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DOL Fiduciary Rule Faces Further Delay

by Alison E. Wright

On Wednesday, March 1, 2017, the Department of Labor ("DOL") proposed a 60-day extension of the applicability date of the ERISA Fiduciary Rule. President Trump's administration has openly criticized the Fiduciary Rule, and on February 3, 2017, directed the DOL to further analyze the legal and economic impact of the rule before its implementation. On March 10, 2017, the DOL issued a Field Assistance Bulletin outlining temporary relief from enforcement of the Fiduciary Rule pending the DOL's findings.

The Fiduciary Rule and Employee Benefit Plans

Originally issued in April of 2016, the Fiduciary Rule was effective on June 7, 2016, but was not set to be applicable until April 10, 2017. The Fiduciary Rule is of particular importance to ERISA-covered employee benefit plans with investment components, such as 401(k) plans and HSAs with assets less than $50 million. Under the rule an advisor is a fiduciary if he makes a "recommendation" to a plan, a plan fiduciary such as an investment committee, or a participant in the plan. "Recommendation" is defined broadly as "a communication that, based on its context ... and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." In addition, fiduciaries must put the client's interests ahead of profit and must disclose all conflicts of interest.

February 3, 2017 Memorandum

On February 3, 2017, President Trump's administration issued a memorandum directing the DOL to analyze the Fiduciary Rule and its exemptions and prepare an updated legal and economic analysis regarding the Fiduciary Rule's impact including:

- Whether the anticipated applicability of the Fiduciary Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
- Whether the anticipated applicability of the Fiduciary Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect

investors or retirees; and
- Whether the Fiduciary Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

This memorandum directed that, if the DOL finds the Fiduciary Rule and its exemptions are inconsistent with the administration's goal to "empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies," then the DOL must propose either to revise or rescind the rule.

New Comment Periods and Enforcement

Under the proposed delay, the DOL created two new comment periods. First, a 15-day comment period focuses on whether enforcement of the Fiduciary Rule should be delayed. This comment period ends March 17, 2017. Next, a 45-day comment period focuses on substantive issues concerning the rule. This second comment period ends April 17, 2017, a week after the rule was originally set to take effect.

The DOL's March 10, 2017 Field Assistance Bulletin clarifies enforcement of the Fiduciary Rule during this period of uncertainty while the DOL reviews the rule and, in particular, during the gap period between the original applicability date, April 10, 2017, and the issuance of final regulations that would postpone the applicability date. If the DOL delays implementing the Fiduciary Rule, no enforcement action will be taken with respect to the period between April 10, 2017 and the issuance of final regulations delaying the applicability date. Relief will also be extended if the Fiduciary Rule's implementation is not delayed, so long as the advisor or financial institution satisfies the Fiduciary Rule "within a reasonable period after the publication of a decision not to delay the April 10 applicability date."

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