

**FIELD ASSISTANCE BULLETIN NO. 2017-01**

DATE: March 10, 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 (Department) recent proposal to extend for sixty (60) days the applicability date of the 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 applicability date of 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 has an applicability date of April 10, 2017. The PTEs also have an 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 seeking public comments on (i) a proposal to adopt a 60-day delay of the April 10 applicability dates described above, (ii) the questions raised in the Presidential Memorandum, and (iii) generally on questions of law and policy concerning the fiduciary duty rule and PTEs. The March 2 notice stated that, if adopted as a final rule, the proposed 60-day delay would be effective on the date of publication in the Federal Register of a final rule delaying the April 10 applicability date.

Although the Department intends to issue a decision on the March 2 proposal in advance of the April 10 applicability date, financial services institutions have expressed concern about investor confusion and other marketplace disruption based on uncertainty about whether a final rule implementing any delay will be published before April 10, whether there may be a "gap" period during which the fiduciary duty

rule becomes applicable before a delay is published after April 10, or whether the Department may decide either before or after April 10 not to issue a delay based on its evaluation of the public comments. For example, the Department understands that many financial services firms and advisers are concerned that, if the Department decides not to issue a delay, there may not be sufficient time to provide retirement investors before the April 10 applicability date with disclosures or other documents intended to comply with the transition period relief in the BIC Exemption, the independent fiduciary exception in the rule, or other disclosure provisions of the rule or the PTEs. Moreover, we understand that in order to comply with the BIC Exemption in the unlikely event of a “gap” period or if the Department decides not to issue a delay, some financial services firms and advisers are considering distributing communications to existing retirement investor clients and potential plan and IRA customers that, among other things, include language regarding an uncertain applicability date and conditional acknowledgements of fiduciary status, i.e., that the firm will be a fiduciary but only if the rule becomes applicable. Although such conditional communications would represent significant steps towards compliance with the BIC Exemption, they are very likely to create significant confusion among retirement investors.

It has been the Department’s longstanding commitment to provide compliance assistance to employers, plan sponsors, plan fiduciaries, employee benefit plan officials, and financial services and other service providers so that the fiduciary duty rule and exemptions are implemented in an efficient and effective manner. *See* Conflict of Interest FAQs (Part 1 Exemptions)(“The Department’s general approach 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 final rule and PTEs.”)¹ Although the Department believes it will issue a decision on the March 2 proposal before the April 10 applicability date, and intends to follow the general approach to enforcement described above, given the concerns described above, the Department has determined that temporary enforcement relief is appropriate to protect against investor confusion and related marketplace disruptions attributable to uncertainty regarding the timing of the Department’s decision on whether to delay the applicability date of the fiduciary duty rule and related PTEs.

Temporary Enforcement Policy

In recognition of the foregoing transitional and other concerns, the Department is adopting the following temporary enforcement policy:

- A. In the event the Department issues a final rule after April 10 implementing a delay in the applicability date of the fiduciary duty rule and related PTEs, the Department will not initiate an enforcement action because an adviser or financial institution did not satisfy conditions of the rule or the PTEs during the “gap” period in which the rule becomes applicable before a delay is implemented, including a failure to provide retirement investors with disclosures or other documents intended to comply with provisions of the rule or the related PTEs.
- B. In the event the Department decides not to issue a delay in the fiduciary duty rule and related PTEs, the Department will not initiate an enforcement action because an adviser or financial institution, as of the April 10 applicability date of the rule, failed to satisfy conditions of the

¹ The FAQs are available on the Department’s website at www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf.

rule or the PTEs provided that the adviser or financial institution satisfies the applicable conditions of the rule or PTEs, including sending out required disclosures or other documents to retirement investors, within a reasonable period after the publication of a decision not to delay the April 10 applicability date. The Department will also treat the 30-day cure period under Section IX(d)(2)(vi) of the BIC Exemption and Section VII(d)(2)(v) of the Principal Transactions Exemption as available to financial institutions that, as of the April 10 applicability date, did not provide to retirement investors the disclosures or other documents described in Section IX(d)(2)(vi) of the BIC Exemption and Section VII(d)(2)(v) of the Principal Transactions Exemption.

To the extent that circumstances surrounding the decision on the proposed delay of the April 10 applicability date give rise to the need for other temporary relief, including prohibited transaction relief, EBSA will consider taking such additional steps as necessary.

This Bulletin is an expression of EBSA's temporary enforcement policy; it should not be read as expressing any view on any decision regarding a final rule on the March 2 proposal, and it does not address the rights or obligations of other parties.