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2017 WASHINGTON D.C. INVESTMENT MANAGEMENT CONFERENCE

Hot Topics Panel on Recent Developments

Arthur C. Delibert, Partner, K&L Gates LLP
Robert J. Zutz, Partner, K&L Gates LLP
Kristina M. Zanotti, Partner, K&L Gates LLP
C. Dirk Peterson, Partner, K&L Gates LLP
Fatima S. Sulaiman, Partner, K&L Gates LLP
Marguerite W. Laurent, Associate, K&L Gates LLP

DOL Fiduciary Rule Updates

RECAP

- The DOL Fiduciary Rule became applicable June 9, 2017 and greatly expanded the number of market participants that are ERISA fiduciaries by reason of providing “investment advice”
- The “Best Interest Contract” or “BIC” Exemption became applicable at the same time, but with limited conditions
- Investment “recommendations” directed to or particularized for specific covered recipients = fiduciary investment advice unless an exception applies
- NOT a recommendation: general communications, education
- Sophisticated Independent Fiduciary Exception – Negative Consent Letters

WHERE ARE WE NOW? TRANSITION PERIOD

- Fiduciary Status Applies, but Exemptions are Easier to Comply with and Enforcement is limited.
- Conditions of "Transition Period" BIC Exemption: Impartial Conduct Standards
  - Give advice that is in the "best interest" of the retirement investor, subject to standards of prudence and loyalty
  - Charge no more than reasonable compensation
  - Make no materially misleading statements
- DOL and IRS will not enforce during the Transition Period if a fiduciary is working "diligently and in good faith" to comply
  - ERISA plan participants and fiduciaries have separate right of action
  - IRA owners have no statutory right of action for breach of fiduciary duty
- (As of this writing) Transition Period is currently scheduled to end January 1, 2018. HOWEVER, 18 month extension (Until July 1, 2019) has been proposed

FURTHER DOL GUIDANCE

- Transition Period FAQs
  - PTE 84-24 continues to be available for all annuity contracts (including fixed indexed and variable) during the Transition Period, subject to impartial conduct standards
  - Overhaul of compensation systems not yet needed, as long as recommendations meet the impartial conduct standards (flexibility on how to safeguard compliance)
  - Negative consent works for independent sophisticated fiduciary representations (not limited to Transition Period)
  - Model developers selling non-client specific models to unaffiliated distributors are generally not fiduciaries
  - During the Transition Period, service providers do not need to use the term "Fiduciary" in their 408(b)(2) disclosures, as long as services are accurately disclosed
- Field Assistance Bulletin 2017-03
  - Non-enforcement policy on arbitration limitation

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CHALLENGES: LEGISLATION AND LITIGATION

- Legislative efforts
  - Financial Choice Act (H.R. 10)
  - Affordable Retirement for Savers Act (H.R. 2823)
  - Rider to appropriations bill
  - Wagner Bill (H.R. 3587)
  - Challenges in the Senate
  - State Legislative Backlash – Nevada, New York, New Jersey, Massachusetts, California
- Litigation

Questions?

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