November 30, 2017

Department of Labor Finalizes 18-Month Extension for Simplified Compliance With the BIC Exemption Under the ERISA Fiduciary Advice Rule

On November 29, the US Department of Labor (DOL) finalized its 18-month extension of the transition period under the Best Interest Contract Exemption (the "BIC Exemption").[1] As described in Katten's earlier advisory, "Compliance With the ERISA Fiduciary Advice Rule for Private Investment Fund Managers and Sponsors and Managed Account Advisers: Beginning June 9, 2017," the BIC Exemption permits the giving of advice and receipt of compensation for such advice by an investment advice fiduciary when dealing with a retirement investor (such as an IRA, small ERISA plan, or individual participants in ERISA plans) that is not represented by an "independent fiduciary."

In April of this year, the DOL limited the requirements of the BIC Exemption to require compliance only with its "impartial conduct standards" (ICS) for the period from June 9, through December 31. In August of this year, the DOL proposed a further delay of the full implementation of the BIC Exemptions from January 1, 2018 until July 1, 2019. Pursuant to the extension, fiduciaries relying on the BIC Exemption are required to comply only with the ICS through July 1, 2019.[2]

As described in Katten's earlier advisory, "Sign of Future Changes? DOL Proposes 18-Month Extension of Transition Period for Compliance With ERISA "Fiduciary Investment Advice" Rule," compliance with the ICS generally requires that an investment advice fiduciary (1) act in the "best interest" of plan participants and IRA owners; (2) receive no more than "reasonable compensation" (as defined under ERISA and the Internal Revenue Code); and (3) make no materially misleading statements about recommended transactions, fees, compensation and conflicts of interest.

The DOL indicated that the extension will give it time to consider public comments submitted pursuant to its earlier Request for Information on the Fiduciary Rule, and to consider potential input from the Securities and Exchange Commission and certain other regulators.

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1 The extension also applies to the Principal Transaction Exemption and to certain amendments to Prohibited Transaction Exemption 84-24.

2 Following the conclusion of the 18-month transition period, the other conditions of the BIC Exemption will become operative and, as currently drafted, include: that financial institutions enter into written contracts with retirement investors which acknowledge fiduciary status and contain an obligation to adhere to the ICS; disclosure of fees, services and conflicts of interest; the adoption of policies and procedures designed to ensure compliance with the ICS, including policies designed to ensure that compensation practices do not incentivize advisers to make recommendations that are not in the best interest of retirement investors; and the maintenance of a website containing other specified information.

If you have questions about the extension, please contact your attorney at Katten or any of the following attorneys.

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Notwithstanding the delay in the full implementation of the BIC Exemption, the extension states that the DOL expects financial institutions and advisers to adopt supervisory mechanisms to prevent violations of the ICS, exercise care in their communications to retirement investors and accurately describe recommended transactions and compensation practices.

In connection with the extension, the DOL also announced that it will extend the temporary enforcement relief provided under Field Assistance Bulletin 2017-02 until July 1, 2019. Under the enforcement policy, the DOL provided that it will not seek enforcement action against investment advice fiduciaries who are "working diligently and in good faith to comply with their fiduciary duties and to meet the conditions of the PTEs."

In light of the extension, and the uncertainty as to what will ultimately become of the Fiduciary Rule and the related Exemptions, financial institutions and advisers that intend to rely on the BIC Exemption may wish to review their policies and procedures for complying with the conditions of the ICS.