an even weaker standard than before the DOL standard was issued,” she continued.

“I am ever hopeful that the Commission will put investor protection over the [brokerage] industry’s unsubstantiated talking points and issue regulations that build on and complement, not undermine, the DOL’s 2016 final regulation.”

Borzi concedes, however, that the rule she saw to the finish line could use some tweaks. “Improving the quality of advice and the rigor of education and training for advisors needs to be evaluated,” she said. “Training programs need to be based on a fiduciary model.”

Too often, she continued, “industry-sponsored training programs focus on marketing and selling specific products rather than how to evaluate and identify investments that enhance retirement security for the client.”

In addition, “objective independent research that focuses on the impact on performance of the advice that individuals are given” is also being undertaken, Borzi said. “This would be particularly helpful to individual investment brokers and advisors who have such an important role to play in the advice market.” **IA**

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