The U.S. Department Of Labor's Conflict of Interest/Fiduciary Regulatory Package Survives Challenge in DC

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One of the District Courts hearing challenges to the U.S. Department of Labor's Conflict of Interest regulatory package has upheld the regulation and related prohibited transaction class exemptions, including the Best Interest Contract Exemption (the "Conflict Package"). However, there are still other challenges pending in other courts so the journey of the Conflict Package through the litigation that will determine its fate is just beginning. The D.C. District Court upheld the Conflict Package on the challenges made by The National Association for Fixed Annuities ("NAFA") on a number of points raised, but the court indicated that the challenge to the breadth of the Conflict Package was denied because the NAFA did not have standing to challenge the application of the Conflict Package to other parties. For plan sponsors, plan administrators and plan fiduciaries, this means that you should expect to see changes coming from your retirement plan service provider as they attempt to come into compliance with the Conflict Package prior to April 10, 2017.

Plan sponsors should be watching for packages from their retirement plan services providers regarding how their services, agreements and fees may change under the way the service provider has structured its compliance programs in response to the Conflict Package and should investigate whether what is proposed is the only approach for your plan.

It is particularly important to remember that some of the changes can be implemented via a notification and an opportunity to object and if you do not respond to the notification, you will be deemed to have consented to the changes (the "negative consent" permitted under the various prohibited transaction exemptions in the package). Plan administrators and fiduciaries need to watch for communications regarding changes and to review the changes proposed via this negative consent method to document that they are prudently monitoring their retirement plan service providers and understand the agreements for their retirement plans.

Some providers are sending packages that may require the plan administrator or plan fiduciary to respond and make choices or representations that will be used to determine which of the exemptions or alternative approaches might be available to the retirement plan. Given the potential prohibited transaction problems and litigation risks that may result from non-compliance, it will be important to watch, review and respond to these communications carefully.

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