

March 9, 2017

DOL Proposes to Delay Fiduciary Advice Rule, Requests Comments on Delay and on Costs, Benefits of the Rule

On March 2, the US Department of Labor (DOL) published a proposed extension (the "Proposal") of the effective date of what is commonly referred to as the "fiduciary rule" or the "fiduciary advice rule" (the "Rule"). The Rule provides that persons who provide investment advice or recommendations for fees or other compensation with respect to retirement plan assets will be fiduciaries under the Employee Retirement Income Security Act of 1974, as amended (ERISA). This change from prior interpretations of existing law would bring more categories of advisors within the definition of fiduciary. The Rule, by its terms, becomes effective in part on April 10, 2017, and in whole on January 1, 2018.

On February 3, the President issued a Memorandum ("Presidential Memorandum") to the DOL directing that it undertake an updated economic and legal analysis of the Rule, in which it is to consider: (1) potential harm to investors due to reduced access to retirement savings advice, information or products; (2) dislocations or disruptions in the retirement services industry that could harm investors or retirees; and (3) the likelihood of increased litigation or increased cost of retirement services, in each case, as a result of the Rule. The DOL is then to consider whether revision or rescission of the Rule is appropriate.

The Proposal provides for a 60-day extension of the effective date of the Rule, to June 9. It invites comments on the extension itself, and also asks for comments on the three issues raised in the Presidential Memorandum as well as on numerous questions relating to the economic, institutional and operational impact of the Rule.

The deadline for comments on the proposed extension is 15 days from publication of the Proposal, or March 17. The deadline for comments on the topics raised by the Presidential Memorandum and by the DOL in the Proposal is April 17.

Employers and institutions or persons involved in the retirement plan and IRA industry may wish to provide comments concerning either the proposed extension or the broader questions on which the DOL invited comments.

With respect to the extension, the Proposal suggests that the DOL could delay all, or only part, of the Rule. It also acknowledges that the review mandated by the Presidential Memorandum may not be completed before the end of the extension period, which would necessitate further extension of the effective date.

The future of the Rule has been uncertain since the presidential election, and questions about application of the Rule remain, for which the DOL has not yet provided guidance. In these circumstances, it seems that to have the Rule in effect, in whole or part, while the DOL is conducting a review that might result in revision or rescission of the Rule, could

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create a great deal of confusion. In the Proposal, the DOL itself recognized the disruptions that could arise if there were “two major changes in the regulatory environment rather than one.” Therefore, interested persons may wish to urge the DOL to (1) continue to delay the Rule’s effective date until the review required by the Presidential Memorandum is completed; and (2) that any extensions of the delay be announced as soon as practical.

With respect to the DOL’s request for comments on the issues raised in the Presidential Memorandum and other issues, the DOL included a lengthy preamble to the Rule when it was issued back in April 2016. The preamble cited considerable financial and economic research in support of the Rule. Some of that research is updated in the Proposal, suggesting that the DOL may update or extrapolate the prior research for purposes of the review required by the Presidential Memorandum. Parties that have additional, relevant experience and data concerning costs, issues and questions that they have encountered in seeking to comply with the Rule, may wish to present them to the DOL for its consideration in making its review.

The Proposal, including the full list of matters on which the DOL has requested comments, as well as instructions and addresses for comments, is available [here](#).

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