

## WHY APRIL 10 WILL NOT CHANGE ...AND WHAT ADVISORS MUST DO

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### ***Bark Without Bite***

The recent turmoil about the DoL Fiduciary Rule is unlikely to change anything in the short term. Long term changes will require a Herculean effort! In fact, additional exemptions are more likely than revisions of the current rule. There are four obstacles to changing the applicability date of April 10 or making other amendments before that time:

- The Administrative Procedure Act (“APA”) requires a 90 day notice and comment period before the Trump Administration can make such changes... unless a major flaw is discovered in the regulation.
- Three of the most conservative courts have considered every conceivable flaw and found none.... very unlikely that some new flaw will be discovered that was not uncovered in any of the lawsuits filed to date.
- Another court (probably an appellate court) could delay the applicability date... very unlikely to occur before April 10, even with the support of the White House.
- Congress could act to waive the 90 day requirement of the APA... but this would unleash a political firestorm and Democrats would certainly obstruct such a Bill until after April 10.

These obstacles lead to the inevitable conclusion that the April 10 applicability date is not changing.

### ***What to do?***

If plans to comply are underway, the smart course is to continue and show that there was a best effort made should the deadline be missed. If there has been no demonstrable progress to date, the reasonable course is to start immediately with the exemption that is the fastest to implement. For most circumstances this is using a level fee arrangement under the Best Interest Contract Exemption or conduct a [408\(g\) Audit](#) established by the Pension Protection Act.

The greatest and most time sensitive exposure for those who adopt the Best Interest Contract Exemption are any existing clients who may be paying excessive fees. This is a liability because excessive fees disqualifies these clients from the protection of the Pre-existing Account exemption (Grandfathering). As a result, a prohibited transaction is created by simply failing to act.

Advisors must therefore act to develop evidence that demonstrates compliance with Grandfathering requirements. This involves a process of defining the services, costs and other factors to explain the level of compensation. Clients that pay excessive compensation must be dealt with immediately.

For more information on compensation requirements visit [Compliance Compensation](#) at <http://www.compensation.dalbar.com/>.