September 8, 2017

DOL Signals Changes to Fiduciary Rule; SEC Commissioner Calls Rule "Misguided"

By: Sterling Perkinson and Harrison Taylor

The Department of Labor (DOL) has proposed an extension of the transition period of its Fiduciary Rule from January 1, 2018 to July 1, 2019. (See our prior blog post here). At the same time, the DOL signaled that significant changes will be made to the Fiduciary Rule and/or related exemptions prior to the end of the transition period.

- Streamlined Exemption Anticipated. The DOL noted in the preamble to proposed regulations extending the transition period that it "anticipates 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." The recent innovations referenced include the introduction of "clean shares," a new class of mutual fund shares that does not pay commissions or marketing fees.
- Class-Action Waivers and Arbitration Provisions. The Best Interest Contract Exemption (BIC) and Principal Transactions Exemption include restrictions on client agreements with class action waiver and arbitration provisions. In Field Assistance Bulletin 2017-03 (available here), the DOL acknowledged that these portions of the BIC and the Principal Transactions Exemption were inconsistent with federal laws and policies and so it would not enforce these provisions.

These changes show that the Fiduciary Rule's transition period is not just about giving the market time to adjust to the new rules, but also to give the DOL time to re-think significant aspects of the regulation.

SEC Commissioner Comments on Fiduciary Rule

SEC Commissioner Michael Piwowar made his personal views on the Fiduciary Rule and its related prohibited transaction exemptions clear in a comment letter dated July 25, 2017, by encouraging the DOL to "reconsider this misguided rulemaking." (The comment letter is available here.) The comment letter outlines three primary criticisms of the Fiduciary Rule and its related prohibited transaction exemptions:

- The DOL has ignored standard economic theory by dismissing full disclosure as a solution to conflict problems;

- Treating broker-dealers as advisers ignores long-standing securities regulation schemes that distinguish between "advice" activities and "selling" activities; and
- The Fiduciary Rule will disrupt the entire retail investment market as broker-dealers may not be able to apply different standards for ERISA and IRA accounts than apply to other accounts not subject to the Fiduciary Rule.

Given that DOL Secretary Acosta has invited the SEC to work with the DOL on reviewing the Fiduciary Rule, Commissioner Piwowar's comment letter may indicate that fundamental changes to the Fiduciary Rule and its related exemptions could be on the table. However, it should be noted that Commissioner Piwowar's comment letter represents his own views and was not sent on behalf of the SEC.