

**MEMORANDUM ON
TEMPORARY ENFORCEMENT
POLICY ON FIDUCIARY RULE**

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On May 22, 2017, the Department of Labor (DOL) issued Field Assistance Bulletin No. 2017-02 (FAB 2017-02) to announce a temporary enforcement policy with respect to the final fiduciary rule and the related prohibited transaction exemptions (PTEs).

In FAB 2017-02, the DOL said that it was changing its approach to enforcement. Instead of concentrating on “citing violations and imposing penalties”, it will emphasize helping fiduciaries to comply with the fiduciary rule and the related PTEs.

Accordingly, during the phased implementation period ending on January 1, 2018, the Department will not pursue claims against fiduciaries who are working diligently to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions.

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.

The DOL also said that it is still reviewing the fiduciary rule for its impact on the ability of investors to obtain retirement investment information and advice, as directed by President Trump in his Memorandum to the Secretary dated February 3, 2017. If it concludes that the fiduciary rule has an adverse effect on such information and advice, then additional changes may be proposed.

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 comments 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 a smoother implementation of those market changes.

In addition to FAB 2017-02, on May 22, 2017, the DOL published a document entitled “Conflict of Interest FAQs” (FAQs) relating to the fiduciary rule and the prohibited transaction exemptions. In the FAQs, the DOL confirmed that the implementation of the fiduciary rule has been delayed to June 9, 2017. That means that the revised definition of “fiduciary” under ERISA and the Internal Revenue Code becomes effective on that date, and there likely will be no further delay of that date. The FAQs

also confirmed that, with the exception of the “Impartial Conduct Standards”, the other provisions of the fiduciary rule, as well as amendments to the PTEs, will be delayed until January 1, 2018.

In a previous notice, we discussed that the sale of life insurance and annuity contracts to qualified retirement plans is governed by Prohibited Transaction Exemption 84-24 (PTE 84-24). PTE 84-24 permits an insurance agent or broker to receive compensation in connection with the sale of life insurance and annuity contracts to qualified retirement plans. The fiduciary rule adopted by the DOL in 2016, amends PTE 84-24 to remove indexed and variable annuity contracts from the exemption. FAB 2017-02 reiterates that the effective date of this amendment has been delayed to January 1, 2018. That means that indexed and variable annuity contracts can still be sold under PTE 84-24 until January 1, 2018.

PTE 84-24 is an existing exemption that applies to a variety of transactions, including advisory transactions involving insurance and annuity contracts. In its 2016 rulemaking, the Department amended the conditions of PTE 84-24 . . . and revoked relief for transactions involving fixed indexed annuity contracts and variable annuity contracts, effectively requiring advisors to recommending these products to rely upon the BIC Exemption. However, the Department has now delayed applicability of the 2016 amendments until January 1, 2018, except for the impartial conduct standards, which are applicable June 9, 2017. Accordingly, parties may rely on PTE 84-24, subject to the existing conditions of exemption and the impartial conduct standards, for recommendations involving all annuity contracts during the transition period. (FAQ2)

. . . PTE 84-24 covers the payment of commissions to insurance agents, brokers, pension consultants and investment company principal underwriters, and the exemption is not violated if a portion of that commission, in the form of gross dealer concession, override, or similar payment, is paid to another entity such as an independent marketing organization. (FAQ10)

As noted above, while most amendments to PTE 84-24 are delayed until January 1, 2018, there is one amendment that becomes effective on June 9, 2017. That is the “Impartial Conduct Standards”. After that date, every sale of a life insurance or annuity contract to a qualified retirement plan must comply with the “Impartial Conduct Standards”.

During the transition period, financial institutions and advisers must comply with the “impartial conduct standards” which are consumer protection standards that ensure that advisers adhere to fiduciary norms and basic standards of fair dealing. The standards specifically require advisers and financial institutions to:

- Give advice that is in the “best interest” of the retirement investor. This best interest standard has two chief components: prudence and loyalty:

- Under the prudence standard, the advice must meet a professional standard of care as specified in the text of the exemption;
- Under the loyalty standard, the advice must be based on the interests of the customer, rather than the competing financial interest of the adviser or firm;
- Charge no more than reasonable compensation; and
- Make no misleading statements about investment transactions, compensation, and conflicts of interest. (FAQ1)

It seems clear that the fiduciary duty rule and the amendments to the PTEs are here to stay. However, it is less clear that the current version of the fiduciary duty rule and the PTEs will be the final version. If and when changes are made, we will keep you posted.