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DOL Proposes 60-Day Delay to Fiduciary Rule

On March 1, 2017 the U.S. Department of Labor ("DOL") issued notice of a 60-day delay (the "Proposed Delay") to the applicability date of the Fiduciary Rule (including both the investment advice regulation and the new and existing class exemptions). The Proposed Delay was published in the Federal Register on March 2nd. *See* Proposed Delay, 82 Fed. Reg. 12319 (Mar. 2, 2017). If the Proposed Delay is finalized in its current form, the Fiduciary Rule would begin to apply to affected entities on June 9, 2017, instead of the current date of April 10, 2017 (the "Applicability Date"). In the preamble, DOL suggests that the proposed delay would harm consumers and invites comment on whether the Proposed Delay should be finalized.

Rationale for Proposed Delay

DOL issued the Proposed Delay in response to the Presidential Memorandum on the Fiduciary Rule, 82 Fed. Reg. 9675 (Feb. 3, 2017) (the "Memorandum") directing DOL to study the Fiduciary Rule, and, if warranted, to rescind or revise it. However, the preamble to the Proposed Delay suggests that DOL has already concluded that any delay generates losses for consumers that outweigh any savings a delay may generate for the financial services industry. However, because the Memorandum requires DOL to conduct additional economic and legal analysis, DOL is considering delaying the Fiduciary Rule anyway. Under the Memorandum, DOL is required to consider three economic and legal points in determining whether the Fiduciary Rule is consistent with the priority to empower Americans to make their own financial decisions and to facilitate the ability to save for retirement, as well as other typical lifetime financial needs:

- 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 investors and retirees must pay to gain access to retirement services.

DOL stated that the Proposed Delay would provide DOL with time to complete this review and avoid a scenario in which the Fiduciary Rule is revised or revoked after becoming applicable. In this sense, notwithstanding the economic harm that DOL anticipates the delay

would cause, DOL believes a delay may be warranted to avoid potential disruption and confusion that could affect both the retirement services industry and consumers were the Fiduciary Rule to be abruptly changed or rolled back only shortly after the Fiduciary Rule becomes applicable.

Issues for Comment

The Proposed Delay provides for a 15-day comment period, which will end on March 17th. DOL determined that the Proposed Delay is likely to have an effect on the U.S. economy of at least $100 million and that it is a “major rule” subject to the Congressional Review Act. Importantly, DOL suggested that its existing data, derived from the regulatory impact analysis issued alongside the Fiduciary Rule, leads to the conclusion that the harm to investors arising out of the Proposed Delay would outweigh any benefit. However, DOL stated its data is “uncertain and incomplete” and solicited comments on the costs and benefits of the Proposed Delay. DOL noted that its data may overstate the benefits the Fiduciary Rule would provide to investors and understate the compliance costs that would be saved by the Proposed Delay. DOL also solicited comments on whether the Proposed Delay should be extended to a time period longer than 60 days or issue a partial delay of certain elements of the Fiduciary Rule.

In addition to the Proposed Delay, DOL solicited comments on the analysis the Memorandum requires it to undertake. DOL sought comment on several issues to assist its determination of whether the Fiduciary Rule should be revised, revoked, or further delayed. Many of the questions appear to be framed to generate responses in support of the current Fiduciary Rule. The issues include among other things:

- Whether any benefit the Fiduciary Rule would provide to investors would be offset by a reduction in access to investment advice;
- Whether the Fiduciary Rule has moved the market for investment advice and investment products to an optimal mix of advisory services and financial products;
- Whether the Fiduciary Rule has affected or will affect retirement investors’ access to quality, affordable investment advice services and investment products;
- Whether any issues in the regulatory impact analysis issued alongside the Fiduciary Rule were inadequately addressed;
- Whether financial services firms anticipate changes in consumer demand for investment advice and investment products, and how such firms will respond;
- Whether financial services firms are making changes to the investment products and investment advisory services offered, and their pricing or compensation arrangements, in response to the Fiduciary Rule;
- Whether litigation would affect the market for investment products and investment advisory services and would be prone to abuse;
- Whether particular provisions of the Fiduciary Rule could be removed while still accomplishing the DOL’s regulatory objective of establishing an enforceable best interest standard for investment advice; and

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- Whether the financial services industry would abide by the Fiduciary Rule's standards even if the Fiduciary Rule were revoked.

DOL will accept comments related to the Memorandum generally and on these issues until April 16, 2017. Stakeholder comments on the Proposed Delay and issues related to the Memorandum will likely be critical to the effort to delay, revise, or revoke the Fiduciary Rule, and we expect voluminous comments from both Fiduciary Rule proponents and opponents.

Implications

This release has and will continue to cause confusion in the retirement services industry. The Applicability Date is fast approaching, as are compliance deadlines for sending Best Interest Contract Exemption transition notices. Resources at many financial institutions are already stretched thin given the short implementation period between the April 2016 finalization and the April 2017 Applicability Date and now must diverted to reading, understanding, monitoring and reacting to these late in the game signals that a delay may occur. However, we do recommend that financial institutions advocate for a delay in the Applicability Date so it is delayed for at least as many days as DOL needs to perform the careful analysis required by the Presidential Memorandum.

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