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Department Releases Final Extension of Applicability Date

On April 4, 2017, the Department of Labor ("DOL") released for public inspection its final regulation extending the applicability date of the Fiduciary Rule from April 10, 2017 to June 9, 2017 as well as providing additional transition relief through the end of the year (the "Final Extension"). While the Final Extension is a welcome development, it creates a series of significant new challenges for the retirement services industry. Below, we first describe the specific changes in the Final Extension. Then, we outline the challenges.

Description of the Final Extension

- **June 9, 2017 Applicability Date.** Under the Final Extension, the Applicability Date of the Fiduciary Rule (i.e., the definition and exemptions) has been extended by 60 days -- until June 9, 2017.

- **Relief Conditioned on "Impartial Conduct Standards."** The conditions for exemptive relief during the new Transition Period (from June 9, 2017 through January 1, 2018) are amended for the Best Interest Contract Exemption ("BIC") and Principal Transaction exemptions (respectively, PTEs 2016-01 and 2016-02). From June 9, 2017 through January 1, 2018, the sole condition for relief will be adherence to the "Impartial Conduct Standards." Each of the remaining conditions for exemptive relief during the Transition Period is eliminated, including the transition notice. There is no explicit recordkeeping requirement nor a need to designate a BIC compliance office or officers during the Transition Period, but many financial institutions are likely to voluntarily adopt recordkeeping and monitoring procedures. Importantly, the written disclosure requiring acknowledgement of fiduciary status, disclosure of limitations placed on the universe of recommendations, disclosures of Material Conflicts of Interest are no longer required during this Transition Period.

- **Robo Relief.** Transition period relief is unavailable to Robo-advisers. However, DOL has effectively conformed the conditions of PTE 2016-01 section II(h) "level fee" relief to the new conditions applicable during the Transition Period for Robo-advisers by requiring only compliance with the Impartial Conduct Standards and not the written acknowledgement of fiduciary status condition.

- **Continued Availability of PTE 84-24 for Variable Annuities and Fixed Indexed Annuities.** The Applicability Date for PTE 84-24 has been moved back to January 1, 2018 for everything except the application of the Impartial Conduct Standards. This means that for the remainder of 2017, PTE 84-24 can be used to cover the sale of fixed indexed and variable annuities. Likewise, the narrowed scope of relief to

Insurance Commissions and Mutual Fund Commissions also does not go into effect until 2018. This will be welcome relief for those in the annuity business.

- **Other Exemptions.** The effective date for the changes to PTE 75-1, 77-4, 80-83, 83-1, and 86-128 will be June 9th. The relief previously offered by these class exemptions will be significantly curtailed in some instances. Please see our prior alerts regarding those changes.

- **No Change in Duration of Transition Period**. The Transition Period for the Fiduciary Rule continues to sunset as of January 1, 2018.

Challenges Presented by the Final Extension

- While many in the retirement services industry had hoped for a longer delay or at a minimum, a series of delays, DOL signaled that it will not be further delays of the new June 9, 2017 Applicability Date and may instead use the time available in the remainder of calendar year 2017 to complete the updated legal and economic analysis as instructed by President Trump's memorandum of February 3, 2017 (the "President's Memorandum") for the January 1, 2018 full compliance period. In the preamble, DOL states,

  > "Under this final rule extending the applicability dates, stakeholders can plan on and prepare for compliance with the Fiduciary Rule and the PTEs' Impartial Conduct Standards beginning June 9, 2017. At the same time, stakeholders will be assured that they will not be subject to the other exemption conditions in the BIC Exemption and the Principal Transactions Exemption until at least January 1, 2018. *The Department will aim to complete its review pursuant to the President's Memorandum as soon as possible before that date and announce its intention on whether to propose changes to the Rule or PTEs, provide additional relief, or to allow all the conditions of the PTEs to become applicable as scheduled on January 1, 2018.*"

- Because the Fiduciary Rule will be applicable prior to the completion of the analysis required by the President's Memorandum, DOL may be able to take the position that the retirement services industry is able to comply with the Fiduciary Rule. Additionally, because there is no delay to the end of the Transition Period from January 1, 2018, DOL may be able to argue that making changes to the Fiduciary Rule or related exemptions would drive up compliance costs at no industry savings. That is, by January 1, 2018, the financial services industry will be expected to have finished spending the $5 billion in anticipated start-up costs.

- DOL may be unwilling to accept analysis completed prior to the completion of its 2016 Regulatory Impact Analysis when conducting the updated economic analysis required by the President's Memorandum. The DOL dismissed comments challenging DOL's cost estimates stating that they "largely echo comments made in response to the Fiduciary Rule when it was proposed in 2015, and that were addressed in considerable detail in the 2016 RIA."

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While the Final Extension offers some relief, it is a mixed bag. When the President's Memorandum was published, many hoped that we would be closer to rescinding or revising the Fiduciary Rule by now. However, DOL has been able to continue moving forward with the rule as a result of its string of successes in court where the Fiduciary Rule has been challenged as well as its dearth of political oversight as the first Secretary of Labor nominee had to withdraw, and Alexander Acosta, the second nominee, has yet to be confirmed. We will continue to press for a more workable rule and will continue to provide updates.