

ALERTS

New DOL Rule: Subscription Document Supplement

June 9, 2017

The DOL regulation expanding the definition of who is a fiduciary in the context of marketing investment products to Individual Retirement Accounts (“IRAs”) and ERISA-covered pension plans (“ERISA Plans”) takes effect on June 9. In our *Alert* of June 2, we noted that in an op-ed piece, Secretary of Labor Acosta expressed concern about the rule and the limitation it placed on an individual's freedom of choice. On Monday, SEC Chairman Clayton indicated that the SEC wants to work with the DOL in shaping a revised rule, and on Wednesday, Secretary Acosta, testifying before a subcommittee of the House Appropriations Committee, discussed the DOL's request for feedback from stakeholders published in the Federal Register. Secretary Acosta indicated that, in reviewing the new regulation, the DOL would listen to the concerns that “were not heard” by the Obama administration.

An example of a subscription document supplement is available here for IRA and ERISA Plan investors subscribing for interests in funds or subscribing to make an additional investment in funds after June 9. (Please note that capital calls issued in respect of subscriptions accepted prior to June 9 are not additional investments for this purpose.) It may be advisable to use a supplement rather than modifying existing subscription agreements given the uncertainty regarding the rule going forward. The supplement is similar in scope to the sample letter that we sent last week and is intended to help firms establish a reasonable belief that one of the carve outs to the new rule will not cause the investment adviser of the fund to be a fiduciary to the IRA and ERISA Plans in connection with marketing activities. The distinction between the sample letter and the

supplement to the subscription agreement is that the supplement requires an investor that has checked the box that it is a benefit plan investor to represent that it either is advised by a consultant in making its investment decision or that the individuals who make that decision for an ERISA Plan manage at least \$50 million in assets. The supplement is intended to be used in place of the sample letter for investors making new and/or add-on investments.

If a potential investor cannot answer yes to one of the five choices (or in the case of an IRA or self-directed 401(k) Plan cannot answer yes to one of the first four choices), you should consider rejecting the investment to ensure that the investment adviser to the fund will not become a fiduciary to the potential investor in connection with their investment decision.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel.

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INVESTMENT MANAGEMENT

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