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Update on DOL Fiduciary Rule Applicability Delay and Litigation

February 10, 2017

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On February 9, 2017 the Office of Management and Budget (OMB) received a proposed rule to delay the applicability date of the fiduciary rule the Department of Labor (DOL) finalized last year. Currently, the fiduciary rule is scheduled to become applicable on April 10, 2017, and as discussed in a previous post and a LawFlash, the rule was the subject of a presidential memorandum issued February 3 that directed the DOL to reexamine the rule and consider revising or rescinding it.

While there are many reports and speculation among the press regarding the length of the delay, we won't know any definitive details until the proposal is submitted for publication in the *Federal Register*. Here is what we expect will happen next:

- Once the OMB completes its review and (presumably) approves the proposal, the DOL will publish the proposed rule in the *Federal Register*.
- A comment period will begin on the date the proposal is published.
- Once the comment period closes, the DOL will review the comments and prepare a final rule, which it will submit to OMB.
- Assuming the OMB approves the final rule following its review, the DOL will publish the final rule in the *Federal Register*, formally adopting the new applicability date.

We expect that the comment period will be short, and encourage interested parties to consider commenting on aspects of the rule and its proposed delay.

On February 8, just before the proposed delay went to the OMB, a federal district court in the Northern District of Texas **rejected** challenges to the DOL fiduciary rule. Ruling in favor of the DOL on all counts, the court rejected the plaintiffs' arguments that (i) the DOL exceeded its statutory authority under ERISA and/or its exemptive authority in issuing the fiduciary rule and related exemptions, (ii) the new exemptions impermissibly created a private right of action, and (iii) the rulemaking process violated the Administrative Procedure Act.

The same day the ruling was issued, the DOL had requested that the court hold off on issuing a ruling until at least March 10, so that the DOL could conduct a further review of the rule.

Morgan Lewis intends to provide continued observations and in-depth analysis as more definitive information develops.

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