CLIENT ALERT

DOL Proposes to Further Delay Significant Components of Fiduciary Rule

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On Thursday, August 31, 2017, the Department of Labor (the "DOL") issued a notice of proposed amendment (the "Proposal")[1] that would extend the present transition period[2] for the Best Interest Contract Exemption and the Principal Transactions Exemption, and delay the applicability date for Prohibited Transaction Exemption 84-24 (regarding annuity products) from January 1, 2018 until July 1, 2019. The DOL is seeking comments on the Proposal for the 18-month delay, which must be submitted to the DOL on or before September 15, 2017.

Although the full applicability of the exemptions, which are part of the DOL's regulatory package, including the regulatory definition of who is a "fiduciary" (the "Fiduciary Rule") under the Employee Retirement Income Security Act of 1974,[3] would be delayed, fiduciaries still would have to provide investment advice that satisfies the impartial conduct standards (including providing advice in the retirement investors' "best interest," charging no more than reasonable compensation and avoiding misleading statements). The applicability date of the new definition of "fiduciary" under the Fiduciary Rule, which became applicable on June 9, 2017, is not being extended under the Proposal. Under the terms of the Proposal, compliance with the remaining conditions of the exemptions, including the requirement to provide specific written disclosures and representations of fiduciary compliance in communications with investors and implementation of specified policies and procedures, as applicable, would not come into effect until July 1, 2019.

[1] 82 Fed. Reg. 41365 (August 31, 2017).

[2] 82 Fed. Reg. 16902 (April 7, 2017).

[3] 81 Fed. Reg. 21002 (April 8, 2016).

While the Proposal would implement a date-certain 18-month delay, the DOL is also interested in receiving comments on alternative approaches (such as a delay lasting until 12 months after the DOL concludes its review as directed by President Trump in his February 3, 2017 memorandum (previously summarized here), or a tiered approach such as the later of a date certain and the occurrence of a defined event). The DOL plans to consider comments that provide insight as to any relative benefits or harm of the various delay approaches. While the transition period for the suspended portions of the exemptions will be further extended, it remains to be seen whether the extension will ultimately lead to more substantial changes to the terms and conditions of the exemptions or even changes to the Fiduciary Rule. In that regard, the Proposal notes that the DOL anticipates that it will propose in the near future a new and more streamlined class exemption built in large part on recent innovations in the financial services industry. We understand "recent innovations" to be a reference to the development of so-called "clean shares," which are a relatively new class of mutual fund shares that were developed in response to the Fiduciary Rule, and do not have sales loads or annual 12b-1 fees. Finally, we note that the DOL issued two sets of FAQs describing its temporary enforcement policies during the transition period (available here and here).

We will keep you apprised of further developments regarding the Proposal, including additional industry comments and the terms of the final extension period. See our client memo dated May 6, 2016 for a detailed summary of the Fiduciary Rule and related exemptions here.

If you have any questions regarding this client alert, please contact the following attorney or the attorney with whom you regularly work.

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