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BENEFITS BRIEF

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DOL Issues Field Assistance Bulletin with Enforcement Relief from DOL Fiduciary Rule and Exemption Requirements Pending Rule Delay

Today, the Department of Labor ("DOL") published on its website a Field Assistance Bulletin ("FAB 2017-01") addressing notice and compliance issues under the DOL Fiduciary Rule given the uncertainty surrounding the proposed delay of the rule's Applicability Date. **The FAB will permit financial institutions to avoid sending out notices and client communications prior to April 10, 2017.**

The regulation "Definition of the Term 'Fiduciary'; Conflict of Interest Rule--Retirement Investment Advice", 81 Fed. Reg. 20946 (April 8, 2016), Prohibited Transactions 2016-01 and 2016-02 and the 2016 amendments to Prohibited Transactions 75-1, 77-4, 80-83, 83-1, 84-24, 86-128 (together, the "Fiduciary Rule") becomes applicable on April 10, 2017. On March 2, 2017, the DOL proposed to delay this Applicability Date. 82 Fed. Reg. 12319 ("Proposed Delay").

Many financial institutions have been concerned that it would be necessary to provide notices and communications to clients in anticipation of the April 10, 2017 Applicability Date even though it is expected that, following the notice and comment period, the Proposed Delay would be finalized and the Applicability Date ultimately delayed.

Groom has been working with the Department to identify an approach to help financial institutions avoid customer confusion and the unnecessary expense associated with sending out notices in advance of the original April 10 Applicability Date. The FAB provides enforcement relief under the two scenarios that firms had been concerned about: (1) where the DOL decides not to issue a delay of the Fiduciary Rule's Applicability Date; and (2) where the DOL delays the Applicability Date, but the delay is published after April 10, 2017. While we think these scenarios are unlikely, the enforcement relief provided in the FAB provides much needed certainty that no matter what the outcome of the Proposed Delay, firms will have adequate time to communicate with clients.

FAB 2017-01

FAB 2017-01 was issued in response to industry concerns regarding the potential for a final rule to be issued after April 10th thereby creating a gap period and timing issues related to sending notices related to the Best Interest Contract exemption, independent fiduciaries with financial expertise exclusion or other disclosure provisions of the Fiduciary Rule. Importantly, the FAB makes clear that the DOL anticipates that it will complete the rulemaking process on the delay before April 10th. However, in order to provide compliance assistance, the DOL issued FAB 2017-01 after finding that temporary enforcement relief was warranted to protect against investor confusion and related marketplace disruptions.

FAB 2017-01 identifies the two possible undesirable outcomes of the current Proposed Delay:

a. The DOL decides to delay the applicability date of the rule and the final delay is issued after April 10^{th}; or
b. The DOL decides not to delay the applicability date of the rule.

FAB 2017-01 announced that in the case of a late delay, the DOL will not initiate any enforcement action based on non-compliance with the Fiduciary Rule, including the related exemptions during this gap period.

In the case of a decision not to issue a delay, the DOL will not initiate any enforcement action based on non-compliance with the Fiduciary Rule, including the related exemptions. Further, the DOL will treat the 30-day cure period under Section IX(d)(2)(vi) of the BIC as available to institutions that had not provided transition notices to retirement investors.

The DOL also indicated that it would consider issuing additional enforcement relief if the circumstances surrounding the Proposed Delay so require.

Reaction to FAB 2017-01:

The relief provided in FAB 2017-01 will permit financial institutions to pause the process of sending out Best Interest Contract transition notices, independent fiduciary financial expert letters, and other consumer facing communications that would otherwise have caused confusion if a delay is announced. It is important to understand that because the DOL is not permitted to pre-judge the outcome of the notice and comment process currently underway with respect to the Proposed Delay, the guidance should not be taken as a signal that DOL expects not to issue a delay or to do so after April 10, 2017. Rather, the guidance is intended to provide certainty under all scenarios. If you have questions about FAB 2017-01's implications for your firm, please call us to discuss.