

Morgan Lewis

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September 15, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
(Attention: D-11712, 11713, 11850)
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Extension of Transition Period and Delay of Applicability Dates for Prohibited Transaction Exemptions 2016-01, 2016-02, and 84-24 (RIN 1210-AB82)

Ladies and Gentlemen:

Morgan, Lewis & Bockius LLP ("Morgan Lewis")¹ appreciates the opportunity to comment on the Department of Labor's ("Department") proposal to delay the applicability date of certain conditions of the Best Interest Contract Exemption (Prohibited Transaction Exemption ("PTE") 2016-01), the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02) and PTE 84-24 (collectively, the "exemptions") and to extend the transition period for those conditions to July 1, 2019.

As the Department staff knows, our clients have been and continue to be deeply involved with implementing the requirements of the new fiduciary rule and related exemptions, which are significantly transforming the retirement services landscape.²

A delay is necessary, because:

- The Department is in the process of reexamining the fiduciary rule and related exemptions in accordance with the President's Memorandum,³ and has stated that it needs more time

¹ Morgan Lewis is an international law firm with extensive financial services, investment management, fiduciary and employee benefits practices. We assist service providers, including broker-dealers, investment advisers and consultants, banks and trust companies, recordkeepers, and third party administrators with ERISA and Internal Revenue Code compliance and reporting obligations.

² See, e.g., Letter from D. Kleinman and M. Richman, Morgan Lewis, to Office of Regulations and Interpretations, Employee Benefits Security Administration (Mar. 17, 2017).

³ Memorandum of February 3, 2017, for the Secretary of Labor re: Fiduciary Duty Rule, 82 Fed. Reg. 9675.

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to conduct and complete a thorough and thoughtful review consistent with the memorandum.⁴ Indeed, the Department has not indicated a timeline for when the review will be completed.

- There remains significant uncertainty regarding the final form of the fiduciary rule and exemptions. In the Department's own words, "[w]hether, and to what extent, there will be changes to the Fiduciary Rule and PTEs as a result of this reexamination is unknown until its completion."⁵
- The Department is considering proposing new exemptions, the implementation of which may affect developing products and business models, as well as compliance plans and related costs.⁶
- The Department has expressed a desire to coordinate with the Securities and Exchange Commission ("SEC") with respect to any changes to the ruleset, including any proposed new exemptions.⁷

Absent a delay, firms will have no choice but to ready themselves for the January 1, 2018, applicability date, notwithstanding that the ruleset may be significantly changed from its current form. If that is the case, then firms and retirement investors, alike, would bear the costs of compliance for measures that may ultimately be revised, repealed or replaced. A delay will assist service providers in avoiding such significant costs. More importantly, a delay will help to avoid attendant investor confusion, while preserving the protections that have already become applicable—namely, the expanded definition of the fiduciary investment advice in combination with, under the exemptions, the impartial conduct standards.⁸

We support a delay of the exemptions' additional conditions until the later of July 1, 2019, or no less than one year from the date on which the Department finalizes, through a final rule, any changes to the ruleset in connection with the reexamination or formally communicates that there will be no changes to the same. This approach provides the Department the opportunity to fully evaluate the ruleset in accordance with the President's Memorandum and to coordinate with the SEC on any changes to the ruleset. This approach also provides certainty for the industry and retirement investors, alike, reducing the costs and disruption that is otherwise attendant with an

⁴ See 82 Fed. Reg. 41,370-71 (Aug. 31, 2017).

⁵ *Id.* at 41,371.

⁶ See *id.* (The Department "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," and concedes that "neither such a proposal nor any other changes or modifications to the Fiduciary Rule and PTEs, if any, realistically could be implemented by the current January 1, 2018, applicability date.").

⁷ See *id.*

⁸ As the Department observed: "If advisers fully adhere to these requirements [*i.e.*, the impartial conduct standards], affected investors will generally receive the full gains due to the fiduciary rulemaking." 82 Fed. Reg. 16,902, 16,909.

uncertain timeline, and additional provides financial institutions with time to evaluate and implement the ruleset once finalized, in whatever form.

Alternatively, we request that the Department grant the 18 month delay as proposed. Such a delay provides a level of certainty that will, at least for the short term, curb potentially unnecessary expenditures to comply with rules and conditions that may change and avoid marketplace disruption and investor confusion.

In either case, we also request that the Department extend its previously announced temporary enforcement policy consistent with the term of any delay, to take into account the current uncertainties in applying the new rules and the likelihood of additional guidance from the Department that may affect firms' compliance approach.

Thank you for your consideration of this request. If you have any questions or require any additional information, please do not hesitate to contact us.

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Sincerely,



Michael B. Richman

cc: Daniel R. Kleinman
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Katrina L. Berishaj