

**FIELD ASSISTANCE BULLETIN NO. 2017-02**

DATE: MAY 22, 2017

MEMORANDUM FOR: MABEL CAPOLONGO, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: JOHN J. CANARY
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: TEMPORARY ENFORCEMENT POLICY ON FIDUCIARY
DUTY RULE

Background

This document announces a temporary enforcement policy related to the Department of Labor's final rule defining who is a "fiduciary" under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (Code), and the related prohibited transaction exemptions, including the Best Interest Contract Exemption (BIC Exemption), the Class Exemption for Principal Transactions In Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption), and certain amended prohibited transaction exemptions (collectively PTEs).

The final rule, entitled "Definition of the Term 'Fiduciary'; Conflict of Interest Rule -- Retirement Investment Advice," was published in the Federal Register on April 8, 2016, became effective on June 7, 2016, and had an original applicability date of April 10, 2017. The PTEs also had an original applicability date of April 10, 2017, with a phased implementation period ending on January 1, 2018, for the BIC Exemption and the Principal Transactions Exemption. The President, by Memorandum to the Secretary of Labor dated February 3, 2017, directed the Department to examine whether the fiduciary duty rule may adversely affect the ability of Americans to gain access to retirement information and financial advice and to prepare an updated economic and legal analysis concerning the likely impact of the rule as part of that examination. On March 2, 2017, the Department published a notice proposing a 60-day delay in the applicability date of the fiduciary duty rule and the related PTEs and seeking public comments on the questions raised in the Presidential Memorandum, and generally on questions of law and policy concerning the fiduciary duty rule and PTEs.

On March 10, 2017, the Department issued FAB 2017-01 to announce a temporary enforcement policy related to its proposal to extend for 60 days the applicability date of the fiduciary duty rule and the related PTEs. On April 7, 2017, the Labor Department promulgated a final rule extending the applicability date of the fiduciary duty rule by 60 days from April 10, 2017, to June 9, 2017. 82 Fed. Reg. 16902. It also extended to June 9 the applicability dates of the BIC Exemption and the related Principal Transactions Exemption, and required fiduciaries relying on these exemptions to adhere to the impartial conduct standards set forth in the exemptions only as conditions of the exemptions during a transition period through January 1, 2018. *Id.* In this manner, the Department established a phased

implementation period from June 9, 2017, until January 1, 2018, during which time the fiduciary duty rule will be applicable and these new exemptions will be available, subject to the impartial conduct standards only. The final rule further delayed the applicability of amendments to an existing exemption, Prohibited Transaction Exemption 84-24, until January 1, 2018, other than the impartial conduct standards, which will become applicable on June 9, 2017. Finally, the final rule extended for 60 days the applicability dates of amendments to other previously granted exemptions. *Id.*

The public comment period on questions raised in the Presidential Memorandum, and generally on questions of law and policy concerning the fiduciary duty rule and PTEs, closed on April 17, 2017.

The 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. The Department also 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 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.

Although the Department has a statutory responsibility and broad authority to investigate or audit employee benefit plans and plan fiduciaries to ensure compliance with the law, compliance assistance for plan fiduciaries and other service providers is also a high priority for the Department. The Department has repeatedly said that its general approach to implementation will be marked by an emphasis on assisting (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions, and others who are working diligently and in good faith to understand and come into compliance with the fiduciary duty rule and exemptions. Consistent with that approach, the Department has determined that temporary enforcement relief is appropriate and in the interest of plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners.

Temporary Enforcement Policy

Accordingly, during the phased implementation period ending on January 1, 2018, 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.¹

¹ On March 28, 2017, the Treasury Department and the IRS issued IRS Announcement 2017-4 stating that the IRS will not apply § 4975 (which provides excise taxes relating to prohibited transactions) and related reporting obligations with respect to any transaction or agreement to which the Labor Department's temporary enforcement policy described in FAB 2017-01, or other subsequent related enforcement guidance, would apply. The Treasury Department and the IRS have confirmed that, for purposes of applying IRS Announcement 2017-4, this FAB 2017-02 constitutes "other subsequent related enforcement guidance."

To the extent that circumstances surrounding the applicability date of the fiduciary duty rule and exemptions give rise to the need for other temporary relief, EBSA will consider taking such additional steps as necessary.

This Bulletin is an expression of EBSA's temporary enforcement policy; and it does not address the rights or obligations of other parties.