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Client Alert

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DOL Extends Transition Period for Fiduciary Rule Exemptions: What This Means for Service Providers

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The Department of Labor (DOL) has extended the current Transition Period for the DOL Fiduciary Rule exemptions by 18 months. The Transition Period was scheduled to end on January 1, 2018, but now will end on July 1, 2019. During this extended Transition Period, the DOL will reexamine the Fiduciary Rule and exemptions to see if changes are warranted, and will coordinate with other regulatory entities, including the SEC, FINRA, and state insurance commissioners regarding the Rule.

This extension does not change the requirements of the Fiduciary Rule or the Transition Period exemptions currently in effect; it merely maintains the current status quo until July 1, 2019. While the Fiduciary Rule continues to apply, certain provisions of the Best Interest Contract Exemption (BICE or BIC Exemption) and the Principal Transaction Exemption, and amendments to Prohibited Transaction Exemption 84-24 are deferred. Further, the DOL's current non-enforcement policy is also being extended. Covered investment advice to ERISA plans, plan participants and IRA owners must still comply with either the ERISA fiduciary standard or the Impartial Conduct Standards, as applicable.

Here's what the extension means:

- **Expanded Fiduciary Definition Remains in Effect.** The "new" definition of fiduciary advice became applicable on June 9 of this year. The extension does not affect this definition. If you are a fiduciary under the new definition, you will continue to be considered a fiduciary and must comply with all applicable requirements.
- **Transition BIC.** The transition rules for complying with the BIC Exemption will also remain in effect (for nondiscretionary advice). This means financial institutions and their advisers will need to adhere to the Impartial Conduct Standards, but will not be required to levelize adviser compensation or make the disclosures and comply with other requirements under the full BIC Exemption. For more information about the practical impact of Transition BIC, see our prior alerts on independent RIA firms, broker-dealers and independent insurance agents.
- **Transition 84-24.** Transition PTE 84-24 continues to be available for all annuity and life insurance recommendations, but insurance agents and brokers will need to comply with the Impartial Conduct Standards and make the disclosures required under the exemption. (See our client alert for more information.) Annuities and insurance contracts can also be sold under Transition BICE (which is easier to comply with) if a financial institution (*e.g.*, a broker-dealer or registered investment advisory firm) agrees to be a fiduciary for the sale.
- **Non-Enforcement Policy.** While the DOL says it will not pursue claims against fiduciaries during the extended period, this only applies if the fiduciaries are working diligently and in good faith to comply with the rule and the transition exemptions. Acknowledging that firms have flexibility in establishing diligent and good faith compliance, the DOL points out that specific provisions of the full BIC exemption provide guidance. For example, the DOL observes that reliance on the full BIC exemption requirements that govern recommendations of proprietary products would "certainly constitute good faith compliance." The IRS has also agreed not to enforce the rules during the Transition Period under the non-enforcement policy. However, if the DOL or IRS determine that an adviser (and supervisory entity) are not making a good faith and diligent effort to comply, they will enforce the rules. Further, the policy does not prevent private enforcement of the rules. Also, the DOL emphasizes that the "basic fiduciary norms and standards of fair dealing" continue to apply during the extended period.

Does the extension mean you can relax? Not at all. The Fiduciary Rule continues to apply just as it has since June 9, and there will be an ongoing debate over whether and how to change the Rule. During this extended Transition Period, the DOL will be looking at possible changes to the exemptions and possibly the Fiduciary Rule. Here are what we believe are essential steps in the next 18 months:

- **Review Current Compliance.** To ensure that firms are protecting themselves from exposure – that they are "working diligently and in good faith" and are not exposing themselves to liability from private enforcement actions – they should revisit their compliance efforts to make sure that they are consistent with the Impartial Conduct Standards and otherwise meet the spirit of the transition exemptions.

- **Communicate with Regulators About the Future.** Affected firms should take advantage of the opportunity to revisit the guidance and to communicate with the DOL on possible changes. Indeed, the DOL specifically asks for "input and data from stakeholders demonstrating the regulated community's implementation of the Impartial Conduct Standards." While this may mean reiteration of comments previously submitted, it may also be possible to provide evidence to the DOL of the impact of the changes in the rules – positive or negative – to assist in the regulatory analysis. Whether concerns are technical "fixes" or substantive policy issues, the next 18 months will be a critical time to communicate with the DOL and other regulators regarding the future of the Rule and the exemptions.

We anticipate that the DOL will use the extended Transition Period to propose changes to the exemptions and possibly to the Fiduciary Rule itself. We do not think it likely, however, that we will see the elimination of the Impartial Conduct Standards. As firms and advisers await the final modified rule package, they should focus on developing policies and procedures that support compliance with those standards.

Employee Benefits and Executive Compensation Team

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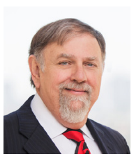

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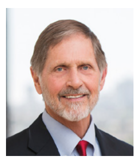

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