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DOL Issues Temporary Enforcement Guidance on Fiduciary Rule

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On March 10th, in connection with the DOL's recent proposal to delay the applicability of the fiduciary rule, the DOL issued temporary guidance (Field Assistance Bulletin No. 2017-01) regarding how it will enforce the rule in the coming months given the uncertainty of when the fiduciary rule will become applicable. While the DOL intends to take action to delay the fiduciary rule prior to its April 10th applicability date, it recognizes that uncertainty in the current environment is causing investor confusion and marketplace disruption. The DOL's temporary enforcement policy is as follows:

• If the final action to delay the applicability of the fiduciary rule and its related prohibited transaction exemptions ("PTEs") is issued after April 10th, the DOL will not enforce non-compliance with the rule and PTEs during the "gap period," i.e., the period between the rule's initial applicability and subsequent delay.

• If the proposal to delay the applicability of the fiduciary rule and its related PTEs is not finalized, the DOL will not initiate enforcement actions against investment advisors and other financial institutions not complying with the rule on April 10th, provided they comply with the rule or a PTE within a reasonable time following a decision not to delay the April 10th applicability date.

• Further, if the fiduciary rule is not delayed by April 10th, the DOL will allow financial institutions to provide required disclosures under the Best Interest Contract and the Principal Transactions Exemptions to investors within 30 days of April 10th, by extending to them a 30-day "cure period" in these exemptions for financial institutions who discover disclosure errors or omissions.

Although the enforcement policy provides regulatory relief to financial institutions and other service providers, it cannot completely alleviate concerns about the fiduciary rule's approaching applicability date because the fiduciary rule provides for private rights of action. (Field Assistance Bulletin No. 2017-01 acknowledges that it "does not address the rights and obligations of other parties.") Accordingly, the DOL's enforcement policy does not insulate financial institutions and other retirement plan service providers from all potential liability if the fiduciary rule were to become applicable. As a result, service providers in the retirement plan market may need to continue to prepare to comply with the fiduciary rule unless and until it is formally delayed, modified and/or rescinded.