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Client Memorandum

April 20, 2021

U.S. Department of Labor Continues Focus on Retail Retirement Investors

Key Takeaways

- On April 13, the U.S. Department of Labor (the "DOL") released two guidance documents relating to a recently adopted DOL exemption (PTE 2020-02, *Improving Investment Advice for Workers & Retirees*, or the "Investment Advice Exemption," available here). The Investment Advice Exemption permits certain investment advisers to receive compensation and to engage in other transactions with retirement investors that are subject to the U.S. Employee Retirement Income Security Act of 1974 (as amended, "ERISA") or Section 4975 of the U.S. Internal Revenue Code of 1986 (as amended, the "Code"), such as individuals managing their own 401(k) accounts or individual retirement accounts ("IRAs").
- The new DOL guidance, like the Investment Advice Exemption itself, remains focused on non-discretionary investment advisers and retail retirement investors, and is unlikely to have much impact for discretionary investment managers working primarily with institutional investors.
- The guidance confirms a continuing interest, under the Biden administration, in protecting retail retirement investors while providing investment professionals and financial institutions the flexibility to offer and be compensated for investment advice relating to some of the most significant investment decisions retail retirement investors make.

Background

On December 18, 2020, the DOL adopted the Investment Advice Exemption, with a scheduled effective date of February 16, 2021. Despite speculation that the Biden administration might postpone the effectiveness of the Investment Advice Exemption or take other steps to revisit it, as the Biden administration has done for other DOL rules (see our prior client alert here), the DOL allowed the Investment Advice Exemption to go into effect as scheduled. On April 13, 2021, the DOL released two guidance documents[1] (the "FAQs") that are intended to aid investment advisers and retirement investors in interpreting and applying the Investment Advice Exemption.

[1] *New Fiduciary Advice Exemption: PTE 2020-02, Improving Investment Advice for Workers & Retirees, Frequently Asked Questions*, available here, and *Choosing the Right Person to Give You Investment Advice: Information for Investors in Retirement Plans and Individual Retirement Accounts*, available here.

DOL FAQs Continue Policy of Prior Administration

The FAQs generally reiterate and amplify certain aspects of the Investment Advice Exemption without significant adjustment. These include requirements that investment professionals and financial institutions seeking to rely on the exemption provide investment advice that is in the "best interest" of retirement investors, and that financial institutions seek to mitigate any conflicts of interest that may cause investment professionals to subordinate the interests of retirement investors to their own. In particular, the FAQs provide the DOL's most detailed guidance to date on compensation structures that may create impermissible incentives for investment professionals, for purposes of the Investment Advice Exemption. These include "payout grids" that provide for significant or retroactive increases in compensation rates once certain thresholds are met.

The FAQs also indicate a desire by the DOL to revisit the Investment Advice Exemption in the future, including by amending the Investment Advice Exemption itself, amending or rescinding other existing prohibited transaction class exemptions or issuing additional interpretive guidance. The DOL may also revisit the regulatory definition of fiduciary "investment advice" for purposes of ERISA and Section 4975 of the Code, which could include codifying interpretations of existing regulations that were included as part of the Investment Advice Exemption's publication.

The DOL's choices of emphasis in the FAQs suggest that this additional regulatory activity is likely to continue focusing on the retail retirement investor market, including in particular retirement investors considering whether to roll over savings in 401(k) accounts into individual retirement accounts or annuities. The FAQs and the Investment Advice Exemption do not yet effect or suggest an interest by the DOL in pursuing a broader regulatory project akin to the DOL's now-stricken "Fiduciary Rule," which triggered a broad re-evaluation of communication and exemption practices in the financial industry in 2016 and 2017 (see our prior alerts here and here). As such, the FAQs – much like the Investment Advice Exemption itself – is unlikely to have much relevance for discretionary investment managers focused on the institutional investor market.

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