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DOL Issues Temporary Enforcement Policy Regarding the Fiduciary Rule

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On Friday, March 10, 2017, the Department of Labor ("DOL") published on its website Field Assistance Bulletin 2017-01 ("the FAB") providing a temporary enforcement policy for the DOL's Fiduciary Rule and related Best Interest Contract Exemption ("BICE"). The Fiduciary Rule and BICE, which have become the subject of reevaluation following the change in presidential administrations, have a pending Applicability Date (enforcement date) of April 10, 2017.*

The FAB follows a March 1, 2017 DOL *proposed* rule to extend the April 10 Applicability Date of the Fiduciary Rule and BICE by 60 days to allow for further analysis and review by the DOL.** Because the proposed rule provides for a 15-day public comment period and the DOL must review those comments, it is unclear whether the DOL will have sufficient time to determine whether to formally extend the Applicability Date and, potentially, publish a final rule prior to April 10. The tight timeline raised concerns among advisors and plan sponsors as to whether the Fiduciary Rule and BICE would be enforced on April 10, if a decision to delay was not yet made or a final rule providing for a 60-day extension was not published by that date. In particular, advisors were concerned because the Fiduciary Rule and BICE require a significant number of disclosures and notices to be provided to plan fiduciaries, plan participants and IRA holders prior to the Applicability Date.

The temporary enforcement policy published in the FAB provides advisors with relief from DOL enforcement for failure to fully comply with the Fiduciary

Rule and BICE as of April 10, 2017, under the following two circumstances in which compliance would otherwise be required:

- **Relief During a “Gap” Period.** If the DOL decides to extend the Applicability Date and that delay is issued after April 10, the DOL will not take any enforcement action against advisors for non-compliance with the Fiduciary Rule during the period between April 10 and the date a final rule extending the Applicability Date is published.
- **Relief if No Delay.** If the DOL decides **not** to delay the April 10 Applicability Date, the DOL will not take any enforcement action against advisors who have failed to satisfy the compliance requirements (including disclosure and notice requirements), as long as those requirements are met within a reasonable period after publication of the decision not to delay.

Although the FAB provides for a delay in enforcement in the event of an April 10 Applicability Date, the guidance only applies to DOL enforcement action. The FAB does not provide relief from the prohibited transactions rules generally applicable to both ERISA plans and IRAs, and thus, it offers no protection against the imposition of excise taxes by the IRS.

It is important that plan sponsors and advisors work with counsel to review the contractual terms of any recently negotiated changes to service agreements to comply with the Fiduciary Rule. These agreements may contractually hold advisors to new fiduciary standards as of an April 10 Applicability Date. For example, if a service agreement states a provider will become a fiduciary on April 10, 2017, or if the agreement states the provider will become a fiduciary on the “Applicability Date” and the DOL does not issue a final rule prior to April 10, then the provider may be contractually held to a fiduciary standard on April 10.

For more information on the practical implications of the Fiduciary Rule and BICE, including the implications of a possible delay, please access the recording of our March 1, 2017 webinar *What Comes Next? – Lessons Learned & Practical Implications of the Fiduciary Rule Under Review*: <http://www.truckerhuss.com/events/>.

We will continue to monitor the status of the Fiduciary Rule and advise you of any significant developments.

* For more information on the new administration’s request for review of the Fiduciary Rule, please see our [February Special Alert](#).

** Please see our [February Benefits Report article](#) for an overview of the proposed 60-day extension.

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