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Fiduciary Rule– No Further Delays

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Three items of key importance with respect to the Department of Labor's ("DOL") rule changing the definition of the term "fiduciary" (the "Fiduciary Rule") happened on May 22, 2017:

1. Secretary of Labor Alexander Acosta confirmed that the Fiduciary Rule will become applicable June 9, 2017, without further delays.
2. DOL issued a new set of frequently asked questions ("FAQs") specifically designed to provide guidance for the phased implementation period running from the applicability date on June 9, 2017, until full compliance with the new prohibited transaction exemptions is required on January 1, 2018 (the "Transition Period").[1]
3. DOL issued Field Assistance Bulletin ("FAB") 2017-02 detailing their nonenforcement policy during the Transition Period.[2]

In confirming the June 9 applicability date, Secretary Acosta acknowledged that the Fiduciary Rule as written may not align with President Trump's deregulatory goals. However, upon a careful consideration of the record and the requirements of the Administrative Procedure Act, DOL found no principled legal basis to delay the applicability date past June 9. The examination of the Fiduciary Rule mandated by President Trump in his February 3, 2017 Memorandum remains ongoing, while DOL continues to seek public input on whether the rule should be revised or revoked. Secretary Acosta acknowledged the importance of ensuring that savers and retirees receive prudent investment advice, but emphasized that doing so in a way that limits choice is not the vision of the Administration.

The FAQs issued concurrently with Secretary Acosta's statements are intended to provide guidance on complying with the Fiduciary Rule during the Transition Period.

The FAQs clarify that, as of June 9, 2017, not only will the amended definition of fiduciary apply, but so will the new Best Interest Contract ("BIC") Exemption and Principal Transactions Exemption, and amendments to certain existing prohibited transactions exemptions (collectively with BIC Exemption and Principal Transactions Exemption, the "PTEs"), and such PTEs will be available to advisers and financial institution to rely on for prohibited transaction issues raised by the Fiduciary Rule.

The BIC Exemption and Principal Transactions Exemption will, however, be subject to fewer conditions during the Transition Period. Advisers and financial institutions that seek to rely upon such exemptions are required only to comply with the impartial conduct standards (make best interest recommendations, receive only reasonable compensation, make no misleading statements about investment transactions, compensation, and conflicts of interest) during the Transition Period. Other conditions, such as the requirement in the BIC Exemption to execute a contract with IRA investors, make specified disclosures, and implement specified policies and procedures to address conflicts of interest (such as changes to levelize individual adviser compensation), will not become applicable until the Transition Period ends on January 1, 2018. The FAQs also confirm that PTE 84-24 will remain available for any annuity contracts during the transition period (not just fixed annuities) with only the addition of impartial conduct standards to the existing conditions of PTE 84-24.

While specified policies and procedures are not required for BIC Exemption compliance during the Transition Period, the FAQs emphasize that DOL does expect financial institutions to adopt such policies and procedures as they reasonably conclude are necessary to ensure that advisers comply with the impartial conduct standards. Thus, although financial institutions will not have to implement the same types of compensation policy changes for individual advisers during the Transition Period, financial institutions still need to ensure that advisers are making best interest recommendations even while conflicts of interest related to compensation exist. Question 6 suggests that as an alternative to tamping down conflicts of interest associated with adviser compensation, financial institutions could increase monitoring and surveillance of investment recommendations, or use other approaches.

Further guidance was provided in the FAQs regarding the new requirement in amended PTE 86-128 to obtain advance written authorization with respect to IRAs and non-ERISA plans. For existing IRA and non-ERISA plan customers, financial institutions may obtain this authorization using negative consent, as long as the fiduciary gave the required disclosures and consent termination form to the customer by June 9, 2017.

The FAQs also provide additional guidance on avoiding fiduciary status in some cases. Question 12 describes examples of statements that fall within the "educational" exception and should not be considered fiduciary recommendations, Question 13 clarifies that the representations that can be relied on in connection with the "transactions with independent fiduciaries with financial expertise" exception may be obtained by negative consent. Also, Question 14 provides additional comfort to model developers that do not individualize the model for, or deal directly with, the end-client.

Addressing the possibility of agency enforcement, DOL issued FAB 2017-02, which provides that, during the Transition Period, DOL will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the Fiduciary Rule and its exemptions, or treat those fiduciaries as being in violation of the Fiduciary Rule and its exemptions.

DOL further indicated that the Treasury Department and the Internal Revenue Service (the "IRS") have confirmed that their temporary enforcement policy, as previously announced in IRS Announcement 2017-4, will match this "subsequent related enforcement guidance," from the DOL, such that the IRS also will not apply § 4975 of the Internal Revenue Code (which provides excise taxes relating to prohibited transactions) and related reporting obligations during the Transition Period. FAB 2017-02 and IRA Announcement 2017-4 do not address the rights or obligations of any other party, however. Thus, ERISA plan participants and fiduciaries with a separate statutory private right of action could still bring claims for breach of fiduciary duty.

Notes:

[1] The FAQs are available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period.pdf.

[2] FAB 2017-02, https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02