Robinson+Cole

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Department of Labor Secretary Acosta Announces Partial Implementation of the Fiduciary Rule

On May 22, 2017, Department of Labor (DOL) Secretary Alexander Acosta announced in an op-ed in the *Wall Street Journal* that the DOL will not issue another delay of the "fiduciary rule," set to become generally effective on June 9, 2017. Secretary Acosta stated on Monday evening that "[w]e have carefully considered the record in this case…and have found no principled legal basis to change the June 9 date while we seek public input."

The long-awaited rule, which revised the definition of "fiduciary" for retirement investment advice purposes, had an original applicability date of April 10, 2017. President Donald Trump, by way of presidential memorandum dated February 3, 2017, ordered the DOL to review the fiduciary rule and prepare an updated economic and legal analysis to determine whether the fiduciary rule was likely to harm investors, disrupt the retirement services industry, or cause an increase in litigation. After receiving more than one thousand comments from those who would potentially be affected by the rule, the DOL issued a rule to delay its effective date to June 9, 2017, so it could further evaluate the rule.

In tandem with Secretary Acosta's announcement, the DOL issued Field Assistance Bulletin (FAB) No. 2017-02, which issued a temporary enforcement policy on the fiduciary rule, as well as an 11-page set of FAQs relating to the upcoming June 9 effective date and the transition period from June 9, 2017, to January 1, 2018, when the rest of the rule is set to take effect.

FIELD ASSISTANCE BULLETIN NO. 2017-02

The DOL issued Field Assistance Bulletin 2017-01 on March 10, 2017, to address concerns of those in the financial services industry. The industry feared that, in the event a final rule was issued after the original April 10, 2017, applicability date, a gap period would be created between the date the Best Interest Contract (BIC) Exemption notices were required to be sent and other disclosure provisions of the fiduciary rule took place, and the issuance of a final rule. This temporary enforcement policy stated that, in the case of a late delay, no enforcement action would be brought by the DOL due to noncompliance with the fiduciary rule, including related exemptions, during the gap period. As we know, the DOL did ultimately delay the applicability date of the fiduciary rule to June 9, 2017, and there was some uncertainty as to whether that date would stand or another delay would occur.

FAB 2017-02 was subsequently issued by the DOL on May 22, 2017, to correspond with Secretary Acosta's *Wall Street Journal* announcement. This FAB contained a new temporary enforcement policy, which states that during the phased implementation period (transition period), which will occur between June 9, 2017, and January 1, 2018, the DOL "will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary rule and exemptions."

Preceding guidance was issued by the Treasury Department and the IRS on March 28, 2017, when it was announced that they would not be enforcing the excise taxes relating to prohibited transactions and related reporting obligations with respect to any transaction or agreement that the DOL's temporary enforcement policy [relating to the 60-day delay]…or other subsequent related enforcement guidance, would apply. The IRS and Treasury Department have confirmed that this FAB 2017-02 constitutes "other subsequent related enforcement guidance."

Therefore, it appears the IRS and Treasury Department do not intend to enforce the excise tax or reporting obligations during the transition period.

Even though the IRS, the Treasury, and the DOL will generally not take any action to enforce the fiduciary rule, Title I of ERISA still permits participants to independently enforce their ERISA rights. So, it is possible that participant claims will be made in the event of any failure to follow the fiduciary rule.

CONFLICT OF INTEREST FAQS (TRANSITION PERIOD)—WHAT IS BECOMING EFFECTIVE AND WHEN?

On June 9, 2017, those who provide investment advice to retirement savers will become fiduciaries, and the "impartial conduct standards" will become requirements of the prohibited transaction exemptions. Other exemption conditions that were set to become applicable on April 10, 2017, will be delayed to January 1, 2018. During the transition period, the DOL will continue to conduct its examination of the fiduciary rule, as ordered by the President.

An important point addressed in the FAQs (Q&A 12) was whether communications with participants about increasing contributions to the plan constitutes fiduciary investment advice. The FAQ concluded that generally such communications are providing general financial, investment, and retirement information and therefore such information does not constitute investment advice. This FAQ clarifies an issue that was troubling a number of record keepers and provides useful information on the ability to provide general information that is not advice.

Advisers who receive compensation in exchange for their advice that would otherwise violate the prohibited transaction rules must come into compliance with the BIC Exemption and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption) (collectively, Exemption) as of June 9, 2017. In other words, investment advisers must structure their advice to retirement savers to avoid the prohibited transaction rules or comply with an Exemption. During the transition period, the BIC Exemption only requires advisers to meet the "impartial conduct standards," which are consumer protection standards that require advisers to (1) give advice that is in the "best interest" of the investor, with an applicable duty of prudence and loyalty; (2) charge no more than reasonable compensation; and (3) make no misleading statements about investment transactions, compensation, and conflicts of interest.

Additionally, the fiduciary rule amended a number of other preexisting exemptions. Prohibited Transaction Exemptions (PTEs) 75-1, 77-4, 80-83, 83-1, and 86-128, amended by the fiduciary rule to place additional restrictions on the availability of these exemptions, will take effect on June 9, 2017. Specifically, an additional transition rule will apply to PTE 86-128, which generally requires a written authorization be executed in advance by an independent fiduciary or individual retirement account (IRA) owner. IRAs and non-ERISA plans that are already customers of a financial institution as of the June 9 effective date do not require an affirmative written consent but may rely on negative consent, provided the fiduciary has given disclosures and consent termination forms to the customer by that date.

Once the transition period comes to an end on January 1, 2018, unless the rule or the prohibited transaction exemptions are revised, full compliance with all exemption conditions will apply, including the requirement to execute a contract with IRA investors with certain enforceable promises (including preservation of the investors' ability to bring a class action claim in court), to make specified disclosures, and to implement specific policies and procedures to protect retirement investors from advice that may not be in their best interest.

PTE 84-24, an existing prohibited transaction exemption applicable to a number of transactions, including those involving insurance and annuity contracts, was amended by the fiduciary rule, and the impartial conduct standards were added as a requirement for relief. Furthermore, relief was revoked for transactions involving fixed indexed annuity contracts and variable annuity contracts. This caused advisers choosing to recommend these products to rely on the BIC Exemption. The DOL has delayed the applicability of these amendments until January 1, 2018, *with the exception of the inclusion of the impartial conduct standards*, which will become applicable to PTE 84-24 on June 9, 2017. The DOL FAQs further indicate that parties may rely on PTE 84-24, "subject to existing conditions of the exemption and impartial conduct standards, for recommendations involving all annuity contracts during the transition period." Therefore, the exemption (with the addition of the impartial conduct standards) as it previously existed will remain in force during the transition period.

Finally, during the transition period, the DOL does not require that firms or advisers provide their customers with any type of warranty of their adoption of specific best interest policies and procedures nor does it insist that they adhere to all of the specific provisions of the BIC Exemption as a condition of compliance. Parties need not comply with provisions of the fiduciary rule taking effect on June 9, 2017 "until 11:59 p.m. or immediately before midnight at the end of the day) local time…and will not be treated as fiduciaries under the rule before then." The DOL has expressed through its FAQs an understanding that, for some firms, the development and implementation of compliance solutions may, in some cases, extend beyond January 1, 2018. The DOL has stated its interest in hearing from stakeholders about extra time needed to implement compliance and effective compliance solutions, as well as any roadblocks that might support an additional extension of the January 1, 2018, full compliance date.

Many in the financial services industry have already invested considerable time and effort in revising their practices and policies to comply with the fiduciary rule. Many providers are also ready to comply with the fiduciary rule on June 9. Those providers in the financial services industry not generally able to meet the requirements of the rule as of June 9 will be behind most of the providers and are likely at more risk of a claim.

Generally, record keepers have made the decision to become a fiduciary or to change their practices so that they will not be offering fiduciary services. Plan sponsors may wish to discuss with their providers whether the providers will be fiduciaries of the plans. Plan fiduciaries have a fiduciary duty to monitor other fiduciaries that they retain.

Robinson+Cole's Employee Benefits and Compensation Group is available to assist clients in reviewing their fiduciary responsibilities with respect to employer-sponsored retirement plans. If you have any questions about the fiduciary rule or the Memorandum in general,
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