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Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
New York
New Jersey
Illinois
Delaware

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DOL Fiduciary Rule Transition Period Extended to July 1, 2019

An early holiday gift to many, the U.S. Department of Labor (DOL) on November 27 formalized an extension of the transition period of the Best Interest Contract (BIC) Exemption, the Principal Transactions Exemption, and certain conditions of Prohibited Transaction Exemption 84-24. The transition period will now end on July 1, 2019 rather than January 1, 2018. Investment advice fiduciaries are expected to adhere to the "impartial conduct standards," among other conditions (depending on the applicable exemption) during the transition period. As a reminder, the impartial conduct standards impose a duty on fiduciaries to make recommendations in accordance with ERISA's long-standing stringent duties of prudence and loyalty, to charge no more than reasonable compensation for their services, and to avoid making any misleading statements to the retirement investor. Absent any changes or further delays from the DOL, firms and individuals who provide fiduciary investment advice in need of an exemption will be subject to all conditions of these exemptions, including (among others) the controversial duty to enter into an enforceable contract with IRA investors, as well as a requirement to adopt numerous exacting policies and procedures, starting on July 1, 2019.

The DOL stated that its decision to extend the transition period gives it "time necessary to consider public comments submitted pursuant to the Department's July Request for Information, and the criteria set forth in the Presidential Memorandum of Feb. 3, 2017, including whether possible changes and alternatives to exemptions would be appropriate in light of the current comment record and potential input from, and action by the Securities and Exchange Commission, state insurance commissioners and other regulators."

The Fiduciary Rule itself determines whether one becomes a fiduciary by reason of providing non-discretionary investment advice to retirement investors. Generally, if one obtains fiduciary status, and earns compensation in connection with its fiduciary responsibilities, a prohibited transaction occurs and an exemption is needed. The aforementioned exemptions are the primary exemptions under the Fiduciary Rule. The Fiduciary Rule went into effect on June 9, 2017 and is not subject to this (or any) delay; the transition period (and extension thereof) only relates to certain conditions of the exemptions. This means that firms and individuals should continue to ascertain (i) whether they are making "recommendations," including with respect to roll-overs and distributions, in the first place (ii) whether an applicable "exception" to the Fiduciary Rule is available, and (iii) if necessary, which exemption to rely upon. Here are some additional observations:

- Firms, to the extent they are relying on these exemptions, are expected to evaluate and upgrade, as necessary, their adherence to the impartial conduct standards. Given that the DOL is allowing for compliance flexibility, firms should consider seizing the opportunity to tailor their approach to the impartial conduct standards. The DOL has been clear that good faith compliance is essential; DOL Secretary Alex Acosta confirmed as much when he told Congress recently that the DOL would initiate enforcement against firms for willful

non-compliance. There could also be excise taxes imposed for non-exempt prohibited transactions.

- The DOL opted for the transition period to end on a date-certain (July 1, 2019) rather than upon the occurrence of a particular event (e.g., a formal pronouncement by the DOL that it would not propose any changes to the Fiduciary Rule) on the basis that the former would provide the market greater certainty and avoid needless compliance costs.

- The DOL confirmed that it plans to propose a new class exemption, which will likely be aimed at market innovation and transparency, "in the near future." The DOL did not rule out the possibility that this new exemption could be proposed before year-end.

- We remain somewhat optimistic that the DOL, the SEC and the states will coordinate on a rulemaking to avoid duplicative and inconsistent regulatory obligations. The DOL alluded to this need for harmonization in its decision to extend the transition period. SEC Chair Jay Clayton has also expressed a desire to coordinate with the DOL and the states on a uniform standard, the latter a necessary stakeholder because of recent state developments seeking to impose their own obligations on firms and individuals who provide investment advice, as we described previously.

- DOL staff continue to comb through the Fiduciary Rule for ways to wring out unnecessary regulatory costs and increase access of retirement investment advice by "Mr. and Mrs. 401(k)" (to use the artful phrase of SEC Chair Jay Clayton). As noted above, soon after President Trump took office, he ordered the DOL to conduct this analysis and propose changes to address these concerns.

- Speaking of the DOL, a number of personnel changes are afoot. Preston Rutledge was nominated by the President to serve as Assistant Secretary. He already had his confirmation hearing and it appeared to go smoothly. It is an open question, however, whether he will be confirmed before the end of the year. In the interim, Jeanne Klinefelter Wilson will serve as Acting Assistant Secretary (and, ultimately, Deputy Assistant Secretary). She is well-regarded by many ERISA lawyers. It is not entirely certain what role these individuals will have on the DOL's current re-examination of the Fiduciary Rule.

George Michael Gerstein

James F. Podheiser

For more information, contact George Michael Gerstein at 202.507.5157 or ggerstein@stradley.com *or James F. Podheiser at 856.321.2404 or* jpodheiser@stradley.com.

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