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What You Need to Know About the DOL Fiduciary Rule

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In late November 2017, the Department of Labor (DOL) granted an 18-month extension on certain key pieces of the prohibited transaction exemptions that accompanied the DOL's fiduciary rule.¹ This is just latest development in a process that has spanned many years of ups and downs in the life of the fiduciary rule. Importantly, the rule is still in effect. This latest development only delays certain conditions of the prohibited transaction exemptions that were issued along with the fiduciary rule. Compliance with the

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¹ 82 Fed. Reg. 56,545 (Nov. 29, 2017).

rule itself, and with other conditions of the exemption, is still required.

Here's the background. The DOL revised the three-decade-old regulation defining when a person is considered a fiduciary when providing investment advice.² The overall effect of the rule will be to broaden the investment advice that is considered fiduciary and the parties who will be considered fiduciaries. The rule became applicable on June 9, 2017.

Two new prohibited transaction exemptions were adopted along with the rule — one called the Best Interest Contract Exemption and the other called the Principal Transaction Exemption. In addition, the DOL amended an exemption applicable to annuity sales (PTE 84-24) to incorporate requirements similar to those in the Best Interest Contract Exemption and the Principal Transaction Exemption. Certain conditions of the exemptions are already in effect, but others were subject to a transition period that ended January 1, 2018.

In the most recent development in this long and winding road, the DOL published a notice in the Federal Register on November 29, 2017, announcing that the transition period will be extended to July 1, 2019.³ This extended transition period gives additional time for investment advice fiduciaries to comply with certain aspects of the exemptions. These conditions include, among other things:

- The requirement to have a written contract meeting certain standards, including a prohibition on waivers on the right to participate in a class action
- Transaction-based disclosures
- Disclosures on publicly accessible website

The notice also extends the period of temporary enforcement relief.

The DOL issued a Field Assistance Bulletin 2017-02 in May 2017 that provides that the DOL will

² 81 Fed. Reg. 20,946 (Apr. 8, 2016).

³ 82 Fed. Reg. 56,545 (Nov. 29, 2017).

not pursue claims against investment advice fiduciaries who are “working diligently and in good faith to comply with their fiduciary duties and to meet the conditions” of the rule and the exemptions. The IRS issued parallel enforcement relief.

As noted above, however, the extended transition period does not make the rule inapplicable or ineffective. The rule is effective right now; and only certain conditions of the exemptions are the subject of the extended transition. Other conditions, like the “Impartial Conduct Standards,” are currently in effect. The Impartial Conduct Standards include: acting in the client’s best interest; charging no more than reasonable fees; and avoiding any materially misleading statements. The Impartial Conduct Standards require compliance efforts outside of those subject to the transition period (but subject to the temporary enforcement relief).

WHAT CAN WE EXPECT THE DOL TO DO NOW?

We expect to hear more from the DOL, likely in the not-too-distant future. The DOL has indicated it is considering options for a more streamlined exemption, in response to comments that the Best Interest Contract Exemption and Principal Transaction Exemption are unduly burdensome and difficult to administer. In addition, the DOL indicated that it still needs to consider the criteria set forth in the Presidential Memorandum issued on February 3, 2017. There is also an extensive comment record, including many thousands of comments in response to the numerous DOL proposals on the fate of the rule. The DOL has also indicated a desire to coordinate with other applicable regulators, including the Securities and Exchange Commission (SEC) and state insurance commissioners. Lack of coordination with the SEC, which regulates investment advisers as well, has been a common criticism of the rule.

There is also a bill in the House of Representatives that has been introduced to stop implementation of the rule and impose a different standard, although it hasn’t received much traction. And the new head of the Employee Benefit Security Administration, the

branch of the DOL responsible for this rule, is expected to have some influence on the final rule.⁴

WHAT CAN WE EXPECT FINANCIAL SERVICES PROVIDERS TO DO NOW?

We anticipate that financial service providers may be adopting a “wait and see” approach, at least temporarily, while awaiting the DOL’s next move, but probably not indefinitely. While 18 months is a long time in many respects, it is not long in light of major system overhauls that may be required by the rule for some providers (especially if some months are used to evaluate what’s going to happen next).

In addition to the DOL, financial services providers can expect possible questions on these issues from their prudential regulators, such as the Office of the Comptroller of the Currency, Federal Reserve, and state banking commissions for banks; the Securities and Exchange Commission and Financial Industry Regulatory Authority (FINRA) for investment advisers and broker-dealers; and state insurance departments for insurance companies and insurance agents. These agencies have already been asking questions about firms’ intended plans to comply with the new DOL rules, raising questions in examinations. In addition, in February 2018, the Massachusetts Securities Division brought a complaint against a firm for failing to follow the policies it had adopted to comply with the “impartial conduct standards” under the Best Interest Contract Exemption.⁵ These regulator inquiries present potentially more immediate issues for regulated financial services firms.

WHAT CAN WE EXPECT PLAN SPONSORS TO DO NOW?

Of all the stakeholders in this rule, this development likely affects plan sponsors the least because service providers to plan sponsors may have been relying on exemptions other than the exemptions affected by the transition. Thus, plan sponsors should consider carefully any changes proposed by service providers in light of the extension of the transition period.

⁴ PASS Act of 2017, H.R. 3857, 115th Cong. (2017). *See also*, e.g., Protecting American Families’ Retirement Advice Act, H.R. 355, 115th Cong. (2017); Affordable Retirement Advice for Savers Act, H.R. 2823, 115th Cong. (2017); Affordable Retirement Advice Protection Act, S. 1321, 115th Cong. (2017).

⁵ In the Matter of Scottrade, Inc., Administrative Complaint, Docket No. E-2017-0045, filed by the Massachusetts Securities Division on Feb. 15, 2018.