

## Insights

### **The Department of Labor Allows the Upcoming June 9 Applicability Date for Portions of the Fiduciary Duty Rule to Stand While Continuing to Review the Overall Rule**

May 23, 2017

Late Monday, May 22, 2017, Secretary of Labor Alexander Acosta issued an opinion editorial in the *Wall Street Journal* explaining that although public comments and more in-depth analysis will continue with respect to the overall fiduciary duty rule, he saw no legal reason to further delay the already extended deadline of June 9, 2017, to implement certain portions of the rule. Specifically, the definition of fiduciary will be effective as well as the process of utilizing an impartial conduct standard when reviewing retirement plan advice provided by investment and financial advisors.

#### **Background**

The Department of Labor issued the "Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice," on April 8, 2016 (effective June 7, 2016, with an April 10, 2017, applicability date), commonly referred to as the "fiduciary duty rule." The goal of the fiduciary duty rule, as stated in the rule's preamble, was to review the current definition of fiduciary and related tests to determine whether certain investment and financial advisors who were not covered by the definition should be included to protect retirement plan participants and beneficiaries.

Further, on February 3, 2017, the White House released the Presidential Memorandum on fiduciary duty rule, which instructed the Secretary of Labor to carefully review the fiduciary duty rule issued under President Obama's administration, including its legal and economic impact (i) on individuals' access and ability to save for retirement, (ii) on the industry and investors and retirees, and (iii) due to the potential for increased litigation, which may harm investors and retirees. The DOL issued a final rule extending the applicability date of portions of the rule (e.g., the definition of fiduciary and the impartial conduct standards) on April 7, 2017, to June 9, 2017, while adding a phased implementation period for the new exemption, best interest contract, and amendments to other exemptions to January 1, 2018, in order to conduct its review.

#### **This Week's Release**

The DOL issued on May 22, 2017, two new items that those closely following the evolution of the fiduciary duty rule will want to review:

First, a "Temporary Enforcement Policy on Fiduciary Duty Rule," (FAB 2017-02) which provides, through the phased-in implementation period, ending on January 1, 2018, that the DOL "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.” This is most welcome news for investment and financial advisors in the retirement plan industry.

Second, a series of “Conflict of Interest FAQs” for the transition period. The FAQs answer specific fact-based scenario questions regarding standards to which advisors will be held accountable during the transition period as well as how the delay affects the use of certain prohibited transaction exemptions. Advisors will want to review these FAQs carefully and reach out to their legal counsel, as needed, to ensure they are aware of how the rules impact their business.

### **The Future**

Secretary Acosta’s comments about the continued review of the fiduciary duty rule appear to foreshadow potential upcoming changes in the rule as relevant to the exemptions. Therefore, we will continue to closely monitor any movement regarding this rule as it evolves. We urge anyone in this industry to do the same.

If you have specific questions as to how the fiduciary duty rule and/or related guidance affects you and your business, please contact one of our **Employee Benefits Professionals**.