

Fiduciary Rule to Go Live June 9, 2017

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Following months of uncertainty stemming from a February 3, 2017, Presidential memorandum ordering the Secretary of Labor to conduct a review of the final fiduciary advice regulatory package (the "Final Rule"), including a 60-day delay in its applicability date, it seems all but certain the Fiduciary Rule will take effect on June 9, 2017.

Early in the administration of President Trump, the Final Rule became a key subject of efforts to deregulate. The Final Rule was written and became effective during the Obama administration, but the applicability (enforcement) date was not until April 10, 2017. On April 4, 2017, six days before the applicability date, following the directive from President Trump's February 3, 2017 memorandum, the Department of Labor ("DOL") issued a regulation providing for a 60-day delay in the applicability date in order to further review the Final Rule. The delay, which pushed the applicability date to June 9, 2017, left many industry and legal professionals wondering whether the administration actually had the ability to stop a regulation already in effect without a formal rule-making process to repeal it.

Then, on May 22nd, Secretary of Labor Alexander Acosta wrote in an opinion piece for *The Wall Street Journal* that although "the Fiduciary Rule as written may not align with President Trump's deregulatory goals," the DOL "found no principled legal basis to change the June 9 date.... respect for the rule of law leads us to the conclusion that this date cannot be postponed." As a result, the Final Rule will become effective on June 9, 2017. This means that as of that date, a person who provides investment advice for a fee or other compensation (direct or indirect) will be a fiduciary and, therefore, must act solely in the best interest of the recipient of that advice, without regard to their own interests.

The June 9 applicability date does not mean the DOL will not continue to follow the President's directive to further examine the Final Rule. The same day as *The Wall Street Journal* article, the DOL published a Field Assistance Bulletin (the "FAB"), stating that "[t]he Department is

actively engaging in a careful analysis of the issues raised in the President's Memorandum. It is possible, based on the results of the examination, that additional changes will be proposed to the fiduciary duty rule and PTEs [Prohibited Transaction Exemptions]."

Signaling that the January 1, 2018 *full* implementation date is less than a certainty and that the Trump administration is still actively considering whether and to what extent to change the Final Rule, the FAB states that the DOL "intends to issue a Request for Information (RFI) in the near future seeking additional public input on specific ideas for possible new exemptions or regulatory changes based on the recent public comments and market developments. The Department is also aware that after the fiduciary duty rule and PTEs were issued firms have begun to develop new business models and innovative market products to mitigate conflicts of interest. The RFI will specifically ask for public comment on whether it is likely to take more time to implement these new approaches than what the Department envisioned when it set January 1, 2018, as the applicability date for full compliance with all of the exemptions' conditions, and, if so, whether an additional delay in the January 1, 2018 applicability date would reduce burdens on financial services providers and benefit retirement investors by allowing for a smoother implementation of those market changes."

The FAB also notes that the DOL's initial emphasis regarding the Final Rule will be on compliance assistance and not enforcement activities, such as citing violations and imposing penalties. To that end, the FAB announced a temporary enforcement policy "during the phased implementation period ending on January 1, 2018, [under which] 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." And, "[t]o the extent that circumstances surrounding the applicability date of the fiduciary duty rule and exemptions give rise to the need for other temporary relief, [the Employee Benefits Security Administration] will consider taking such additional steps as necessary."

Phased Implementation

The Final Rule was to have a transition period, with the principles of the Final Rule becoming effective on April 10, 2017, and many of the written disclosure requirements to help uphold those principles becoming effective on January 1, 2018. The Final Rule will now have a revised transition period from June 9, 2017 through January 1, 2018. Furthermore, under the Trump administration, the DOL has issued several additional transition exemptions, further mitigating the June 9, 2017 compliance burden. A summary of the compliance requirements as of June 9th and January 1st are as follows:

June 9, 2017:

- Applicability date for the Final Rule and new Prohibited Transaction Exemptions (PTEs);
- Applicability date for most of the amendments to existing PTEs including PTE 86-128, PTE 75-1, PTE 77-4, PTE 80-83, and PTE 83-1;
- Required compliance with the Impartial Conduct Standards (ICS) of the Best Interest Contract Exemption ("BICE") and the Principal Transactions Exemption (the ICS require

plan fiduciaries to (i) receive no more than reasonable compensation; (ii) act in their client's best interest (i.e., meet ERISA's prudence and loyalty standards); and (iii) refrain from making misleading statements); and

- Required compliance with the ICS of PTE 84-24.

January 1, 2018:

- Full compliance with the BICE and the related Principal Transactions Exemption, which means:
 - in addition to adhering to the ICS, financial institutions seeking to rely on the BICE must adopt policies and procedures designed to ensure that their individual advisors adhere to the ICS; disclose important information relating to fees, compensation and material conflicts of interest; and retain records demonstrating compliance with the exemption; and
 - for the Principal Transactions Exemption, in addition to adhering to the ICS, financial institutions must acknowledge fiduciary status, disclose material conflicts of interest and obtain the consent of the plan or IRA, adopt certain policies and procedures, including policies and procedures reasonably designed to ensure that individual advisors adhere to the ICS; and retain certain records.
- Applicability date for other amendments to PTE 84-24, such as the removal of the ability to use this exemption with respect to recommendations regarding variable or indexed annuities.

If the DOL determines that a change is warranted after considering the concerns of the American public, it will do so down the road. However, because the Final Rule will go into effect in only nine days, investment advisors must move forward now to ensure that fees paid and compensation received are reasonable, and that there is evidence in their files that these issues were appropriately evaluated. In addition, fiduciary advisors must continue "working diligently and in good faith" to adopt policies and procedures that are reasonably designed and implemented to guard against conflicts of interest. Finally, plan sponsors and their advisors should work with ERISA counsel to review the contractual terms of any recently negotiated changes to plan service agreements and any other new or revised disclosures, to ensure compliance with the Final Rule.

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

MAY 2017

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