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LAWFLASH

FIDUCIARY RULE—NOT DELAYED YET

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60-day delay proposed, comments requested on president's study.

The US Department of Labor (DOL) has proposed to delay the applicability date of the fiduciary rule (and related prohibited transaction exemptions) by 60 days and has also requested comments to help it complete a study that President Donald Trump ordered in the Presidential Memorandum.

WHAT YOU NEED TO KNOW

- The proposed delay is 60 days, which would make June 9 the new compliance date. This is less than the widely anticipated 180-day delay.
- It would not affect the January 1, 2018, date for compliance with the full conditions of the Best Interest Contract and Principal Transaction Exemptions.
- The comment period on the proposal ends March 17, 2017. The DOL has specifically requested comments on
  - whether the benefits of a 60-day delay justify its costs, including the potential losses to affected retirement investors;
  - the length of the delay;
  - whether it should delay applicability of all, or only part, of the final rule's provisions and exemption conditions (e.g., should the DOL delay the exemptions' notice and disclosure provisions, but allow the impartial conduct standards to become applicable on April 10?); and
  - the cost and regulatory impact analyses related to the delay.
- The proposed delay is subject to the Congressional Review Act, requiring good cause to be shown for the final rule to become effective upon publication in the *Federal Register*. The proposed delay is also categorized as an "economically significant regulatory action" and must be accompanied with an economic impact analysis.

CAN WE COUNT ON A DELAY?

The delay is not final yet, and the following steps need to be taken before it can be effective:

1. The comment period, scheduled to end on March 17, must be completed;

2. the DOL will need to review and address the comments it receives, and prepare a final rule delaying the applicability date;
3. the delay will then need to be resubmitted for review by the Office of Management and Budget (OMB); and
4. subject to the OMB's approval of the delay,, the DOL will publish the final rule in the *Federal Register*, formally adopting the delay.

The time it takes to complete each step can vary, and we note that the April 10 applicability date is now less than 40 days away.

WHAT COMMENTS DID THE DOL REQUEST ON THE FIDUCIARY RULE ITSELF?

In addition to proposing a delay, the DOL has also requested comments on a wide range of issues related to the questions raised in the Presidential Memorandum and generally on questions of law and policy concerning the fiduciary rule and related exemptions.

The DOL's questions are included in Part C of the preamble to the proposed delay and include such topics as how the fiduciary rule has impacted the markets for investment advice; the fiduciary rule's impact on costs, availability of products and services; and firms' strategies for, and costs associated with, compliance with the fiduciary rule.

The comment period for these issues ends April 17, 2017.

WHAT SHOULD FIRMS DO NOW?

We strongly encourage firms to submit comment letters on the delay, as well as on the substantive questions the DOL has raised on the fiduciary rule itself. Given the short period for comments on the delay, we suggest that firms consider first commenting on the delay and then separately addressing substantive issues on the fiduciary rule. Firms may also want to consider ways to help the DOL complete its review of comments on the delay as quickly as possible.

We also emphasize that the proposed delay will not be effective until the DOL issues a final rule. Until then, April 10, 2017, is still the rule's applicability date. As such, firms are advised to carefully consider their compliance strategies, business models, and communications with their representatives, employees, clients, and potential customers. Important here will be developing contingency plans to address the possibility of an April 10 or delayed effective date.

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