No Further Delay on Implementation Date of DOL Conflict of Interest Rules

Skadden

05/26/17

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In a May 23, 2017, op-ed in *The Wall Street Journal*, Secretary of Labor Alexander Acosta indicated that the conflict of interest regulation (commonly referred to as the fiduciary rule) issued by the Department of Labor (DOL) will become applicable on June 9, 2017, and will not be subject to any further delay. (See our April 7, 2017, client alert "DOL Finalizes Delay of Conflict of Interest Rule.") Secretary Acosta explained that the DOL has, in light of the requirements of the Administrative Procedure Act, "found no principled legal basis to change the June 9 date" and that "[r]espect for the rule of law leads us to the conclusion that this date cannot be postponed." Despite the impending applicability of the fiduciary rule, Secretary Acosta cautioned that "[t]rust in Americans' ability to decide what is best for them and their families leads us to the conclusion that we should seek public comment on how to revise this rule."

The fiduciary rule covers conduct that also is within the authority of the Securities and Exchange Commission (SEC), in particular with respect to the conduct of broker-dealers. The Dodd-Frank Act directed the SEC to consider potential changes to its regulations governing the standard of conduct for broker-dealers with respect to providing investment advice to retail investors. In this regard, Secretary Acosta observed that "[u]nder the Obama administration, the Securities and Exchange Commission declined to move forward in rule-making. Yet the SEC has critical expertise in this area. I hope in this administration the SEC will be a full participant."

On May 22, 2017, the DOL issued Field Assistance Bulletin No. 2017-02 (the Bulletin) setting out its temporary enforcement policy and a new set of FAQs, regarding the fiduciary rule. The Bulletin states that from June 9, 2017, to January 1, 2018, the DOL "will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the [fiduciary rule] and exemptions, or treat those fiduciaries as being in violation of the [fiduciary rule]." The DOL warned that the Bulletin only states the DOL's policy and does not address the rights or obligations of any other parties. The Internal Revenue Service has confirmed that its corresponding enforcement policy regarding Section 4975 of the tax code will continue to apply as long as the DOL's policy applies. However, the DOL's nonenforcement position does not affect the ability of plans or plan participants to pursue private litigation.

The FAQs address the phased implementation of exemptions as well as a number of other related matters. Although the fiduciary rule will take effect as of June 9, 2017, until January 1, 2018, the "best interest contract" exemption and PTE 84-24 will generally be deemed satisfied as long as the fiduciary satisfies the Impartial Conduct Standards set forth in those exemptions. Those standards require that the fiduciary act in the client's best interest, charge no more than reasonable compensation and make no misleading statements.

In the FAQs, the DOL explained that it is continuing its analysis of the fiduciary rule in response to President Donald Trump's February 3, 2017, memorandum to the then-acting secretary of Labor (see our February 6, 2017, client alert "Trump Directs Department of Labor to Review Fiduciary Rule") and that it will be seeking more input "for possible new exemptions or regulatory changes based on recent public comments and market developments." The DOL stated that the coming request for input also will include a request for comment as to whether the January 1, 2018, full applicability date of the exemptions needs to be delayed further to "allow for more effective retirement investor assistance and help avoid needless or excessive expense as firms build systems and compliance structures that may ultimately be unnecessary or mismatched with the DOL's final decisions on the issues raised in the President's memorandum." Both Secretary Acosta's statements and the FAQs suggest that the DOL's continuing analysis may produce changes and possibly a further delay of full implementation past January 1, 2018.