

## Status of the DOL Fiduciary Conflict of Interest Rule as it Applies to HSAs that are Part of a High Deductible Health Plan

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The Flex Reporter has been closely monitoring, the formulation and finalization of the U.S. Department of Labor (“DOL”) Fiduciary Conflict of Interest Rule as it applies to HSAs that are part of a High Deductible Health Plan, since early this year. On August 31, 2017, the DOL’s proposal to extend the transition period for the full implementation of the Best Interest Contract Exemption (“BICE”), the Principal Transactions Exemption, and PTE 84-24 (relating to sales of annuities and other transactions involving insurance companies and agents) (collectively, the “Exemptions”) by eighteen months from January 1, 2018 to July 1, 2019, was published in the Federal Register<sup>15</sup>. Given the most recent pronouncements by the DOL’s Employee Benefit Security Administration (“EBSA”) and the Office of Management and Budget (“OMB”), it appears highly likely that the DOL will finalize and issue the proposal after the 15-day comment period include in the proposals.

The most recent ECFC article on the topic was published in the June 2017 *Flexible Reporter*, titled “Non-Delay of DOL Fiduciary Conflict of Interest Rule Has Impact on HSA Custodians and Trustees”, by John R. Hickman, Esq. and Steven C. Mindy, Alston & Bird, LLP. This article particularly will rely on the information published in the June Flex Reporter. Many of the affected parties have implemented significant portions of the guidance issued to date. Nonetheless, many of the associations representing the affected parties have been lobbying for continuing the delay of the implementation of part or all of the Fiduciary Conflict of Interest Rules.

In addition the DOL announced in Field Assistance Bulletin No. 2017-03, issued on August 30, 2017, that it would not pursue a claim against any fiduciary based on the failure to satisfy the BICE or the Principal Transactions Exemption, or treat any fiduciary as being in violation of either of these exemptions, if the sole failure of the fiduciary to comply with either the BICE or the Principal Transactions Exemption, is a failure to comply with the Arbitration Limitation in Section II(f)(2) and/or Section II(g)(5) of the respective exemptions. To the extent that circumstances give rise to the need for other relief, including prohibited transaction relief, EBSA will consider taking such additional steps as necessary.

Please remember that certain parts of the Fiduciary Conflict of Interest Rule became applicable on June 9, 2017, including to non-ERISA plans like HSAs: (1) the rule’s definition of “fiduciary” of a plan under ERISA 3(21)(A)(ii) and Code 4975(e)(3)(B); (2) the Impartial Conduct Standards including BICE, on which many HSA providers will rely; and (3) the applicability date of amendments to some existing DOL prohibited transaction exemptions for the fiduciary rule<sup>16</sup>. The Impartial Conduct Standards require that: (a) advice is in the “Best Interest” of the investor; (b) no more than reasonable compensation will be received, directly or indirectly; and (c) statements about the transaction, fees, compensation, material conflicts of interest, and other relevant matters are not materially misleading when made. In addition, the transition relief for PTE 84-24 allows providers of annuity contracts other than “fixed rate annuity contracts” to continue relying on PTE 84-24 through the transition period, subject to satisfaction of the Impartial Conduct Standards.

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<sup>14</sup> Seth Gaudreau, an Associate with The Wagner Law Group assisted with this Article.

<sup>15</sup> 82 Fed. Reg. 41365 (August 31, 2017)

<sup>16</sup> 82 Fed. Reg. 16902 (April 10, 2017)

As additional background to help you understand the status of this issue, the DOL published, in the Federal Register on July 6, 2017, a Request for Information (“RFI”)<sup>17</sup> in connection with its review of the Fiduciary Conflict of Interest Rule defining who is a “fiduciary” as a result of giving investment advice for a fee or other compensation with respect to assets of an employee benefit plan or IRA (affected HSA). This RFI was intended to influence the effective date of the updated fiduciary guidance and the advisability of extending the then effective dates of the regulations, predominantly January 1, 2018. Specific items that were highlighted in the RFI that have not otherwise been mentioned are: (1) an alternative streamlined exemption; (2) the incorporation of Securities Regulation of Fiduciary Investment Advice; (3) bank deposits and similar investments; and (4) mutual fund clean shares, T-shares, and fee-based annuities. Mutual fund clean shares, T-shares, and fee-based annuities were introduced in response to the Fiduciary Conflict of Interest Rule in order provide pricing based on the service performed rather than expense ratios or commission compensation, to provide clarity and reduce any potential conflicts of interest.

The new fiduciary rule has been years in the making and traces back to the five-part test that was established in 1975 that provided a person giving “investment advice” would be held to ERISA’s fiduciary standard if: (1) the person renders advice as to the value of securities or other property; (2) on a regular basis; (3) pursuant to a mutual agreement; (4) the advice serves as a primary basis for investment decisions; and (5) the advice is individualized. Before the most recent iteration, the DOL published proposed regulations in 2010 modifying the definition of fiduciary investment advice. After receiving hundreds of comment letters, public hearings, and meetings with stakeholders, the DOL announced the withdrawal of the proposed regulation in 2011. On April 20, 2015, the DOL published new proposed regulations, as well as proposed new and amended prohibited transaction exemptions intended to address certain undesirable consequences of the proposal’s expansion of the fiduciary definition. Following an extended comment period, during which thousands of comment letters were received, the DOL issued final regulations and the new and amended prohibited transaction exemptions on April 8, 2016, which at the time had an effective date of June 7, 2016, an applicability date of April 10, 2017 for certain standards and a full implementation date of January 1, 2018. After receiving many comments and much discussion, the deadlines have been extended in multiple steps.

The DOL and the Securities and Exchange Commission are still working at both streamlining the rules and arriving at an appropriate level of regulatory and sub-regulatory guidance. It appears that the agencies are attempting to develop and implement a relatively workable, coordinated standard for a Fiduciary Conflict of Interest Rule.

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<sup>17</sup> 82 Fed. Reg. 31278 (July 6, 2017)