FIDUCIARY REGULATIONS: NEW PROPOSED EFFECTIVE DATE IN JUNE

The full article below was released in February 2017. In response to President Trump's request to review and gather information relating to the fiduciary regulations, the Department of Labor (DOL) announced on March 1 that it will propose a 60 day extension of the effective date of the fiduciary regulations, from April 10 to June 9, as it gathers comments from the public on the effect of the regulations. The extension is not in place yet, and many organizations are planning to meet the rules as of April 10, 2017.

On April 8, 2016, the U.S. Department of Labor (DOL) issued final regulations intended to protect the public from certain practices of the financial industry that adversely affect retirement plan investments. The regulations hold financial advisers to a high fiduciary standard when selling products for retirement accounts. Instead of a "buyer beware" marketplace, the DOL has required that financial advisers act in the consumer's best interest when selling investments for a retirement account. Persons held to the new standards include brokers, consultants and valuation firms that previously had little legal accountability toward retirement accounts.

The final regulations are designed to curb the often undisclosed amounts (such as commissions on insurance) that advisers have been taking on sales of investments to retirement vehicles such as IRAs and 401(k) accounts. By assigning fiduciary responsibility to dealers recommending investments to retail retirement accounts, the regulations seek to prevent excessive charges to the public on investments which are not in their best interests.

Not unexpectedly, the financial industry objected to new rules that upset an old profit model.

The final regulations, as originally published almost a year ago, are operative as of April 10, 2017.

On February 3, 2017 President Trump issued a memorandum directing the Secretary of the DOL to determine whether the new fiduciary regulations impair the public's access to retirement information and financial advice.

Specifically, the memorandum requires the DOL to assess whether the public is apt to be harmed by any reduction in its access to certain

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retirement savings offerings, information or advice, and whether the regulations are likely to increase litigation and prices that investors and retirees must pay for retirement services. If so, then the DOL is directed to rescind or revise the rule. If it alters the regulation, the DOL must adhere to the Administrative Procedures Act which is designed to protect the public's due process rights in rulemaking by providing the public notice and a comment period.

The effective date of the regulation will remain April 10, 2017 unless the DOL follows procedures for delaying that date. The effective date of a final, published regulation cannot be postponed by an executive order or presidential memorandum without the agency's going through a public notice and comment process (*Natural Resources Defense Council, Inc. v. EPA*, 683 F.3d 752 (3d Cir. 1982)). However, under 5 U.S.C. 705, the DOL may postpone an effective date of a regulation pending judicial review. Alternatively, the DOL may unilaterally delay the effective date, without public notice and a comment period, if it finds the notice and public procedure are impracticable, unnecessary or contrary to the public interest (5 U.S.C. §553(b)(3)(B)). Otherwise, the regulations can be delayed, amended or repealed only by new law.

The procedures available for altering or delaying the fiduciary regulation are not easily or quickly implemented. The passage of a new law can take months. It is unlikely that the DOL would find it impracticable, unnecessary or contrary to the public interest to notify or have the public comment on any change or delay in the regulations. It is not certain that the DOL needs to suspend the effective date of the regulations pending current litigation, but it might do so.

For now, given the proximity of the date, the public should assume that the final regulations will take effect, as scheduled, on April 10, 2017. President Trump's memorandum to the DOL has not changed this result.