

**FIELD ASSISTANCE BULLETIN NO. 2017-03**

DATE: AUGUST 30, 2017

MEMORANDUM FOR: MABEL CAPOLONGO, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: JOHN J. CANARY
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: ENFORCEMENT POLICY ON ARBITRATION LIMITATION IN THE
BEST INTEREST CONTRACT EXEMPTION AND PRINCIPAL
TRANSACTIONS EXEMPTION

Background

This document announces an enforcement policy related to the limitation of arbitration in the Best Interest Contract Exemption (BIC Exemption) and the Class Exemption for Principal Transactions In Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption), issued by the Department of Labor under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (Code). These exemptions were issued in connection with the Department's final rule defining who is a "fiduciary" under ERISA and the Code, entitled "Definition of the Term 'Fiduciary'; Conflict of Interest Rule -- Retirement Investment Advice."

The final rule and the exemptions were 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, with a phased implementation period ending on January 1, 2018, for certain provisions in the exemptions. 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 dates of the exemptions. On April 7, 2017, the Labor Department promulgated a final rule extending to June 9, 2017, the applicability date of the final rule and exemptions, and required fiduciaries relying on the exemptions to adhere to the "impartial conduct standards" set forth in the exemptions – act in the best interest of customers, charge no more than reasonable compensation, and not make misleading statements – as the only conditions of the exemptions during a transition period through January 1, 2018. 82 Fed. Reg. 16902. On May 22, 2017, the Department issued FAB 2017-02 to announce a temporary enforcement policy during this transition period through January 1, 2018. A notice of proposed amendment to the exemptions to extend the transition period for 18 months until July 1, 2019 is scheduled to be published in the August 31, 2017, edition of the Federal Register.

Sections II(f)(2) of both the BIC Exemption and the Principal Transactions Exemption, which are currently scheduled to become applicable on January 1, 2018, make the exemptions unavailable if, *inter alia*, the financial institution's contract with a retirement investor includes a waiver or qualification of

the retirement investor's right to bring or participate in a class action or other representative action in court. Sections II(g)(5) of both the BIC Exemption and the Principal Transactions Exemption applies this condition to investment advice provided to ERISA plans. In light of the position adopted by the Acting Solicitor General in an amicus brief in *NLRB v. Murphy Oil USA, Inc.* (“*Murphy Oil*”), the United States Government is no longer defending these specific provisions as applied to arbitration agreements preventing investors from participating in class-action litigation (the Arbitration Limitation). Thus, in a brief filed in the United States Court of Appeals for the Fifth Circuit in *Chamber of Commerce v. Acosta*, Case No. 17-10238 (5th Cir.), the Department of Labor took the position that the Arbitration Limitation should be vacated insofar as it applies to arbitration clauses because it cannot be harmonized with the Federal Arbitration Act and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Enforcement Policy

Accordingly, the Department of Labor will not pursue a claim against any fiduciary based on failure to satisfy the BIC Exemption or the Principal Transactions Exemption, or treat any fiduciary as being in violation of either of these exemptions, if the sole failure of the fiduciary to comply with either the BIC Exemption or the Principal Transactions Exemption, is a failure to comply with the Arbitration Limitation in Section II(f)(2) and/or Section II(g)(5) of the exemptions.¹

This policy will continue to apply as long as the exemptions include the Arbitration Limitation now found in Section II(f)(2) and/or Section II(g)(5). To the extent that circumstances give rise to the need for other relief, including prohibited transaction relief, EBSA will consider taking such additional steps as necessary.

¹ On March 28, 2017, the Treasury Department and the IRS issued IRS Announcement 2017-4 stating that the IRS will not apply 26 U.S.C. § 4975 (which provides excise taxes relating to prohibited transactions) and related reporting obligations with respect to any transaction or agreement to which the DOL'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 2017-03 constitutes “other subsequent related enforcement guidance.”