Simpson Thacher

Memorandum

Department of Labor Confirms June 9, 2017 Applicability Date for ERISA Fiduciary Rule and Issues Transition Relief and Guidance

May 25, 2017

On May 22, 2017, the Department of Labor ("**DOL**") confirmed that the general applicability date for the new fiduciary rule promulgated under the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**"), will remain June 9, 2017, while also issuing certain transition relief information and guidance for the period running from June 9, 2017 through January 1, 2018.

The DOL had initially published its final rule re-defining who is a "fiduciary" for purposes of ERISA, while also implementing and revising certain related prohibited transaction exemptions, on April 6, 2016. See here for our client memorandum summarizing the fiduciary rule and the related exemptions. The original applicability date for the new fiduciary rule had been April 10, 2017, but the DOL subsequently delayed that applicability date until June 9, 2017. There had been speculation that the DOL, under direction from the Trump administration, would further delay and/or substantially curtail the implementation of the fiduciary rule. However, Secretary of Labor Alexander Acosta noted in a Wall Street Journal op-ed that the DOL ultimately concluded that it "found no principled legal basis to change the June 9 effective date," even though the DOL is continuing to review and seek further public input on the fiduciary rule.

As part of its most recent pronouncement, the DOL indicated that, until January 1, 2018, the DOL "will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary rule and exemptions." The DOL also issued guidance in the form of FAQs regarding the implementation of the fiduciary rule and the related prohibited transaction exemptions. Some of the more helpful FAQs illustrated types of investor communications and non-client specific model portfolio information that would not be construed as fiduciary investment advice for purposes of the fiduciary rule. The FAQs also confirmed that a party transacting business with certain types of sophisticated independent plan fiduciaries (which could, for example, include a private investment fund seeking investments from pension plan investors) may satisfy the "reasonable belief" requirement under the "seller's exemption" to the fiduciary rule by relying upon the plan fiduciary's negative consent to written representations regarding the independent plan fiduciary's status, expertise and level of assets under management.

For further information regarding the DOL's fiduciary rule and related prohibited transaction exemptions, please contact a member of the Firm's Executive Compensation and Employee Benefits Practice Group.

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