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DOL Fiduciary Rule – What's Next?

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On an almost daily basis, there are developments regarding the status of the Department of Labor's ("DOL") fiduciary rule creating a climate of uncertainty. Stakeholders, such as financial institutions that serve retirement clients and plan sponsors, continue to deal with an uncertain environment and are eager to see "what's next."

What we know – After approximately six years of development under the Obama Administration, in April of 2016, the DOL finalized regulations that will result in sweeping changes to the U.S. retirement landscape. The regulations define who is acting as a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") as a result of providing investment advice to retirement plans and individual retirement accounts and will have the effect of greatly expanding the number of market participants that are deemed ERISA fiduciaries. The regulations also include new prohibited transaction exemptions and amend (and, in some cases, partially revoke) several existing prohibited transaction exemptions. The centerpiece of the new and revised prohibited transaction exemptions is a principles-based exemption called the Best Interest Contract Exemption. The fiduciary rule is currently scheduled to become "applicable" on April 10, 2017.

Since Election Day, there have been a number of developments that potentially impact the rule, including:

- December 8, 2016 – President-elect Donald Trump announced that he nominated Andrew Puzder, Chief Executive of CKE Restaurants, to serve as Secretary of Labor.
- January 13, 2017 – The DOL issued guidance in the form of questions and answers on the rule.[1]
- January 19, 2017 – Senator Elizabeth Warren sent letters to 33 financial firms inquiring whether each firm will support a delay of the rule.
- January 20, 2017 – President Trump was inaugurated and the White House issued a regulation freeze order.
- February 3, 2017 – President Trump issued a memorandum directing the Secretary of Labor to (i) examine the rule and prepare an updated economic and legal analysis concerning the rule's likely impact and (ii) publish for notice and comment a proposed rule rescinding or revising the current rule should it be determined that the current rule is inconsistent with the Trump administration's priorities.
- February 3, 2017 – The DOL issued a press release that stated the DOL would now consider its legal options to delay the rule.

[1] The January 13, 2017 guidance, which was the second set of Q&As issued by the DOL (the first having been issued in October 2016), was accompanied by separate "consumer" Q&As largely defending the rationale of the fiduciary rule.

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- February 7, 2017 – Senator Warren sent a letter to the acting Secretary of Labor providing information in support of the rule that Senator Warren received in response to her January 19 letter to 33 financial firms.
- February 8, 2017 – A federal court in Dallas, Texas rejected the arguments of several plaintiffs, including the Securities Industry and Financial Markets Association, the Insured Retirement Institute, the Financial Services Roundtable, and the U.S. Chamber of Commerce, challenging the legality of the rule. The court also rejected the Justice Department's request for a stay pending the "status report" the DOL plans to file pursuant to the President's memorandum issued on February 3, 2017, directing the DOL to review the fiduciary rule.
- February 9, 2017 – The DOL sent a proposal to delay the fiduciary rule to the Office of Management and Budget ("OMB"). OMB is expected to approve the rule, which would be the last step before the rule is released to the public. Although the contents and form of the proposal are not final until it is released, the proposal is expected to include a delay of the applicability date, possibly for 180 days. The proposed rule could be finalized after a short comment period. Alternatively, the proposal could be in the form of an "interim final rule" that could be effective immediately but invites post-promulgation comment.[2]
- February 13, 2017 – Senator Warren sent a letter to Andrew Puzder that expressed her concern for Puzder's nomination and asked for responses to several questions.
- February 15, 2017 – Andrew Puzder withdrew from consideration as Secretary of Labor.
- February 16, 2017 – President Trump nominated Alexander Acosta, the Florida International University College of Law Dean, to serve as Secretary of Labor.

What we don't know – As of this writing, the many matters yet to be settled include:

- Will Alexander Acosta be confirmed as the new Secretary of Labor?
- Will the rule be delayed and, if so, for how long?
- Will the DOL proposal at OMB take the form of a proposed rule or an interim final rule?
- Will there be a public comment period before or after a delay is effective?
- Will the DOL's proposal at OMB be legally challenged?
- Will the rule ultimately be revised?
- Will the rule ultimately be rescinded?

What's Next – We expect additional developments regarding the rule in the coming days.

- The Senate will hold a confirmation hearing for President Trump's Secretary of Labor nominee. It is possible that the longer it takes for a new Secretary of Labor to be confirmed, the more difficult it may become for the Trump Administration to ultimately rescind or revise the fiduciary rule.

[2] A shortened comment period or an "interim final rule" would rely on an exception — such as the "good cause" exception — to the Administrative Procedure Act's rulemaking requirements as a basis for not engaging in prior notice and comment proceedings or eliminating the otherwise-required 30-day delay prior to effectiveness.

- OMB will release the DOL's proposal to the public. Once released, we will know the length of the delay of the rule's applicability date and whether stakeholders will have an opportunity to provide comments before or after the delay is effective.
- As directed by the White House, the DOL will prepare an updated economic and legal analysis concerning the rule's likely impact. We believe the DOL will seek to complete this analysis as quickly as possible to allow the DOL sufficient time to further propose rescinding or revising the rule, if the DOL deems such action is warranted. Any such proposal will be subject to additional public comment. We anticipate many comments "for" and "against" the rule with the ultimate outcome uncertain at this time. Consequently, impacted stakeholders may want to weigh in as part of the rulemaking process and also consider engaging DOL and Congressional offices.

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