IGNITES
A Financial Times Service

DOL Delay Sets Stage for Dismantling Fiduciary Rule

By Emile Hallez March 2, 2017

The Department of Labor has moved to postpone its fiduciary rule by 60 days, inching closer toward the Trump administration's apparent goal of dismantling it.

That two-month delay is much shorter than many were expecting, but it is likely that the DOL will seek a more substantial additional delay during the initial period of postponement, according to industry lawyers.

The rule, which the DOL finalized last year, officially became effective on June 7, 2016. The rule was set to become applicable on April 10, 2017. The current delay will push that date past June 10. The idea behind the rule was to require that advisors serving retirement clients act in their customers' best interests, rather than adhere to a lower standard of making suitable investment recommendations. Former labor secretary Thomas Perez characterized the best interest standard as the same as that placed on doctors and lawyers.

"I think there will be another effort made to delay it even further," says Fred Reish, a partner at Drinker Biddle.

Following the Office of Management and Budget's review that concluded earlier this week, the DOL's proposed delay of the applicable date of its conflict of interest rule and numerous exemptions was posted on Wednesday morning for public inspection on the Federal Register's website. The document is slated to be published in the register Thursday morning, which will kick off a 15-day public comment period.

After collecting comments, the DOL could modify its rule proposal before resubmitting it to the OMB. The OMB will then review the potentially revised proposal, after which the final version would be published in the Federal Register and could become effective immediately.

Accomplishing all of that before the rule's initial enforcement date is a tall order, but it is possible, Reish says.

"My understanding is that this will all be done before April 10," he says.

However, the DOL's proposal to delay the rule also includes a request for comment regarding its overall impact, which extends for 45 days after the document's publication in the Federal Register. That request includes dozens of questions about the impact of the rule and its exemptions on access to investment advice and products — and receiving complete responses will almost certainly require more time, Erisa lawyers say.

“They’re asking a lot of questions,” says Scott Webster, a partner at Goodwin. “They’re setting it up for that longer comment period to get into a longer delay.”

Many had expected that the DOL would implement a six-month delay for the rule, a conclusion that was based on a draft version of President Donald Trump’s memo that directed the regulatory agency to review the rule and potentially delay, revise or rescind it. However, the final version of that memo did not include a specific time frame.

The 60-day delay is likely due to the OMB’s designation of the proposal as “economically significant,” Webster notes. That designation applies to proposals that are anticipated to have an impact of at least $100 million during the course of a year.

In its analysis of the economic effects of a delay, the DOL pointed to figures from its regulatory impact analysis for the rule. Those numbers included an estimate of potential gains for IRA investors of $33 billion to $36 billion over 10 years and compliance costs of about $16 billion during that time for the industry, $5 billion of which would be first-year expenses. The 60-day delay could lead to a reduction in the estimated gains for IRA investors, which are pegged at $147 million during the first year the rule would go into effect. However, the delay would relieve firms of $42 million in daily compliance expenses over 60 days, beyond start-up costs, the DOL states in the proposal.

A 180-day delay would have the effect of reducing investor gains of an estimated $441 million during the first year and $2.7 billion over 10 years, according to the DOL. Meanwhile, a delay of that length would save the industry an estimated $126 million in compliance costs.

The idea of a short delay followed by a much longer postponement was originally what Republicans had in mind following the presidential election, Webster says. Sometime between November and early February, the idea of a single, longer delay took over — but that strategy didn’t pan out, he notes.

“My speculation is that they went back to the original plan,” he says. By asking for a thorough amount of public comment and using multiple delays, the DOL is “trying to bolster their position in case there is litigation — there will almost certainly be litigation against the proposed delay.”

During the 60-day delay, the DOL will likely draft another proposal for the longer postponement, he says.

While the rule is in postponement, the DOL will likely either revise or kill it, based on comments from the public and the industry about adverse effects they say it would have.

“If I had to lay odds, I would say they will modify it,” Drinker Biddle’s Reish says.

The making of a new version of the rule, as well as any accompanying exemptions, will likely happen after a new labor secretary is confirmed, Reish notes. Former U.S. attorney Alexander Acosta has been nominated for that post, but no one has yet been formally suggested to head the Employee Benefits Security Administration.

“The Republicans have not pushed for the confirmation of the new secretary; they need to do that,” Reish says. “You need that kind of leadership in place to have a new regulation.”

And there is another potential complication for the DOL: The staff who spent the better part of a decade building the rule might not be very keen on dismantling it. If knowledgeable staff become disillusioned under the new administration, and opt to leave their government jobs, that could make drafting a new rule or revising the current version difficult, Goodwin's Webster says.

"The current staff and leadership of the department understand this rule, and they understand why it was written the way it was written," Webster says. "It will be very difficult for the administration to revisit the rule and revise it in any meaningful way … without that historical context."

For example, the author of the recent proposal to delay the rule is Timothy Hauser, EBSA's deputy assistant secretary for program operations, who helped draft and advocate for the rule itself.

"My concern is that if a lot of the staff leaves, are they going to capture everything correctly? Are they going to fix everything or address everything?" Webster says.

Regardless of what appears to be an imminent delay, it would be wise for firms to continue to plan for compliance by April 10, says Scott MacKillop, a former Erisa lawyer who now leads Colorado-based advisory firm **First Ascent Asset Management**.

However, a watered-down version of the rule is generally expected, MacKillop says.

"I'm sort of saddened by having the prospect of having to start the [regulatory] process over again," he says. "The [current version of the] rule certainly wasn't perfect, but retirement investors are not going to be well served if they lose their fiduciary protection."