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DOL Publishes Additional Guidance on Fiduciary Rule and Announces No Further Delay to Applicability Date

[30716]

May 24, 2017 TO: ICI Members SUBJECTS: Pension RE: DOL Publishes Additional Guidance on Fiduciary Rule and Announces No Further Delay to Applicability Date

On May 22, 2017, Department of Labor Secretary Alexander Acosta announced in an op-ed published in the *Wall Street Journal* (subscription may be required) that DOL will not delay the June 9, 2017 applicability date of the fiduciary rule. As you know, in April 2017, DOL delayed the original April 10, 2017 applicability date of the final rule and related exemptions to June 9, 2017 (with generally only the "impartial conduct standards" component of the Best Interest Contract (BIC) Exemption, Principal Transactions Exemption, and other amended prohibited transaction exemptions becoming applicable on June 9, 2017 and full compliance with the exemptions required on January 1, 2018).[1] The final rule (which contains the expanded fiduciary definition) will be fully applicable on June 9, 2017. Notwithstanding this announcement, Secretary Acosta also indicated in the op-ed that DOL will seek public input on how to revise the rule.

In conjunction with this announcement, DOL published two pieces of guidance related to the transition period between the applicability date of June 9, 2017 and the full compliance date of January 1, 2018.

1. Conflict of Interest FAQs.[2] DOL published another set of frequently asked questions (FAQs)[3] related to the final rule and exemptions, which addresses compliance requirements during the transition period, as described in more detail below.
2. Field Assistance Bulletin No. 2017-02.[4] Field Assistance Bulletin (FAB) 2017-02 announces a temporary enforcement policy applicable during the transition period, as described in more detail below.

Conflict of Interest FAQs

There are 15 FAQs addressing compliance during the transition period, with some additional questions not necessarily relating solely to the transition period. The following describes some of the more noteworthy FAQs.

- FAQs 1-3 explain when firms and their advisers must comply with conditions of the BIC Exemption, Principal Transactions Exemption, and other amended prohibited transaction exemptions (including specific details regarding compliance with PTE 84-24 in FAQs 2, 9, and 10). More specifically, the FAQs state that parties must comply with the applicable portions of the exemptions after June 9, 2017 if they receive compensation for investment advice in a manner that would violate the prohibited transaction rules. FAQ 1 also outlines the requirements of the impartial conduct standards. FAQ 2 explains that the amendments to PTE 84-24 (which greatly limit the usage of the exemption) will not apply until January 1, 2018, except for the impartial conduct standards which will apply as of June 9. In contrast, FAQ 3 explains that the amendments to the other exemptions (PTEs 75-1, 77-4, 80-83, 83-1, and 86-128) will apply as of June 9, including the amendments restricting their availability.

- FAQ 4 states that DOL could propose changes to the rule and exemptions after completing the examination pursuant to the President's February 3, 2017 memorandum, and that DOL plans to issue an RFI in the near future for additional public input on possible new exemptions or regulatory changes. The FAQ acknowledges that certain compliance approaches in development (such as the use of "clean shares" in the mutual fund market) could take significantly more time to implement than DOL had envisioned in setting the January 1, 2018 full compliance date, and that DOL therefore will seek input on whether a delay to the January 1, 2018 compliance date (and possibly creating a new streamlined exemption) would be appropriate.

- FAQ 6 clarifies that an adviser will be able to use the BIC Exemption during the transition period even if compensation structures that create conflicts of interest persist. Significantly, the FAQ clarifies, among other things, that the policies and procedures requirement that commissions vary only based on "neutral factors" is not required during the transition period.

- FAQ 7 indicates that "robo-advice providers" and other "level-fee advisers" may rely on the BIC Exemption during the transition period, subject to adherence to the impartial conduct standards only.

- FAQs 8 and 11 indicate that parties must be in compliance with the rule by 11:59 pm local time on June 9, 2017, and that the grandfathering relief provided by the BIC Exemption applies to investments made and systematic purchase programs established before that time.

- FAQ 12 provides additional guidance regarding whether communications to plan participants regarding increasing contributions constitute investment advice. The FAQ describes three different scenarios in which plan participants receive information about the benefits of increasing contributions and explains that the communications fall within the investment education exception to the fiduciary advice definition, specifically the plan information and general financial, investment and retirement information categories within that exception.

- FAQ 13 confirms that a firm intending to rely on the independent fiduciary exception to the fiduciary advice definition can satisfy the reasonable belief requirements by including standardized representations in its disclosures to the independent fiduciary that rely on negative consent.

FAB 2017-02

The temporary enforcement policy described in FAB 2017-02 applies to the period between June 9, 2017 and January 1, 2018. According to the FAB, "the Department will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions." In the FAB, DOL notes that if the need for other temporary relief arises, it will consider taking additional steps.

FAB 2017-02 also includes an announcement that excise tax relief from the IRS will automatically apply during this period. In March, DOL issued FAB 2017-01, which provided temporary enforcement relief related to its proposal to delay the applicability date of the final rule for 60 days.[5] IRS issued Announcement 2017-4 in connection with DOL's FAB 2017-1.[6] This announcement provided relief from excise taxes under Internal Revenue Code section 4975 that apply in the event of a prohibited transaction. The IRS will not apply the excise tax and related reporting obligations to any transaction to which FAB 2017-01, "or any subsequent related enforcement guidance," applies. In FAB 2017-02, DOL confirms that this new enforcement policy qualifies as subsequent related enforcement guidance. Therefore, IRS relief from excise taxes will also be in effect until January 1, 2018.

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endnotes

[1] *See* ICI Memorandum No. 30667, dated April 6, 2017. *Available at* https://www.ici.org/my_ici/memorandum/memo30667.

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

[3] For a description of earlier FAQ guidance, *see* ICI Memorandum No. 30573, dated February 9, 2017. *Available at* https://www.ici.org/my_ici/memorandum/memo30573. For a description of the first set of FAQs (relating to the Best Interest Contract Exemption and other exemptions), *see* ICI Memorandum No. 30361, dated October 28, 2016. *Available at* https://www.ici.org/my_ici/memorandum/memo30361.

[4] FAB 2017-02 is *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02.

[5] FAB 2017-01 is *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-01. *See* ICI Memorandum No. 30637, dated March 13, 2017. *Available at* https://www.ici.org/committees/pension/memo30637. This relief would have applied if the 60-day proposed delay had not been finalized before the April 10, 2017 applicability date, or if DOL had decided not to delay the applicability date. Because DOL finalized the 60-day delay prior to April 10, 2017, this temporary enforcement policy never went into effect.

[6] IRS Announcement 2017-4 is *available at* https://www.irs.gov/pub/irs-drop/a-17-04.pdf. *See* ICI Memorandum No. 30657, dated March 30, 2017. *Available at* https://www.ici.org/my_ici/memorandum/memo30657.

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